

"THE VAGRANCY ACT OF 1968: A SUCCESS OR FAILURE"

A CRITICAL Analysis of the 1968 Vagrancy Act.

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By

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LIST OF ABBREVIATIONS:

E.A.L.J.	-	East Africa law journal
E.A.L.R.	-	Eastern Africa law reports
K.B.	-	Kings Bench
K.L.R.	-	Kenya law reports.
E.A.S.	-	East Africa Standard

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INTRODUCTION:

The Act was introduced as a law for the welfare of the society. Its objects are to deter lazy members of the society from interfering with the rights of others and to end the beggars by rehabilitating them !

The purpose of this disertation will be to examine how effectively the objects of the Act have been fulfilled with reference to Nairobi.

In chapter 1, I will analyse the possible origins of vagrancy and its legislations, and the mischief they were made to prevent. It should be noted that for the purpose of the law Kenya was born in 1886 at the time of the partition of Africa<sup>2</sup>. Earlier in 1885, there was the Berlin Conference in which the Europeans laid down the principles they would follow in dividing natural and human resources. About the native of the British law, one writer remarks:

" law was record only to weapons of war in the establishment of the colonial rules and for the early settlers and officials there was very little between the two; they were both useful impliments to co erce the Africans. Acceptance of this role of the law was not universal amongst colonial officials but it was the dominant view"<sup>3</sup>

The British brought with them mode of production, that is capitalism which guarantees the sanity of private *enterprise* This was unknown to the Kenyans and that is why the British invasion was met with patriotic *resistance* which they savagely tried to suppress and clear the way, for the advance of capitalism<sup>4</sup> They wanted to exploit Kenya with no obstacles. Law was to be used to creat favourable conditions, vagrancy laws included. One windscrierd, says that:

" the social destiny of humanity is the expansion of capitalism, the entrenchment of wavery and the increased unproverishment of the oppressed classes by a manority of tycoons and profiteers. This is what capitalism development cannotes"<sup>5</sup>

The Vagrancy Acts should therefore be seen in this light. The Capitalists wanted labour for their plantation economy.<sup>6</sup> For this purpose the African had to be forced to work. Laws were used to , ensure this. It is on this basis that it is submitted that the act have no relevance to independent, Kenya unless the same conditions prevail.

In chapter 2, I will deal with the operative Act which was passed in 1968.<sup>7</sup> The aim here is to ascertain what objects the act was intended to serve and how effectively this has been done. For the Act to be successful it should define clearly and precisely its terms especially who is a vagrant. The definitions are given in S.2(a-d). My inquiry is whether these are a sufficient guide to the Police in implementing the Act. The Act gives police alot of discretion<sup>8</sup> which can easily be abused and has actually been abused as shown in chapter 3. The Act also provides for the establishment of Rehabilitation Centres, and Detention Camps. It is yet another purpose of this paper to investigate of whether such have been established in the republic.

In chapter 3 I will illustrate the working of the act in court, with the help of tables. For this purpose I have chosen three years 1976, 1978 and 1979. Also included are interviews from the Court Officers. My investigation is centred in Makadara District Magistrate Court which is representative of other District Courts.

Finally I will give the conclusion and some suggested reforms.

## CHAPTER ONE

### HISTORICAL ORIGINS OF VAGRANCY IN KENYA

#### (a) Introduction of a new mode of production

One of the characteristics of capitalist mode of production is separation of the worker from the means of production. This type of production was unknown to the Kenyan masses, was transplanted into the Kenyan soil by the European, settlers. The following discussion will show this was done.

Before the economy of the Europeans, the Africans were stock breeders and cultivators of the soils on a more or less primitive basis depending and the character of the region but always under the condition of relative abundance of land. Not only was there no scarcity of land in Kenya, but in terms of the ratio of population to the amount of available land it may be said that the land reserves were virtually unlimited. It is true of course that the yield from these land was mediocre because of the crude agricultural implements and the standard of living was very low, but there was no material force pushing this population, to work in the mines or farms or factories of the white colonialists without transformation in the administration of land in Black Africa, there was no possibility for introducing the capitalist mode of production.

For this purpose compulsion of a non-economic nature had to be used and brutal separation of the black masses from their normal subsistence had to be carried out. A large part of the land had to be transformed overnight into crown land owned by the colonialists state or into private property, owned by the settlers or by capitalist corporations. The black population had to be resettled in reserves which were inadequate for sustaining all the inhabitants. In addition a head tax that is, money tax on each inhabitant was imposed as another lever since primitive agriculture yielded no money income.

With the various extra-economic pressures the colonialists created a need for the Africans to work for wages in order to earn and pay the taxes and buy the small supplement of food necessary for his subsistence, since the remaining land was no longer adequate for a livelihood.

The Europeans used legislative and administrative measures to get land out of the Africans. It can safely be said that European settlement in Kenya, was largely a consequence of the Kenya - Uganda Railway completed in 1902. The British Government wanted to see such developments in Kenya, as could make the railway repay the expenses of building. They thought the Africans could not be able to do any profitable agriculture and hence on the outset started encouraging settlers to come to Kenya<sup>2</sup>. In this venture they were faced with the problem of alienation of African land to settlers.

As far back as 1883 the British Government had been advised by its law officers that power to alienate land did not accrue by virtue of being protectors of a state, so means of alienating land had to be found. For immediate purposes the Indian Land Acquisition Act 1894<sup>3</sup>, was brought into operation in Kenya, which gave the administrative officials power to acquire land compulsorily for Railway, Government buildings and other public purposes. For the settlers regulations were promulgated which gave the governor power to grant leases, over the Sultan dominion. To make the situation better by this time the British Law Officer had changed their views and said that power to alienate land accrued by virtue of protection. Hence the Government could give land to settlers without any fear of legal setback<sup>5</sup>.

To satisfy the settlers greed for land the 1901<sup>6</sup> order in Council was passed which gave the governor power over all the crown land. He could grant leases on terms and conditions he thought fit. Africans were, therefore, left at the mercy of his discretion. He could give their land to settlers if he thought it fit. The Act defined crown land as "All public lands within East Africa protectorate and all land which have or may be have after be acquired by her majesty under the land acquisition Act, 1894 or otherwise whatsoever.

The 1902 ordinance gave the commissioner power to grant outright sales of land and leases for 99 years with such promising conditions. Europeans settlement commenced in earnest in 1903 Charles Eliot the governor encouraged settlers from Britain and even South Africa.



There were three types of settlers who responded to his gospel. The Lord Dalamere's class, who were wealthy and very rich, the South African Boers who had it tough from the South Africa Boers wars. They wanted to start life a fresh. The third group comprised of Syndicates which wanted to find a source of raw material for their industries.

If there was any doubt as to the extent of the power of the Government as given under the 1902 order in Council they were put to rest by the 1915 Crown Lands Ordinance<sup>8</sup>. It defined Crown lands as to include land occupied by the Native tribes and land reserved by the governor for the use and support of the members of the native tribes. But such reservation shall not confer on any tribe or members of any tribe any rights to alienate the land so reserved or any point thereof<sup>9</sup>.

This was paradoxical for in effect government took control over all the African land and clearly Africans became slaves on their own motherland. They had no right to deal with what traditionally and legally was theirs. They had to toil for the colonizers to pay taxes and for livelihood. They were at last separated from the means of production, hence perpetuating capitalism.

The effect of the 1915 ordinance was clearly given judicial effect by the case of Wainaina V Murito<sup>10</sup>. Where Barth J observed that "native rights whatever they were under the Githaka" System disappeared and natives occupied such land as tenants at will of the Crown". This was in the interior of Kenya. At the coast similar measures were applied to rob Africans claims over land. The 1908 ordinance" provided for adjudication of land rights at the coast. Those who did not establish their title lost their land to the Crown. They faced the fate of their brothers in the interior of working for the settlers.

The rights of the Africans were forgotten. The 1915 Ordinance defined "public lands" as unoccupied land" such a definition disregarded the presence of the local residents. In the eyes of the law of property of the colonizers, they could not have title to land. They were tenants at the mercy of the Crown. The application

of this ordinance naturally resulted in the displacement of many natives. The, British settlers conveniently disregarded the inconvenience caused to the natives. This attitude of absolute disregard of the interests and rights of the natives was experienced in the case of Ole Njong and others V A.G.<sup>12</sup> in which the court quoting with approval a Botswana (then Beuchuanaland)<sup>13</sup> case emphasized that:

"The idea that there may be an established system of law to which a man owes obedience and that at any time he may be deprived of the protection of that law is an idea not easily accepted by English lawyers. It is made less difficult if one remembers that the protectorate is over a Country in which a few dominant civilized man have to control a great multitude of the semi-barbarous".

This pronouncement was amplifying the official view on land occupation and native displacement. Simply stated it meant: the economic interests of the civilized people had to be served whatever their socio-economic inconvenience this carried to the semi-barbarous" such a promising condition induced even the unwilling settlers to come and get rich without sweat in Kenya<sup>14</sup>.

It is clear that the europeans were not interested in developing Kenya but exploiting and underdeveloping it. Brett states:

"British attitude to colonial development were decisively conditioned by her needs as a major manufacturer and capital-exploiting country. The resulting demand for external markets and cheap source of material (raw) had always influenced policy; There demands were greatly intensified by the effects of the war which suddenly exposed her competative weakness and hightened the importance of markets which could be directly controlled through the colonial system<sup>15</sup>

Paul Baran drove home the same point in this book<sup>16</sup> where he emphasizes the destruction of the traditional economics and societies by the whole sale seizure of land for capitalists productions for their own profits at the expense of the natives.

The table below shows how much land was taken by the whites. It should be remembered that it was the most fertile land, the well watered, at the Kenya Highlands which was occupied by whites.

WHITE SETTLEMENT IN KENYA HIGHLANDS<sup>17</sup>

Settler Approximates	100	1000	1200	2000	3000	4000
Occupied Acreage	?	4.5 M	3.1 M	5.1 M	6.1 M	7.3 M
Years	1903	1915	1920	1934	1943	1953

It should be noted also that the land figures are occupied acreages in the Highlands. The total alienated acreage was over 10 million acres by 1953.

So with the colonizers came a different mode of production which replaced the African traditional ways of subsistence. He was deprived of his land so that the capitalists could exploit the so stolen land by using African labour.

It was the failure to provide adequate land with all other factors of production required for cash crop farming which consigned the population (African) to economic servitude on the settler farms.

(b) Labour and Taxation:

After taking most of land the immediate problem which faced the settlers was one of labour most of the settlers were not rich except a few dominant ones like lord Dalmere. The rest were inexperienced, poor ex-soldiers or penniless white and coloureds from South Africa. Africans had no initiative to work for the settlers but they could have worked if the wages were enough. This could have reduced the capitalists profits which was the worst crime they could commit. African had to be compelled to work. The settlers pressured the administration to use administrative legislative and financial force to make labour

available. They argued that the problems with Africans was that they were lazy and did not want to work. But I think Africans reaction was perfectly normal for it really requires a most abnormal or unusual force or pressure to make a man engage in this kind of a convict labour, when he has not been accustomed to it.

The state was loyal to the settlers so it intervened to save them from labour shortage. The tax ordinance<sup>18</sup> was, therefore, not accidental, it was made to make the natives work for the settlers in order to raise the tax required. To enforce this the 1908 ordinance<sup>19</sup> was passed which created criminal offences for negligent work in the foreigners farms, some of the administrative officials were not willing to be hired as labour recruiters so labour supply fell.

This forced some of the settlers to adopt "Kaffir" farming in 1904. This was a method whereby the settler gave a small plot of land to a native to till who in turn provided him with labour. The method originated in South Africa, whereby the native was allowed to cultivate in Boers land and both shared the yields. So it was different in East Africa, though the native labour commission frowned at the practise it was the seed of the solution of Agricultural labour problem.

In 1918, the Resident native (squatters) ordinance<sup>20</sup> appeared. In the preamble it declared that:

"It is desirable to encourage the resident native labour on farm and take measures for the regulation of the squatting or living of the natives in places other than those appointed for them by the government of the protectorate".

The act introduced contract labour as was indicated in the case of Thathi wa Mbathi V Rex<sup>21</sup>. in which the supreme court held that a labourer under the 1918 ordinance was not a servant as in Master and servant ordinance of 1906 and that criminal offences attaching to desertion did not apply to him. He, therefore, had freedom to leave his work if he was not satisfied with the terms. This had the effect of endangering settlers labour and the act was amended in their favour in 1925<sup>22</sup>.

Ordinance<sup>23</sup> which required an African to carry a Certificate of Identification, primarily intended as a means of tracking down individuals who floated their contracts and, therefore, became liable under the master and servant ordinance, the employers charter, Kipande as the certificate was called was a major source of political dissatisfaction, expensive to administer and had no parallel in Tanzania and Uganda. One was supposed to have it signed by his previous employer before he could be employed by another. This made it very difficult for the African for the settler was left free of dictate all the terms.

To keep labour supply steady, in 1920 Milner allowed compulsion to be used to recruit labour for public works, being satisfied that the position justified the measure<sup>24</sup>.

This desperate move to force natives to work in farms was also symbolised in the short-lived "Ainsworth Circular" of 1919 which empowered administrative officials to get Africans - women and children included out of the reserves to work on the whites farms.

Taxation also created an urgent need for cash, income, according to senior D.O.

"I think that taxation has been imposed upon the natives more with the intention of producing cheap manual labour than of conferring benefits to them".<sup>24a</sup> It was argued that taxation of Europeans reduced their incentive to produce while that on the Africans forced them to engage in modern economic pursuits which would not have otherwise interested them. However, the effects of the tax system could only be expected to increase poverty and dependence in the native reserves by a net transfer of resources out of them. This helped to develop the colonizers economic stand while it underdeveloped the Africans.

"Custom duties and the native hut tax and poll-tax amounted to 75% - 85% revenue".<sup>24b</sup>

The revenue was used for the improvement of Europeans system of communication - building of roads harbours and highways needed for profitable production on the farms. These never benefited the Africans as they were not even allowed to grow cash crops. It was argued that if they did the quality of cash crops would have gone down.

Brett gives a table of Receipts from the main heads of taxation between 1920 -1939 (£ 000's) to show how the African was exploited. They are as follows:

YEAR	1920	%	1924	%	1930	%	1935	%
	23		29		34		39	
Custom & Excise	337	36	388	48	672	42	850	47
Native Hut & Poll Tax.	458	50	553	34	542	35	527	29
Other Taxation.	128	14	285	18	358	23	433	24
T O T A L	923	100	1626	100	1572	100	1810	100

Sources: Report of the commission.....on the financial position in Kenya (pim report) P.206 A, for 1920 - 34. Report of the Taxation inquiry Committee Kenya, 1947 P.66. Figures for 1920 - 22 are for 21 months and have been corrected to 2 years in calculating averages. Other taxation includes poll-tax, petrol tax (1922-30) Levy on Official salaries (1932-37). Traders and professional licences, income tax (1937-39) and all other sub-heads.

In p.193 Brett states:

"But the African must have contributed heavily, 70% in the first above periods almost 50% in the second slightly none in the third and probably less than 40% in forth".

It is clear the taxes were for the benefit of the Europeans. The African welfare was disregarded. They were slaves on their own soil. Those who got chance to escape from the farms and reserves lost no opportunity. This will be discussed later.

Perhaps one of the best illustrations of the administrative attitude to the question of African economic development in the reserves came from a memorandum sent by the member of Parliament. E.D. Morel to the Secretary of State in 1924. He alleged that the tacit aim of Kenyan's policy was:

"To create an unlimited flow of cheap labour for the plantation, though steadily reducing the area in the African reserves: enforcing a high level of taxation, controlling labour protests, by making desertion a criminal offence and using kipande to find the offenders, and finally by discouraging the development of cash crops. He described these measures as shameless and unbridled exploitation."

The letter was sent, to the Chief Native Commissioner G.V. Maxwell to refute the allegations. He had this to say:

"I fear that there is a great deal of truth in what M.V. Morel says...- The present native tax is a real hardship because no special facilities have been given to the natives in the past for the improvement of their crops and quarantine restrictions which lock up the whole of the native areas to preserve a few settlers herds.

By 1920 by Orders of the executive Council.... administrative Officers were clearly discouraged from promoting developments in the native reserves.

Maxwell who was a senior public Servant summed up his attitude to morals letter as follows:

"I honestly feel that the Government must admit to itself that the natives of their Colony have not had a fair treatment, that they have been exploited that their economic development has been repressed instead of being advanced, that they have been overtaxed, that they have not yet received anything like a fair proportion of the Colony's expenditure on medical, educational and other beneficial services".<sup>24c</sup>

Apart from being forced to work and pay taxes the wages were very low. This is discussed by Fured, in his article "Squatters in Kikuyu land". The following table shows the approximate adult male money wages for 30 days work.<sup>24d</sup>

commission thus:

Period	1919	1921	1922	1924	1930	1937
	20		23	29	36	39
Wage in Sh.	8-10	5-7	6-8	12-16	6-10	10-12

Between 1924-29 the wages rose slightly due to increased production, which required a lot of labourers. From 1930's population pressure started to make itself felt, so bands of people started flocking in the farms for labour. There were surplus of it hence the settlers could dictate harsh terms. Also this was the time of depression when the economy was weighing low.

It should be realised that women and children were paid 2-4/- less the men value. Therefore, it can be seen that the wages were "Low" that is low in terms of purchasing power of imported goods, low in terms of total farm running costs and low in terms of African living standards. Between 1933/34 the Carter Commission showed that figures were around 150,000 working men and women.

(c) Africans move out of the reserves:

Once the Europeans achieved Land which was the critical tool in exploitation of natural resources, Legislative administrative and financial pressure was used to get labour. Land alienation led to the creation of reserves for Africans, with population increase many Africans were compelled to seek employment or become resident labourers on European farms. The plight of the pastoral communities which started with the restriction on their grazing, culminated in natural disasters such as drought, livestock disease and plagues. The net result of all these factors was the dislocation of tenure arrangements and the disruption of the Africans Social structure. The situation was further aggravated in the 1930's when even the European farms and plantations could not accommodate all the Africans



who offered their services. Thus there was already created a landless class in Maragoli, Kikuyu and Fort Hall.

A witness from Kapenguria in 1912 gave evidence to the labour commission thus:

"I came to Mombasa because... there is nothing at home.... there at home people die of hunger".<sup>25</sup>

To worsen African position the Native Authority Ordinance 1912 gave great powers to Chiefs to collect taxes and to control the natives. They could restrict their movements and recruit them as labourers if the need arose. The result was that life in the reserves became intolerable and most natives left primarily to escape from their traitors (chiefs) who were the white's agents in recruiting and controlling them. In their natural struggle for survival some went to life in towns and others as squatters in the farms. Here they could get a plot to till in exchange of their labour and also escape from conscription since the settlers protected their squatters from this.

Although some Africans found refuge in farms a large number moved to towns especially Nairobi and Mombasa. No doubt the building of industries attracted many of them, Mombasa was reputed for high wages. By 1925 there were already many upcountry natives in Mombasa. A census in 1921 revealed that there were more than 27,000 Natives in Mombasa town<sup>26</sup>. Most of them had been attracted by fantasy stories about liberty adventure and sophistication. Between 1920 and 1959, the population of Natives in Nairobi, had swollen from (8,000 to 140,000".<sup>26(a)</sup>

In the reserves, Africans had learned the economics of survival. That explains why even before the first world war the Africans could walk all the way from Nyanza to Mombasa, a distance of about 500 miles, to sell their labour in the best markets possible. As Sadler admitted in 1908:<sup>27</sup>

"The upcountry natives were beginning to get sufficiently intelligent to understand the advantages of selling their labour in the best markets and as prices are higher at the Coast there is an inclination to work there in preference to upcountry."

It is clear that the Africans were beginning to realize their labour value. Consequently induced by wage opportunities in towns large numbers left the reserves. Unfortunately the towns could not accommodate all of them, so a number remained unemployed and with no means of subsistence. This conditions were fertile grounds for breeding criminals and Vagrants. They caused an economic imbalance since the surplus labour could not be accommodated. It, therefore, became necessary not only to control the urban immigration but also to introduce a system to deal with the already existing Vagrants.

The emergency period contributed to the Vagrancy problem. As a "Counter-revolutionary" measure the administration awarded land to the loyalists at expense of the mau-mau freedom fighters.<sup>27(a)</sup> This led to many people being landless. The only alternative for them was to join the move to the towns in the hope of a brighter future.

#### Immigration Control:

The first step to cure the economic imbalance caused by mass migration to towns and farms was through the Resident Labourers Ordinance 1925, which conferred to the settler a large degree of control over his labourers. There were criminal penalties for offences in relation to work, Limit on property owned by a squatter and increased working days. The impact of the change was felt in 1927, when charges were brought against 1261 labourers under the ordinance of whom 1050 were convicted.<sup>28</sup>

In 1937 a new Resident labourers ordinance was enacted which gave greater powers of control over labourers and their cattle. Magistrates were empowered to order the removal of Labourers from undeveloped farms. District Councils who were purely Europeans were also given power to limit the number of Africans labourers which could be employed on a farm to prohibit keeping of stock and the number of working days, Resident squatters were thrown out.

Another class of Africans affected were those who continued to reside on their traditional land after much of the surrounding area had been alienated and whose rights to do so had been preserved by the Crown land Ordinance 1915. Their rights were extinguished by the Native trust land Ordinance. They could not be accommodated in the reserves. So another lot of landless people was added to those in towns.

In 1930's bands of Africans were reported wandering the country, a reserve army of unemployed, ready and available for work in the settler sector.<sup>29</sup>

Despite the tough measures, Africans moved to towns and farms in a mere trial for survival. As a result the 1900 Native passes Ordinance was rigidly enforced. The Kipande was used as a measure of Control and restriction of native movement. It was used in the early 1920s for getting labour. One was not allowed to get another employer unless his kipande was signed by his previous master. Freedom of Contract was a dream.

In 1920 it was noted that there were about 20,000 unemployed natives in Nairobi.<sup>30</sup> About a quarter of the males were unemployed.<sup>31</sup> There was no enough houses and sanitary conditons were appalling. The Government and the Municipal Council ~~had~~ not bothered to check the situation. There were instances where 47 people occupied a single home for one family.<sup>32</sup> A residential area could have only 24 Latrines buckets for at least 1,000 people.<sup>33</sup> With the growth of redundant population, there were fears of thefts, assailants and house breaking. There were now many vagrants with no means of subsistence.

The whites were alarmed. They felt that their racial superiority was not being respected for their women were being assaulted in towns. A solution for keeping the natives away was necessary. A better one could have been to provide accommodation, employment and land to them. This could have been expensive. The inflow was to be controlled by pass Laws. The purpose of these was explained by a D.O. in 1933 that:

"It seems only right that it should be understood that the town, is a non-native area in which there is no place for the redundant native who neither works nor services his/her people but forms the class from which professional agitators, slum landlords liquor sellers and other undesirable classes spring. The exclusion of these redundant natives is for the interests of the natives and the whites alike".<sup>34</sup>

The Europeans had realised that surplus natives in towns hindered their economic development and Social Security. Thus they had to be contained in the reserves. The Colonial Government had never intended to make town a place for the natives. It was only for whites comfort. The presence of African in towns was, therefore, frowned upon a nuisance. This position was clearly stated in 1915 by the deputy governor of Mombasa:

"It is only proper that the townships which were primarily established for the occupation of non-natives should be reserved for those who should properly reside there and that the residence therein of the natives should be confined as far as possible to those whose legitimate business requires them so to reside".<sup>35</sup>

The first Vagrancy Regulation was passed in 1898 which provided for the arrest and detention of any person found asking for help or wandering about without any employment or visible means of subsistence. The 1900 Native pass regulations gave Commissioner power to control Natives movement. The Ordinance required any adult leaving his locality to have a pass . These passes were granted by white administrative officials if they were satisfied. The Nairobi Municipality made it an offence for a native:

"to remain in the municipality for more than 36 hours excluding Sundays and public holidays without employment. The onus of proof was on such native unless he had obtained visitors pass".<sup>36</sup>

The above procedure was contrary to the Evidence Act in force.<sup>37</sup> It was challenged in R.V. Awod s/o Wako.<sup>38</sup> In which the conviction was set aside as Contrary to the evidence Act. However, the learned judge had occasion to mention:

"It is no doubt dangerous to have large numbers of the unemployed natives of either sex within the Municipality" p.59

To maintain the status quo, it was necessary to keep the natives in the reserves. After all town was not made for them. Regulations No.2 of 1898 was replaced by regulation No.3 of 1900, which defined a Vagrant as any person:

"wandering about or ~~without~~ or without leave of the owner ... lodging in a varander, out house or shed or unoccupied building or in any cart, vehicle or other receptacle and not having any vissible menas of subsistence".

The police were given wide powers under the Act, they could arrest any person who they thought fitted in the defination without a warrant of arrest. Such vagrant was given any available work and if he refused, he was imprisoned. If no work could be found, he was taken back to the reserve and his chief ordered to take care of him. The whites refused to uproot the root of the problem which was the Socio-economic inbalance. This state of affairs was indicated by the 1926 municipal rules which provided that:

"The african was to seek permission to reside in almose any private owned place within the Municipality bounderies. Loitering in a road-way without a "Valid excuss" during the night was an offence and also staying within the municipality for more than 7 days without any vissible proof of employment".<sup>39</sup>

By these series of rules, the colonial government was able to achieve economic prosperity, enjoyment of Social prestige and political stability. Needless to say, this caused the natives a lot of inconvenience, who not only lost their land but also had no freedom of movement which is one of the fundamental human rights. Slavery in the guise of Civilization was back in Kenya.

To sum up, the illls and courses of the vagrancy problem as revealed from the discussion lay at the socio-economic unbalance in Colonial Kenya. The capitalistic mode of production, clashed with the traditional mode of production. The laws which are part of the state's machinery were geared to, securing and protecting the colonial mode of production.

For these reasons a Vagrant was a nuisance in urban areas and had to be rusticated to the reserves. His future was of no consequence to the exploiter. At independence, the new government inherited the Vagrancy rules as they were and it was its duty to decide whether to preserve them or enact others. The decision was to be influenced by the political and economic strategy the new government adopted. This will be the subject matter of chapter II.

## CHAPTER TWO

### A CRITICAL ANALYSIS OF THE 1968 VAGRANCY ACT

#### (a) MISCHIEF SOUGHT TO BE PREVENTED BY THE ACT

In dealing with any legislation it is important to understand the mischieves sought to be prevented.

The ills sought to be prevented by the Vagrancy legislation are mainly anticipatory. The most important pressure and one which generally provokes the legislation is the insecurity caused to the "public" by the congregation of large numbers of itinerant beggars and iddlers. Such people are deemed a menace to the "Wanainchi" due to their unproductivity and criminal potentialities. It has been contended that Vagrancy acts have been calculated to reduce crime by getting rid of such potential criminals.

At this juncture it should be noted that "public insecurity" is not used to mean the common "Wanainchi" but the ruling class. This is the propertied class who fear that their capital might be interfered with. If the Vagrants are not contained. The use of the term "public" plays an ideological role in destorting the nature of class antagonisms and struggles in Society by making it possible for the ruling social classes, which include the state bureacratic stratum to continue and perpetuate its exploitation and suppression of the workers, peasants and the unemployed all/<sup>in/</sup>the name of "public security" and "public goods". the real public that is the toiling workers, peasants and those excluded from gainful employment by our economic system know too well that benefits accruing to them are incidental to the

benefits that accrue to other individuals the state and foreign capitalists! Therefore "public security should not be taken at its face value. ✓ ) *concur.*

Vagrants add to the problem of unhealthy accommodation in towns. This is because they can not afford reasonable houses and hence join the majority of the low-wage class in crowded dwellings and shanties like Mathare Valley and Kawangware. These places are conducive to Cholera and other infectious diseases. It is for this reason that Vagrancy problem should be contained at all measures.

Kenya benefits greatly from the tourist industry. For this industry to flourish, it is important that the foreigners be impressed so that they can give loans to aid development programmes and also to invest freely. It is part of government policy to encourage foreign investors in a bid to expand Kenya's economy. It, therefore, becomes necessary to repatriate city iddlers to rural areas where it is hoped, they would be discouraged from vagrancy and engage in productive enterprises. This is a very pious hope, for there is no machinery for keeping the vagrants in the rural areas once repatriated and also may be there is no land for them to till. It is clear that the problem is rooted in the Socio-economic structure of our Country. The only remedy, therefore, is complete re-organization of the economic structure which would allow a fairer distribution of the country's property.

(b) FORERUNNERS OF THE 1968 VAGRANCY ACT

Since the 1968 Vagrancy act is the creature of previous acts, a brief discussion of these earlier acts is necessary in our understanding of the present act.

The first vagrancy legislation was passed in 1898.<sup>2</sup> It was aimed at eliminating idle persons from asking for aims or wandering about without any visible means of subsistence. Despite this act, Vagrants were on the increase and stricter measures were called for. For this reason it was repealed by the 1900<sup>3</sup> regulation. This one provided that if any one was proved to be a vagrant he was to be sent to civil jail for a period not exceeding three months,<sup>4</sup> within which the governor of the jail

was obliged to find employment for such a vagrant and to credit his wages.<sup>5</sup> The act was commendable in that the vagrant was made to engage in productive work. His wage was used for his repatriation after release. But the act had a loophole: it did not provide for a machinery to keep the vagrant in the reserves.

In 1920's there was an over production of labour which resulted into large pools of wanderers with no means of livelihood. The 1900 Vagrancy act was, therefore, found ineffective in dealing with the situation and as a result it was amended in 1920.<sup>6</sup> The new Act tightened Control over vagrants. The governors of the detention Camps were required to use all measures to find suitable employment for the vagrants admitted. Efforts to keep surplus labour in the reserves were fruitless since most of these people had no land as it had clearly been alienated to the settlers. The unemployment problem was becoming acute in urban areas, large numbers of people were moving to towns. In a bid to control this flow the 1960 Vagrancy Ordinance was passed.

The act defined Vagrants as:-

- (a) person having no fixed places of abode.
- (b) not only those asking for alms but also those begging or encouraging children to do so.
- (c) persons pretending to profess or tell fortunes or using any subtle crafty means or device by palmistry or otherwise to deceive or impose upon any person.
- (d) persons living or lodging in any area which the minister has declared to be unfit for human living.

The Act gave a definite period of repatriation (3 years) which had not been provided for in the previous acts. The majority of African members of the legislative assembly disapproved the ordinance, for they saw it as a measure calculated to frustrate African job seekers and to limit African urban population. Their objections were ignored and the act was passed.

In 1967 a bill was introduced to amend the law relating to the disabled beggars. It was passed in 1968 and is still the operative act.



This act is the subject matter of discussion in the following sections.

(c) AIMS OF THE 1968 VAGRANCY ACT

The Act is embodied in Cap.58 of the laws of Kenya. It is stated as an act of parliament to make provision for the suppression of vagrancy, for the detention of vagrants and for the care and Rehabilitation of beggars, and for matters incidental thereto and connected therein (emphasis mine).

The essence of this dissertation is to see whether, these three objects have been achieved.

From the start the bill was introduced as one for the benefit of the disabled beggars in our Society. It was introduced by the minister for Home Affairs. He took pains to explain that since independence, the government had been anxious to deal effectively and in a human way with the city beggars and that the government and the City Council were worried over the problem. The vagrancy acts, already in force did not distinguish between the able bodied and the disabled. He went on to say that the bill was only intended to make provisions for the disabled but not to alter the Vagrancy law.

It is clear that the Hon. Minister did not see the need to change the country law as regards able bodied vagrants. This renders the act a failure since he failed to interpret the Colonial Vagrancy legislations in their Socio-economic context. They were made to serve a certain class of people, that is the Europeans. This clearly shows that the Socio-economic structure did not change with independence. It was only a change of the flag and the personnel. It is against this background that it is submitted that the present act can not do better than the Colonial ones.

(d) THE ACT IS UNCONSTITUTIONAL:

The Constitution is the supreme law of the land and any other law which is inconsistent with it is null and void to the extent of its inconsistency per S.3 of the Constitution.<sup>7</sup>

S.81 of the Constitution guarantees freedom of movement. No

Citizen shall be deprived of his freedom of movement within or out of Kenya, except under the conditions in S.83(1). The Constitutional guarantees will not prevail where one is lawfully detained or his movement restricted by order of the Court pending an investigation, or if the restriction is for the interests of defence, public safety or order. An act purporting to deny the citizen either of these freedoms act out in SS.72, 80 and 81 of the Constitution, is void and the act unconstitutional per Sec.3 of the Constitution.

The legal consequences of this is that the citizen whose right is unfringed can seek redress in a Court of Law. Therefore, the test for validity of any act of parliament purpoting to deny a citizen of his or her right of movement and association must be construed in accordance with the exeptions in the Constitution. The extent to which this constitutional guarantee can be upheld depends on both the political and economic structure of Kenya. As noted earlier, the minister in introducing the Bill failed to grasp the purpose of the Colonial Vagrancy laws which conception has rendered the act unconstitutional. This is because the Colonial Vagrancy legislations were passed when there were no such a Constitutional guarantees.

The bill found ardent support from the members and can only be said that they never understood the Constitutional implications of the Bill. During the debate a government protested against a member of parliament who questioned the Constitutionality of the act. He contented that it was irrelevant for one to refer to the Constitution when infact the debate was strictly on the Vagrancy Bill. The act was, therefore, passed containing the Colonial rules.

Consequently the act gives the police power to decide what is financially enough to a person. To do this they have to search ones person at the material time. They do not ask for consent before searching. This contravenes S.76 of the Constitution which states that except with his own consent, no person shall be subjected to the search of his person or property.

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Vagrancy per ss is not a Criminal offence. The only crimes it creates are escape from lawful custody, ill treatment of beggars in centres or breach of orders made by the act per SS.8, 10(3) 12 and 14(3). Despite this Ss..4(2) and 5(2) applies the Criminal procedure code. This is against the Constitutional guarantee that one is presumed innocent until proved guilty or he has pleaded guilty.9

According to the rules of evidence,<sup>10</sup> except for cases like insanity the prosecution bears the burden of proving their case beyond reasonable doubts. As it will be discussed later the act has failed to give anadequate definition of who is a Vagrant. It is logical, therefore, that the prosecution can not be said to have discharged the burden of proof in any given case.

Section 77(2)(b) of the Constitution provides that, one should be informed as soon as reasonably practicable in a language that he understands and in detail of the nature of the offence charged. There is neither Swahili nor Vernacular equivalent for the word vagrancy. Therefore the majority of the people charged never understand the nature of the charge as it is usually mistranslated as "umaskini" which means poverty. This breaches a Constitutional right.

(e) WHO IS A VAGRANT ?:

S.2(a-d) attempts to define a vagrant. The issue at stake is whether these definitions are precise and clear enough to afford adequate guidance to the police in the implementation of the act.

A beggar is defined as a vagrant who whether by reason of physical or mental disability, is unable to maintain himself otherwise than by vagrancy, and in respect thereof whom no person has shown himself willing and able to maintain him. This defination is clear and there is no problem in getting who is a beggar.

There are four definitions of a vagrant S.2(a) defines him as:

"any person having neither lawful employment nor lawful means of subsistence such as to provide himself regularly with such necessities, for the purpose of this paragraph Prostitution shall not be deemed to be lawful employment and earning from prostitution shall not be deemed to be lawful means of subsistence"

This definition seems to extend the meaning of the word beyond its dictionary meaning. Any person without lawful support is included. It is for the police to decide what support is enough for a particular person, what yardstick are they going to apply? What about the job seekers who stay with relatives? it was rightly submitted during the debate that they were not vagrants since their relatives supported them.

Necessities to maintain oneself include food, clothing and lodging. The fact that a person has no work does not per ~~se~~ make him a vagrant. He can be staying with parents or friends. The issue of how much is enough and whether the means of subsistence must be from a particular source was raised in the case of R V OSMAN.<sup>12</sup> Here the police raised an argument that a dependant with one shilling in his pockets cannot claim to have enough to provide for his maintenance by whatever standards. This argument leads to the conclusion that a dependant does not have a lawful means of subsistence and that lawful subsistence means one from ones salary. Secondly that each person must carry in his/her pockets reasonable amount, of money all the time. This is an unconstitutional requirement, hence null and void.

The section also stipulates that earnings from prostitution are not a lawful means of subsistence. The act does, not define what prostitution is, so formeaning one has to revert to the dictionary. The shorter Oxford English dictionary defines prostitution as:

"offering of the body to indiscriminate lewdness for hire"

The source of the definition is "indiscriminate". It is apparent that a person who lives with one man and is maintained by him is not a prostitute regardless of whether she is married to him or not. The inquiries conducted by some magistrates into whether a woman arrested is lawfully married are, therefore, misconcieved and the answer cannot other than negatively be probative of the question before them.

What is the criterion to be used in deciding who is a prostitute? Is it from the appearance? The question of whether one is or is not a prostitute is one of fact and cannot be answered from the appearance. It is only when a woman is soliciting on the streets that she can be said to be an apparent prostitute with no means of subsistence. The fact that a woman who has lawful means of subsistence for instance a Secretary prostitutes to supplement her salary does not thereby qualify her to be a vagrant, where is the logic? She does the same acts as a proper prostitute, the only difference being that she is employed. From this discussion, it is submitted that the definition in S.2(a) is not clear.

The second definition is found in S.2(b) which states that:

"any person having no fixed abode, not giving a satisfactory account of himself and for the purposes of this paragraph any person lodging in or about any varandah, pavement, sidewalk passage outhouse shed, warehouse stores shop or unoccupied building or in any open air or in or about any cart or vehicle shall be deemed a person having no fixed abode".

What is the meaning of a "fixed Abode"? Does it include the Shanties and Cardboard houses in Mathare Valley for example? The act is silent on this. A lot of discretion is vested in the police. The question of a satisfactory, account is clearly vague. What is satisfactory to one policeman may not be satisfactory to another; it depends on the personal standards of each; since the act has not defined a fixed abode in S.2(b), police officers should not take it upon themselves to say whether or not slums and shanties are fixed abodes.

Courts have given no better definition of how much is satisfactory. In the case of R V Nyambura.<sup>13</sup> Nyambura was found in Victoria Street at 10.00 p.m. allegedly having no fixed abode and not giving a satisfactory account of herself. When she was brought before the Court she was informed of the charges against her and invited to reply. She is recorded as having said "nowork, no money, from Nyeri, 27 years old" she was then declared a vagrant. The question is whether if one has no money or work is perse a vagrant. She can be staying with parents schooling. This definition is also not clear.

Section 2(c) defines, a vagrant as:

"any person wandering about or placing himself in any public place, to beg or gather alms."

This definition is wide enough to include people collecting money for charitable purposes like the Salvation army or the Red Cross, there cannot be said to be vagrants by any means.

The last meaning is given in S.2(d). A vagrant is "any person offering, pretending or professing to tell fortunes or using any subtle craft, means or device by palmistry or otherwise to deceive or impose upon any person".

Both fortune telling and palmistry are put in one shoe. The logical conclusion is that, the section applies to people using these means for wrong ends. The question is, how is it to be known before conviction for false pretences that one used fortune telling or palmistry for wrong ends? There is no justifiable way of knowing who is a vagrant under the section.

The discussion of S.2(a-d) clearly leads to the one and only conclusion that the act fails to give adequate guidance in determining who a vagrant is.

(f) COURT POWERS:

Where a person is found to be a vagrant, a beggar and a citizen of Kenya, he may be ordered to be taken to a rehabilitation centre. It is sad to say that the ministry of local government has not established any such a centre. The main complaint is that the government has no funds. One wonders whether it is not the same government which passed the act.

A vagrant must be discharged upon proof that he will engage in a suitable employment or that someone is able to care for and maintain him. How is one to get the job which he could not get before he was arrested? How is it going to be ensured that he works? What will prevent him from escaping back to town?

A working solution would be to provide work for the vagrant and

to establish Supervisory machinery in the reserves where they are repatriated.

Section 4(1)(a) provides further that an order can only be made under the section if the beggar is admitted to a centre without delay. It would have been far much satisfactory in an act affecting the liberty of subject, if a definite period could have been inserted, say a week. If this was the case, it would be apparent when the beggar would be released. As none of the other, paragraphs of S.4(1) applies to a person found to be a beggar, it follows that if there is no place for him in the rehabilitation Centre, he must be released. The act will then be failing in not taking care and rehabilitating beggars.

Where a non-citizen is found to be a vagrant, he can be detained in a place of detention,<sup>15</sup> which is defined in S.2 as a prison or a detention Camp. Where a person is found to be a citizen and a vagrant but not a beggar, and not to have any home he can be detained in his place of origin. The act does not define what a home is. It uses "fixed abode". The shorter English dictionary defines it as:

"a dwelling place, house, abode, the fixed residence of a family or household, ones own house the dwelling in which one regards as ones proper abode".

There is a wider meaning of the same word:

"a place from which the fore fathers came"

This could not have been the case since a person may not have a home according to the act. The fact that a person's parents and grandparents originated in a certain District is of no relevance. If such a person has no home there. It is not clear whether home means the place of origin or residence.

In Rep. v Simiyu<sup>16</sup> for over 20 years the vagrants parents lived in Mombasa without visiting Kitale their original home. He was repatriated to Kitale, the place of origin. In Nzia Maindi v Rep.<sup>17</sup> it was held that the Court must consider the inconveniences and hardships which repatriation would cause to the vagrant if he is repatriated to a place he least knows about.

Where a non citizen is detained the officer in charge of the place of detention must report his detention to the minister responsible for immigration and if no deportation order is made within three months, the vagrant must be discharged (S.15(3)).

Where a citizen is detained the officer in charge must use his best endeavours to obtain employment for him and if found to discharge him to take the employment (S.15(1)). In any event he must be discharged three months after the order (S.15(2)).

Where the person arrested is found to be a citizen and a vagrant but not a beggar and that he has a home an order may be made restricting him to his home District for three years (S.4(1)(c)). This is impossible without a supervisory machinery in the Districts.

Under S.4 a Court can only make an order after finding that a person is a vagrant and either he is or is not a citizen and has or has not a home. Although the act does not make vagrancy a criminal offence it is a penal statute which may result in the loss of liberty through committal to prison or through restriction to a particular district. It is, therefore, submitted accordingly that the findings of the Court must be on evidence beyond reasonable doubt.

(f) ENFORCEMENT OF THE ACT:

S.4 empowers the police to arrest without any warrant of arrest any person who is apparently a vagrant. There is no provision for the obtaining of warrants of arrest, so the provision of S.77 of the Constitution are in full force. This provide:

"except with his own consent no person shall be subjected to the search of his person or his property or the entry by others on his premises."

The police have been forcing their way into people houses in order to question those in the premises. Any such entry is clearly unlawful, unless the occupier of the house is informed that he has no right to exclude the police, it can be submitted that he does not consent to the intrusion.



TABLE I -C:

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YEAR	MONTH:	RELEASED:	REPATRIATED:	DETAINED	REHABI- LIATED:
1978	JAN.	111	43	10	-
	FEB.	130	19	2	-
	MARCH.	200	24	-	-
	APRIL.	142	30	3	-
	MAY	67	12	1	-
	JUNE	-	1	-	-
	JULY	-	-	1	-
	AUG.	-	8	1	-
	SEPT.	-	6	1	-
	OCT.	1	5	-	-
	NOV.	6	1	1	-
	DEC.	10	3	-	-
TOTAL:		666	152	20	

T A B L E A:

YEAR	MONTH	RELEASED	REPARTRIATED	DETAINED	REHABILITATED
1979	JAN.	1	1	1	-
	FEB.	-	2	1	-
	MARCH	-	4	-	-
	APRIL	4	7	1	-
	MAY	12	14	1	-
	JUNE	4	54	4	-
	JULY	1	10	14	-
	AUG.	14	14	3	-
	SEPT.	14	23	2	-
	OCT.	1	2	-	-
	NOV.	7	23	1	-
	DEC.	14	15	-	-
	TOTAL:	71	169	28	-

~~T A B L E S - I (A - C) - will show the breakdown of Court decisions for the three years shown in Table A.~~

T A B L E - I (B):

1976	JAN.	50	41	-	-
	FEB.	167	63	1	-
	MARCH.	94	38	7	-
	APRIL.	152	47	7	-
	MAY.	119	66	5	-
	JUNE.	105	105	6	-
	JULY.	98	125	21	-
	AUG.	125	82	1	-
	SEPT.	122	101	7	-
	OCT.	166	161	7	-
	NOV.	136	72	10	-
	DEC.	151	103	3	-
	TOTAL:	1,435	1,004	75	-

For example the number of those arrested in 1976 was 2,296, in 1978, it had dropped to 771, and a further drop was experienced in 1979 when it was 268. The reason for this as observed by one Court Officer is that there is no enough Police force to confront all the vagrants and in any case those who are there are engaged in other serious matters like robbery.

This is an open confession that the act has failed to perform its purposes. Parliament should have known better the implications and requirements of the act. There are alot of unemployed people (who want jobs) and if the government was serious in implementingthe act it could employ them. The situation should be contained if the act is to be enforced effectively.

Table II will show the daily arrests of vagrants in December, 1980 and under which section the charge is made. The month is used at Vandon. The aim of this table is to further show that the act has failed. In S.2(a-d) definitions of a vagrant are given. But these are not clear; therefore, all those arrested are charged under the same section. The table shows that all the people were charged under S.2(a).

TABLE III:

DECEMBER, 1980

DATE:	1	2	3	4	5	6	7	8	9
NO. OF PERSONS:							2	9	3
SECTION:							2(a)	2(a)	2(a)
DATE:	10	11	12	13	14	15	16	17	18
NO. OF PERSONS:	5			4			21	28	4
SECTION:	2(a)			2(a)			2(a)	2(a)	2(a)
DATE:	19	20	21	22		23	24	25	26
NO. OF PERSONS:				4		5	9		
SECTION:				2(a)		2(a)	2(a)		
DATE:	27	28	29	30		31			
NO. OF PERSONS:	5	17	17	15		15			
SECTION:	2(a)	2(a)	2(a)	2(a)		2(a)			

Also all the Ten vagrancy cases heard on 13/3/81 were charges under S.2(a). The police use the section as an umbrella for charging those whom they collect during their patrols, when they cannot get another type of charge. The cases included:

- Case No: 3498/81
- " " 3505/81
- " " 3502/81
- " " 3499/81
- " " 3311/81
- " " 3484/81
- " " 3491/81
- " " 3487/81

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Out of all these only one person was repatriated and the rest were released.

From the above charts it is clear that no vagrant was Rehabilitated. This can not be interpreted to mean that there were <sup>no</sup> cases deserving rehabilitation. The reason is that there are only Juvenile Centres. The act has failed in that it has remained theoretical as concerns such Centres. It should therefore either be repeated or amended.

From interviews and cases conducted in the Court room, I found that the rules of evidence were not adhered to. It is a fundamental value of evidence that the prosecution should establish a prima facie case before the accused can be put on his defence. This is not adhered to in vagrancy cases. It is for the accused person to prove that he is not a vagrant. One Court Officer observed that the rules of evidence as provided for in the evidence Act were theoretical and not suitable in Vagrancy cases. He further said the reason for this deviation is that it is hard for the police to prove that one is a vagrant. He submitted that is why the burden of proof is shifted to the person charged. This state of affairs can not be excused. It is a constitutional right that every person is presumed innocent untill proved guilty. If the police can not establish a prima facie case then the person charged should be acquitted.

It is clear that an amendment or repeal of the act is overdue. The Magistrates should not use the act adversely against the accused. They are entitled to their Constitutional rights and any other law unconsistient is null and void.

There is no doubt the vagrancy problem is on the increase in Kenya. On one hand, Vagrants are potential Criminals and usually their dwelling places act as breeding places for Contagious diseases like Cholera. This is due to their <sup>low</sup> living standards. They are also unproductive to the society and all these reasons points to the necessity of containing the situation. The vagrancy act in its present form has failed to solve the problem.

#### SUGGESTED REFORMS:

The Act should either be repealed or amended since it is not fit for a Country like Kenya which honours the Bill of rights in its Constitution.<sup>5</sup> The Colonial rules which are the same in independent Kenya.

The government should ensure that rehabilitation Centres are established especially in the big towns. The main root of the problem from interviews conducted with Court Officers is that the government has no funds. The ministry concerned should do something about it.

There is also no supervision of vagrants in the Districts. The government should ensure that vagrants are contained in their home districts. This could be done by introducing compulsory regular reporting by the vagrants to their authorities, for example the Chiefs. They should also see to it that the vagrants are engaged in some productive work.

The Act should define its terms clearly and distinctly to give the police sufficient guidance in their duty. The Court Officers complained that there is no enough police force to confront all the vagrants in Nairobi. The government should, if possible, employ others since unemployment is a big problem in our Country.

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C O N C L U S I O N :

The ills and the causes of the Vagrancy problem as revealed from the discussion lay at the Socio-economic imbalance in Colonial Kenya : The capitalistic mode of production, clashed with the traditional mode of production. The laws which are part of the states machinery were geared to securing and protecting the Colonial mode of production. For this reason the vagrants were a nuisance in urban areas and had to be restituted to the reserves. His future was of no consequence to the exploiter. At independence, the new government inherited the Colonial Vagrancy rules and it is duty to decide whether to preserve them or enact others. It has opted to preserve them.

My submission is that the 1968 Vagrancy Act has failed for the following reasons: -

The Act provides that there should be Rehabilitation Centres but none has been established yet. There are only <sup>Borstal</sup> Boston Centres for Juveniles but not even a single one for adults.

For an Act to be successful it should clearly and distinctly define its terms. But as seen in Chapter II the definitions are not clear. The police should be given an adequate definition to guide them in implementing the act.

Once one is declared a vagrant and he is a citizen and has a home, he is repatriated to his home District. On investigation I found that there is no Supervision of the vagrants once repatriated. They can clearly return to the towns.

From my research in the Court , for a period of three years no one was rehabilitated. The reason was that there are no such Centres.

In the Court room the rules of evidence are not adhered to. The accused is supposed to prove his innocence when the prosecution has not discharged their burden of proof. This is wrong and the practise should be stopped. The Court Officers claim that the reason is that it is hard if not impossible for the police to prove the guilty of the vagrants and that is why the onus is shifted to them.

INTRODUCTION:FOOTNOTES:

1. See Abetos disertation LLB II 1978.
2. Partition and Colonial Occupation in E.A. Edited by R. Oliver and G. Matthews, Claredon press 1963 volume I - p.352.
3. Public law and Political change, by Ghai & McAuslan, p.g. 506-507
4. Mama wa Kinyatti, the Kenya patriotic Resistances against British imperialism.
5. Development of legal Philosophy by Mitiyo Pg.2.
6. See Hassanali Samjee Seminer paper, Kipande a symbol for imperialism (1915-48).
7. Act No.61 of 1968 made effective in Feb. 1969 by LN. No.50 of 1969.
8. See S.3, 1968 Vagrancy Act.

FOOTNOTES:CHAPTER ONE:

1. Mande "Introduction to Marxist economy".
2. M.P.K. Sorrenson, land Reform in the Kikuyu Country Ch.2 pg.14.
3. Indian Land Acquisition Act 1894.
4. 1892 - Change of attitude.
5. 1897 - Regulations.
6. 1901 East Africa (Lands) Order in Council.
7. S.(1) 1901 order in Council.
8. 1915 Crown Lands Ordinance.
9. No.12 of 1915 S.5, 54 and 56.
10. 1923 9(2) K LR 102.
11. The Land title Ord. No.11 of 1908.
12. 5 E.A.L.R. 70 at pg.97.
13. R v Earl of Crews *exp* *aff* Sekgoma (1910) 2 KB 576 at pg.609-610.
14. See Akutekha LLB disertation 1977 pg.4.
15. Brett; Colonialism and under development in E.A. 1919-39 pg.71
16. The political economic growth (Monthly Review press, New York Pg.148).
17. Figures for 1903 and 1915 from M.P.K. Sorrenson, Origins of European settlement in Kenya (Oxford University press Nairobi 1968), pg.45 and 145 for 1920 and 1934 - Agricultural Census cited in E.A. by Brett Colonialism and under-development in E.A. pg.175 for 1942 and 1953 Report of inquiry into general economy in the High lands the (Troup Report) 1953.
18. 1901.
19. Master and Servant Ordinance No.8 of 1906.
20. Resident Native (squatters) Ordinance No.33 of 1918.
21. 1923 9 KLR 1.
22. Resident Native Ordinance No.5 of 1925.
23. Registration Ordinance 1921.
24. Despatch .... relating to the native labour <sup>crud</sup> 873 of 1920 pg.3.
- 24(a) Provincial Commissioner of Nyanza to the Chief Native Commissioner(Nyanza).
- 24(b) Brett, Colonialism and under-development in East Africa pg.32.
- 24(c) See R.M.A. Zwanenberg primitive Colonial accumulation 1919-1939 pg.24, 97
- 24(d) Pg.117 R.M.A. Zwanenberg, above.
25. Mombasa Labour Commissioner 1912-13 pg.184.
26. Mombasa Annual reports.



- 26(a) Kenya Legislative Council debates Vol.81-82 Col.1155, 22/12/59.
- 26(b) See Abeto H.P. disertation LLB. 1978 pg.4.
- 27. See sadler to Secretary of State in correspondence relating to affairs in East Africa protectorate and 4122 of 1908 at pg.26.
- 27. Agricultural developemnt in Kenya by, Heyer and other pg.163.
- 28. Furedi F. at pg.187.
- 29. Kenya Native affairs department, Annimal report 1930 pg.97.
- 30. Estimate by the Chief Native Commissioner "Report of General purposes Committee of Nairobi Minicipal Council 22/5/1920.
- 31. E.A.S. 15/3/1937.
- 32. Rhodes house S.633 Corydon 5/1 memorandum to the native Location of Nairobi.
- 33. K.N.A. Labour 9 1707, 70, 257 Extract from minutes with P. C. 11/8/1930.
- 34. Akutekha disertation 19-8.
- 35. M.H. more, deputy governor of Mombasa.
- 36. Nairobi municipality (Amendment) Bye-Laws 1944, bye-law No.212.
- 37. The Indian Evidence Act.
- 38. 21(2) KLR 57 Cr. Revision Case No.223 of 1945.
- 39. See S.3(2) (9) Municipal rules 1926.

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CHAPTER TWO:

F O O T N O T E S:

1. Taking the law into their hands. The ruling class, the rule of law and the public in Kenya by S.B.O. Gutto, Dept. of public law.
2. Regulation No.2 of 1898 E.A. Protectorate.
3. Regulation No.3 of 1900 E.A. Protectorate.
4. Article 2 of 1900 Vagrancy Ordinance.
5. Article 6 of 1900 Vagrancy Ordinance.
6. Article 9 of 1920 Vagrancy Ordinance.
- 7a) Mr. Matano as he then was Kenya Legislative Assembly Debates Vol 16(2) Col. 3238 of 1968.
7. Rep. v Kadhi 1973 E.A. 153.
8. Oloitiptip Assistant Minister for Commerce and Industry [as he then was Republic of Kenya National debates Vol. 18 Cap.3304 21/11/68.
9. Constitution S.77(2) (a).
10. Evidence Act.
11. 1965 E.A.L.J. page 195.
12. Unreported, District Magistrate's Court Vihiga, criminal case No.425/1976.
13. (1962) E.A. 679.
14. See S.10(2) Vagrancy Act.
15. See S.14(1) (b) Vagrancy Act.
16. Unreported District Magistrate Court at Hamisi Criminal Case No.402 of 1976.
17. 1963 E.A. 322.
18. 1965 E.A.L.J. 195.

CONCLUSION:

1. See M.P.K. Sorrenson, Land Reform in the Kikuyu Country - Supra.
2. Mihyo, the development of legal philosophy pg.2.
3. Nairobi Municipality (Amendment) By-Laws 1944 bye law No.212.
4. Makadara District Magistrate Court.
5. Kenya Constitution part V.
6. Ministry of Local Government.

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

- R. Oliver and Mathew - Partition and Colonial occupation in E.A. (Clarendon Press : 1963 Vol.1)
- Ghai & MacAuslan - Public law and political change.
- Mihyo - Development of legal philosophy.
- Brett - Colonialism and underdevelopment in E.A. 1919 - 37.
- M.P.K. Sorrenson - Land Reform in the Kikuyu Country.
- Van Zwaneberg - Primitive Colonial, accumulation, D. Plut Sussex 1971.
- Colin Leys - Underdevelopment in Kenya Economy of neocolonialism 1964 - 1971 (Heinemann London (1975)).

A R T I C L E S :

- Furadi F. - The Kikuyu Squatters in the Rift Valley.
- Le Pelley P. - Vagrancy and the Law in Kenya IX E.A.L.S. No.1 (1973).