"Administration of criminal justice in our lower courts - a critical analysis"

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I N T R O D U C T I O N

The aim and purpose of this paper is to offer a critical analysis of the system of administration of criminal justice in our lower courts. By lower courts, we mean the District Magistrates courts of all classes (I, II, and III) Towards this end, a critical appraisal of the various agencies involved with the administration of criminal justice have been undertaken. This has been don in an attempt to answer the question, as to whether we can truelly and honestly say that criminal justice is normally done in these courts.

The writer's contention and therefore the thesis of this paper is that, as our criminal process presently stand, it is very difficult to convince any keen observer of the system that criminal justice is normally administered by these courts. We therefore posit the thesis that nothing close to what may pass as criminal justice is handed down in these courts. As a result the criminal process is for many people something to be avoided at all costs. One might of course justly argue that the main purpose of criminal law is the prevention of crime and that therefore if many people shun the criminal process, then it should be taken that the function of criminal law is thereby achieved. Looked at from the angle of the accused, such an arguement may be superflous. The obscure and complicated legal procedures inherent in our criminal process remain a baffling barrier to the accused's understanding of what happened to him, except to the degree to which his advocate, if he has hired any, informally plays the role of a therapist. In consequence, the major impact may be frustration, with little to prevent the frustration from leaving a permanent residue of hostility. It is strongly submitted that our present system for the administration of criminal justice is regarded in that light by most people

In order to support our thesis that rarelly is criminal justice done in these courts, we shall trace the accused person all through our criminal process Thus our analysis will start from the time the accused is arrested by the police upto the time his case is finally disposed of. At various points in our analysis of the accused's journey in the criminal process, we shall point out and emphasize those aspects that make it impossible for these courts to administer justice other than criminal injustice.

Our interest to write a paper along these lines was spurred by what we saw and experienced during our fourth term clinical programme at the Webuye District Magistrates court. Our experience led us to the conclusion that most institutions in the criminal process have manifest defects or are constantly abused, as to make it practically impossible for them to discharge their functions effectively that of ensuring that it is only after the accused has been properly convicted by an impartial tribunal that he will suffer under the harsh rod of our criminal process.

To help us in the exposition of these defects and abuses constant reference will be made to some cases that were decided by the Webuye law courts during our brief stint there, and which highlight some of these issues. The illustrations will therefore serve as a vehicle by which a chunk of reality will be brought into focus as opposed to hypothetical cases. Alongside this illustration will be used to illustrate generalizations which are established otherwise or to direct attention towards such generalizations.

For the proper appreciation of our subject, we propose to approach it under three broad chapters. Chapter one will be basically historical. A broad definition of criminal justice will be attempted. The nature and development of criminal justice will also be examined. English theories regarding criminal justice will be examined. An endeavour will be made to expand on the customary or indegenous criminal law, and as to how English criminal law came to replace it.

The justification for the inclusion of the historical aspect is easy to find. A talk about administration of criminal justice, presupposes an already existing criminal justice system. To establish this therefore, it is imperative that we trace the development of criminal justice in this country. The chapter is also crucial for the purposes of historical continuity. The present criminal law structure is basically a colonial relic bequeathed to us through colonialism. The English penal system developed under different circumstances was surely ill-suited for the Kenyan scene. It is at this point that a discussion of customary criminal justice system comes in. The discussion is aimed at giving a comparison of the two systems, highlighting of course, aspects of customary criminal law that would have been incorporated in the English criminal system that we have, and which should have enriched it.

The adoption of English criminal law wholesale probably partly explains the problems encountered in the administration of criminal justice in this country, which problems we shall highlight in this paper. They are these same problems which have fostered the rapid erosion of public confidence in the impartiality of the criminal process.

In the second chapter which is really the main body of the dissertation, we shall be concerned with the exposition of the defects in our criminal process. It is here that an attempt to trace the accused all through the various stages in the criminal process, will be made. In that spirit, critical examinations of police practices, prosecution, the court, magistracy, plea-bargaining bail and sentencing will be offered. The arguement that will run through will be that there are certain defects in the above agencies of the criminal process that largely contribute to the failure of our courts to dispense criminal justice strictly so called. Thus the police prosecution, and magistrate's malpractices, together with courtroom setting and procedural formalities

obtaining therein militate against a fair trial, and tend to tilt the scales heavily against the accused. To round up the chapter, some aspects of bail, sentencing and plea-bargaining will come under review. The purpose is to underscore the fact that they have been misused or even underused and therefore have tended to work unfairly against the accused and to inflict injustice on the suspected criminal.

As for chapter three, our main concern will be to give a conclusion and a host of recommendations for reform. In this chapter too, we shall give an evaluation as to whether the thesis we advanced at the beginning of the paper will have been sustained. Suggestions for reform will be made in the light of the problems raised in the preceeding chapters. On that note we shall end.

At this point it must be pointed out that the use of "We" in this dissertation does not in anyway suggest that in writing this paper, I collaborated with any other person. Rather it is my own style and version of writing. The mistakes herein if there are any, are entirely mine and should not in anyway be imputed to the other 'we'.

Footnotes are to be found at the end of the final chapter.

The bulk of the material presented herein are extracted from textbooks, statutes, judicial decisions, essays, newspapers and of course my personal experiences at the Webuye courts.

CHAPTER ONE

DEFINITION OF CRIMINAL JUSTICE AND HISTORICAL BACKGROUND

Our analysis of criminal justice must begin with the definition of what we shall be talking about in this dissertation. Common sense understanding of criminal justice include everything from a highly idealized image of Perry Mason rushing to the defence of innocent defendant to a critically cynical view of prisoners shackled in dungeons. But in order to provide a clear view of what we are going to deal with, it is necessary to define our topic.

In the world, people live in groups. Within these groups there are deviants. That is persons who cannot or will not conform to the rules governing that particular society. They will thus become a menace to that society. But still, the society in an effort to maintain its integrity and social cohesion, attempts to control their behaviour through mores and laws. This is because it would be foolhardy to leave each member of society free to decide for himself whether the conduct he chooses to engage in is a tolerable imposition on the interests of others. To regulate this, the society creates a legal order. For our purposes it is the criminal justice system.

Criminal justice system is therefore the apparatus that the society uses to enforce the standards of conduct necessary to protect individuals and the community. This fact has long been recognised that is for stability and social cohesion to prevail, offenders of rules as set by society must be brought to book and punished. The whole process by which the suspected criminal is apprehended, prosecuted, convicted and eventually sentenced, is basically what we mean by "Administration of Criminal Justice."

Thus for the entire machinery of criminal justice to be set in motion, some conduct which the society disapproves, prohibits and which in their eyes is necessarily criminal must have happened or reasonably apprehended. However, what amounts to criminal conduct may be a subject of dispute. The term criminal has its roots in the term crime, and so it is necessary to spell out exactly what crime is. Here, like is the case with other legal terms, much ink has been spilled over its exact definition and scope. But for the purposes of this paper, we have picked on one such definition that we think is appropriate: Crime is thus

> ".....an illegal act, ommission or event whether or not it is also a tort, a breach of contract or a breach of trust the principal consequence of which is that the offender, if he is detected and the police decide to prosecute, is prosecuted by or in the name of the state, and if he is found guilty is liable to be punished whether or not he is also ordered to compensate his victim."[1]

This definition is fitting for the objectives of the paper in that it incorporat all the necessary elements involved in the administration of criminal justice, with which we shall be concerned in this paper. That is the police, courts and of course the prisons. The important aspect of this definition is that the act is considered to be against the state and punishable by the state. This distinquishes crime from other wrongs. The state is the complainant because crime is considered harmful to the entire society. Thus the violation of a rule as set by her will definitely invite her wrath. This is by setting in motion all the necessary apparatus of protecting the society and weeding out criminals.

Crimes are therefore defined and made punishable by criminal law. In Kenya it is contained in the Penal Code (Cap 63 of the laws of Kenya). The general justifying aim of the administration of criminal justice is said to be that the guilty should be detected, convicted and duly sentenced. Basically then, criminal justice is the prevention of crime.

> "The control of crime is the major goal of the administration of criminal justice. The formal process has the objective of discovering those persons believed to be guilty of crimes, screening those who are innocent, and dealing with those who are guilty."2

Strictly, this is the purpose of criminal justice. However, as we shall see later in the discussion, there are many instances where the innocent have suffered under the harsh rod of Criminal Justice. This will be pursued in chapter two.

Certainly there are other goals of Criminal Justice. Sometimes it is said that the point is simply to pay the wicked for their wrongful doing. At other times, that correction of those who show themselves to be in need of it. One often hears the view that:

> "Crimes are punished to show those who have broken the law and those who might be tempted to break it, that the law has teeth that can bite."3

Traditionally then the system had three practical goals: Vengeance, deterrence and rehabilitation. The concept of vengeance for long held sway. It reflects the less noble side of human nature. This is the desire for revenge. It is traceable to the earliest legal code we know; that of Hammurabi of Babylon.

In sum therefore, it can safely be concluded that the enterprise is carried on to make the community safer by identifying and then removing or at least watching those who have shown themselves to be dangerous. This is done by a loose federation of such agencies as the police, prosecutors, courts prisons and even probation agents. All these institutions ensure, however, that a person may be punished if, and only if, it has been proved by an impartial and deliberate process that he has violated a specific law.

However, whether this statement is true will come out in chapter two. It is in this chapter that we intend to give a critical analysis of all the institutions involved in the administration of criminal justice.

At this juncture, we might pose one rather pertinent question; What is the relevance of the English theories as outlined above for our present discussion. The question may easily be disposed of here. Basically, the penal system obtaining in Kenya is essentially English Penal System. It is worthy of note that the English theories of criminal law and procedure were imposed wholesale on Kenya during the Colonial era. And even after Independence, very little has been done to alter or modify the imported law to suit the local conditions. The English institutions such as police, prisons and courts are still with us.

Often one hears a magistrate, while passing a sentence invoking the following words. "I am sentencing you to such period in jail in order to teach you a lesson and also to deter, or warn others that crime does not pay."

This was indeed the most invoked and used terminology by the presiding magistrate at Webuye law courts, where I was based during my fourth term clinical programme.

From this we see that, English penal theories are invoked in our lower courts. It would be entirely naive if we plunged into the subject without really tracing the source of it. That is why we found it necessary to examine the general purposes of criminal law in England. It is true to say that what is held to be the purposes of criminal law in England will definitely be held to be so in Kenya.

As already alluded to, the criminal law we have at the moment in our statute books is entirely English. But this does not imply that in the traditional African Societies, there was no system of criminal justice. It is now an established fact that traditional Africans had a well co-ordinated system of resolving disputes comparable. If not, better than the English system of administration of criminal justice. Since our present criminal law and the institutions used in enforcing it are all of English origin, it is imperative to examine the development of criminal law in England.

ENGLISH NOTIONS AND THEORIES REGARDING CRIMINAL JUSTICE

From the earliest period of English law, we find that wrongs must be corrected or punished. This was not merely through compensation to the injured man, but also to the King, or other persons having authority. Physical force is the natural method of redressing wrongs. A step forward is made when recourse to a court appears as an alternative to physical force.

During this early stages of common law, a person was automatically liable for forbidden acts which could be directly traced to him. Whether the conduct was intended, accidental or necessary in the circumstances was irrelevant as the mental state of the person perpetrating the wrongful act was not taken into account.

> "The main principle of the earlier law is that an act causing physical damage must, in the interest of peace, be paid for. Even if the act is accidental, or even if it is necessary for self-defence. A man acted at his peril."4

For a long time, this idea of strict liability held sway. Eventually, it was mitigated by the entry of church on the scene. Some regard began to be paid to the culpability of the offender. The Ecclesiastical laws and the Penitentiaries naturally looked primarily at the state of the mind of the individual.

This was then, the beginning of the most celebrated maxim in criminal law. 'ACTUS NON FACIT REUM NISI MENS SIT REA.' By definition this means that whatever a person does, it cannot make him criminally liable unless doing it actuated by a legally blameworthy attitude of mind. To date the position is still the same. That is the intent and the act must both concur to constitute [illegible]rime. The two are still the principle cornerstones of the English criminal [illegible]dence. The maxim still plays an important role in the administration of criminal justice in our lower courts. This aspect justifies our having included this section (English theories regarding justice) in our discussion. Whether our lower courts effectively and jealously guard the Sanctity of the maxim will be dealt with in chapter two. We now turn to examine the African notion of crime.

AFRICAN CUSTOMARY CRIMINAL LAW

The question as to whether in the traditional African societies, there was a system of law comparable to the English criminal law has been a subject of dispute for a long time. European observers have often doubted the existence of law in African societies, because generally the Paraphernalia which they associate with law were found missing in the African societies. To them without prisons and the police force, it was assumed that there can be no sanctions such as would give law the requisite validity. But for those who accept that there was a system of criminal law in African societies; they are also confronted with one dilemma; namely whether there was a distinction between criminal and civil law. The problem is further accentuated by the fact that redress for such wrongs was simply compensatory.

Because of this aspect, it has been said in certain quarters that the whole of customary law was civil law. But such a general statement may turn out to be wrong.

> "Let us start, then, by discarding European concepts of law and justice. They are not only irrelevant, but any investigation based on them is found to be fallacious. Our laws and procedure and our distinction between civil and criminal law have grown up with European culture..... It would be remarkable therefore if the two could have a great deal in common."5

Despite this warning, sounded as early as 1934 it was never really taken up and writers on the subject continued the practice of looking at it from that angle.

It must be appreciated that most African societies did make a distinction between crimes and civil wrongs. Considerable anthropological and legal writings support this contention.6 Near home one famous writer comments:

> "There is a fair authority, and in such an hierarchic acephalous society as the Ganda it is indeed probable, that in ancient times certain crimes such as treason against the Kabaka, witchcraft, incest, sexual perversions, adultery with the royal wives, theft and cowardice in war were classed as crimes against the state and were punished with death or at least mutilation. Other offences were dealt with as torts and were settled by the payment of compensation to the injured party....."7

Generally therefore there is ample evidence to show that a distinction between criminal and civil wrongs was made. In Kenya, the Kamba people had a recognisable system of criminal law. Among them they had such offences as those against the person, theft, morality and property.8

Granted that most African societies recognised crimes, were such ingredients as motive, intention and negligence taken into account in determining criminal responsibility. Here again there is considerable amount of evidence suggesting that African societies did infact take into account moral culpability. Dr. T.O. Elias argues forcefully that Mens Rea was considered. The latest authority showing that intention was taken into account comes from Professor Max Gluckman who says:

> "In my opinion it would therefore be a misinterpretation to say that no note is taken here of the mental elements of the offence, even if a death is insisted on. Intention - the motivation or mental elements - is presumed to be what a reasonable man in those circumstances would have felt.....9

He stresses that a certain social relationship, involving hostility, raise a presumption that the harm was done of "Malice aforethought." In sum therefore, we can say that vitiating or mitigating factors were considered and one was not condemned wholesale. From what has been said above, we realize that the African concepts regarding criminal liability were just as refined as the English notions

There was thus no justification, at all for them to be regarded as primitive and therefore inferior, as to be replaced with a foreign penal system in the name of "Civilisation." It would have been a prudent move on the part of the colonialist if they would have synthesized the two systems. Failure to do so was a fatal move. Infact, the reason why there is little respect for law, particularly criminal law in this country, is attributable to that omission. People need a law they can understand. English criminal law developed in a society culturally and economically different from Kenya was therefore illsuite for the country unless it was modified. This was not done. African ideas regarding criminality were therefore discarded. This comes clearly in the notion of punishment.

PUNISHMENT:

This is the most distinctive feature of criminal law. It involves locking offenders behind the bars for some period with a hope that such an action will make them regret their actions. Alternatively they are fined which is also aimed at serving the same purpose.

The traditional methods of treating offenders can be explained by the fact that what was generally sought was compensation for the victim. Although there was no written code, the law was still respected. This was because it was inherent in the body politic, coherent and traditional. Essentially then, offences existed among the Africans but their methods of dealing with th offenders were different from those imposed by colonalists. Because under thei system, there were no such institutions as prisons and the fact that compensati of wronged was insisted on, one could be forgiven for saying that criminal law in such society did not involve the punishment of the offender. Therefore that the deterrent or purely penal theory did not enter into question. That the law as it were, was not vindicative.

Generally, this may be dismissed as a wrong presumption. Indeed there was punishment but not perhaps in the English sense of throwing someone in the dungeons. Compensation could turn out to be as harsh as imprisoning or fining one. For example Muga records.

> "Before western impact compensation was given to the father of a girl who was raped by a boy by the boy's father (This is still the case in some areas in Kenya). A heifer or some other type of livestock was usually given to the girl's father as a compensation."10

For the Kikuyu Kenyatta records that nine sheep or goats had to be paid for adultery or rape"11. Essentially then, such high rate of compensation could b as harsh as locking up someone in jail, particularly so if perpetrator of the offence is not of good social standing.

This however, was not the only form of punishment recognised by the African societies. The other forms were ex-communication from the society particularly so when the offenders conduct threatened the security of the society. There was also Ostracism, curses and public redicule. The latter were however, rarely and sparingly resorted to. To sum up, therefore, it is a misnonour to assume that the sanctions available to traditional communities before colonization were inadequate or primitive for the societies of the time. It has been established that they were effective and served to promote public satisfaction by reconciliation of the offender and the victim.

We have dealt at length on the customary system of criminal law and particularly the punishment aspect of it because, we strongly feel that, the English penal system we adopted; and which is widely applied in our lower courts works rather unfairly. The scant attention given to the compensation of the victim by the modern criminal law has come to be a source of real disatisfaction The victim or his family may feel that no criminal justice has been done, whatever penalty is imposed on the offender while recompense for the injury is ignored. Indeed during my fourth term clinical programme at Webuye law courts, I conducted random interviews with parties who had been injured or affected as a result of the criminal conduct of the other. All of them expressed disatisfaction with the present criminal system which does not compensate a person who has suffered some loss as a result of the criminal conduct of the other. Take an example where one's cow is stolen and sold. Subsequently, the offender is apprehended, tried and fined. One could have expected that part of the fine could be used to compensate the original owner of the cow for the loss incurred which rarely happens.

While saying this, I am well aware of section 175 (b) of the criminal procedure code which provides that:

> "Whenever any court imposes a fine, or confirms an appeal, revision.....the court may, when passing judgement, order the whole or any part of the fine recovered to be applied:-
> (a).....
> (b) In the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is in the opinion of the court recoverable by civil suit;"

This provision as clear as it is, is rarely resorted to. At least this is the impression one gets in all our lower courts. An interview conducted with a cross section of my colleagues over the subject revealed concurrence with this statement. The interview was based on their fourth term clinical programme experiences. One of them who was based in Meru Residents court in fact dismissed the provision as a dead letter.12 That for the two months he was there, he never saw that provision being invoked, and yet there were so many criminal cases which in all fairness needed the sections invocation.

One might at this juncture ask - what rationale there is in the English system of avenging the society and leaving the direct victim in the cold. Every crime in the penal code carries a penalty, yet the victim of the crime gets no compensation except in very peculiar cases. Crime compensation as a form of punishment was certainly a valuable development of African jurisprundence which should have enriched English Jurisprudence. It is highly significant, that criminal law that later came to replace the traditional customary criminal law, should have at least incorporated certain customary offences and also indigenous African ideas of crime, punishment and criminal responsibility.

All along we have been saying that African notions of crime were replaced by the English. How this happened is our next consideration.

REPLACEMENT OF CUSTOMARY CRIMINAL LAW BY ENGLISH STATUTE CRIMINAL LAW

There is a truth that is detectible throughout the history of man, that the conquered people must relinquish their customs, their legal systems, all their values and accept the ways of the conqueror. In this imposition process, the only criterion of evaluating the two systems and their norms is usually based on a priori presumption that all the conqueror's values are better. The British in Kenya were not an exception in this case. This was nowhere better manifesited than in the field of law. After all:

> "The general acts of the Berlin and Brussels Conference had imposed an obligation on the signatory powers to establish systems of justice in their African possessions and stressed the importance of judicial Institutions as a civilizing influence ....."13.

Towards this end, the British promulgated the 1897 East African Order in Council which established an embyonic legal systems. The native court regulations of the same year established native courts which were enjoined to apply native laws and systems not opposed to Natural law and morality. This provision received its final blessings in 1902 East African Order in Council which introduced the following provision.

> "In all cases and crimes to which natives are parties, every court shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in Council or Ordinance....."

This provision remained part of the laws of Kenya from that time onwards. Although local courts were established and enjoined to apply and enforce the native law and custom (which law included customary criminal law), in theory penal codes, based on English or Indian law were introduced. Colonial period resulted in the gradual transformation of the character of customary criminal law through conscious infusion of English notions of criminal law.

The position of customary criminal law at the end of the colonial period was characterised by the fact that it was unwritten. It also applied seperately This was considered rather unsatisfactory. In fact in 1963, a conference was held in Dar-es-Salaam and in which Kenya participated resolved:

> "Every country accepted the principle that penal law should be written and that the present position in some countries, whereby unwritten criminal offences existed side by side with a written penal code must be altered....."14.

At Independence, the Kenya constitution accepted the Principle of legality. In a way this sounded the death knell of the customary criminal law. The principle as enshrined in the constitution provide interlia.

> "No person shall be commited for a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law."15.

The only exception to this constitutional provision is contempt of court, which after all is not a customary law offence. This has left the penal code as the only source of criminal law.

The importation of British penal system brought a system of justice unfamiliar to the Africans. That is prisons, police anf formal courts. It ignored the African concept of restitution. Yet this is an African living concept which can be used to spectacular effect if it was made the centre of the penal and penitentiary policy. Its incorporation would have meant that the African, aware that the alien law was operating under principles which he understands could be more ready to accept and conform to the law. But as the position is, now an impression of criminal injustice is there, however, justly and impartially the penal laws are administered.

To round up our present discussion, one must but answer one partinent question. That is, why did we find it necessary to trace the development of criminal law in England vis-a-vis that of traditional African society. The simplest answer to this question is that, it was necessary for purposes of historical continuity. The machinery for the administration of criminal justice and criminal law it-self obtaining in Kenya is basically English. It would have been rather naive on our part if we failed to carry out the historical analysis. Otherwise how could we explain the fact that we have a penal code which purports to list all criminal offences and which our lower courts are enjoined to use.

The historical analysis has also been necessary because we feel rather strongly that the problems inherent in the proper administration of criminal Justice in our lower courts; can only be explained away by the fact that the whole system appears to be foreign in the eyes of those it is meant to serve. This particular point will be pursued in chapter two.

The historical analysis both of the English and traditional African theories of punishment was used to show that the latter was appropriate and best suited to our conditions. This is still so to date. The introduction of the Institution of prison without an alternative to compensation was probably a wrong decision.

In sum, the criminal justice system obtaining as of today has shortcomings, in so far as it does not incorporate African concepts of criminal law. Consequently many Africans do not report many crimes to the authorities concerned because they have nothing to gain by so doing. In many cases they resort to private customary legal methods of dealing with such cases. With this in mind, we now turn to chapter two, in which we deal with problems recurrent in administration of criminal justice in our lower courts.

CHAPTER 2

JUSTICE OR INJUSTICE

In this chapter, we attempt to expose some of the defects in our criminal justice system.

It should be noted that these courts are indeed very busy particularly in crime matters. This can be seen from the statistical returns between the years 1978-1981 of one such court, Webuye District Magistrate's court (see appendix). Perhaps the only explanation for such an increase in crime can be found in the fact that most areas have been undergoing rapid urbanization and social change.

A general observation one must necessarily make is that the majority of offenders brought to these courts every day come from the lower and poor echelons of our society. This may imply that poverty alone influences the perpetration of crime. We do not believe that poverty is a necessary condition for criminality. After all, there are in our society extremely poor people who are law abiding and also others who are well-off and still engage in crime. But as to why the poor dominate our lower courts, reasons have been correctly stated by one authority

> "The poor tend to predominate in criminal population not because they are anymore criminal than others but because of the different treatment they receive from the society. The poor are more likely to be arrested, charged, found guilty and imprisoned or sentenced to death than the more affluent members of the same society."1

Thus the poor because of the economic weakness cannot afford to bribe their way through, where that helps. The poor because of their relative immobility can easily be apprehended. They also get involved in the kind of situation that is usually relatively easy to detect and investigate; unlike the respectable members who engage in official and white collar crimes which are not easy to detect. It is not therefore strange to find a policeman stopping a man walking in the streets of Webuye or any other town, at night but not a man in a big car even where most likely the two men have the same motives for being in the streets at that time.

The affluent members of our society therefore can influence the criminal process. Consider this case, for instance. In R-V-DINA NASIKE, TRAFFIC CASE NUMBER 967 of 1981 (in short TR. 967 (81); the accused was brought before Webuye court charged with a traffic offence of over loading. The accused was/is a prominent business woman in the neighbourhood. On the day the case was due to be heard, the accused accompanied by the Chairman of the Webuye Town Council, came and had some audience with the Magistrate. That was the end of the matter. The case never ended up in court. What transpired among the three parties is anybody's guess.

The possibility that the magistrate was influenced by the social standing of these personalities cannot be ruled out.

That aside, we hold the view that, any serious examination of our criminal process must necessarily start with an examination of the role of the police. It cannot be disputed that arrest is the first step to criminal process. It is also beyond dispute that, what happens to a suspect whilst in police custody will to a large extent, determine the accused's plea and subsequent disposition of his case. It is therefore pertinent that we examine police powers of arrest and how they are used or misused.

THE POLICE

The police are charged with very many difficult duties which relate mainly to the maintenance of law and order. These duties include the prevention and detection of crimes, apprehension of offenders, the preservation of law and order, the protection of property and the enforcement of all laws and regulations.2

For the efficient performance of their duties, the police are vested with wide powers, including the power of arrest, detention, search, and worthy of special mention is the power of the police to conduct criminal process. Pursuant to the wide powers vested in them, a police officer can arrest without warrant any person whom he has reasonable grounds to suspect of having committed an offence.3 The constitution of Kenya has also similar provisions.4 To arrest someone on 'reasonable grounds' indeed gives the arrester a blank cheque to arrest anybody. People being of different levels of intelligence, one may wonder what standard is used in deciding what is reasonable ground. The phrase 'reasonable suspicion' was interpreted in M'IBUI-V-DYER[5] to mean that the arrester must have reasonable grounds for suspecting that the offence has been committed or is about to be committed. The test is supposed to be objective. But what is reasonable suspicion however, in practice depends on the opinion of the arrester. Because of this, it is very common to find a policeman using his powers of arrest to harass innocent citizens. For instance, the police officer might have a personal grudge against such person, or he might have been bribed and instructed to arrest the innocent person and teach him a lesson. In the Daily Nation of Friday March 12th, 1982 on page 3, Justice Okubasu underscored this point when he said:

> "In the olden days we used to talk of a politician having put a senior police officer in his pocket..... and could therefore harass his opponents, threatening them with arrest. The police have to remember that no person shall be punished for a non-existent offence or be held in custody for no reason."

But perhaps the strongest indictment of police abuses of their powers of arrest came from Fidahussein Abdulla (then senior Resident Magistrate, Nairobi and now Judge of High court of Kenya). While addressing a conference of Kenya Association of Magistrates, he remarked:

"It may be observed that many appeals which come to the Resident Magistrate court from the District Magistrates courts, the record shows that the police officers who stops, searches and detains the suspect, fail to state why such officers stopped, searched and detained the suspect. There have been cases where a person who goes about his normal course of business in broad daylight in the main street of Nairobi carrying a fountain pen, knife or screw driver is convicted under section 232 of the penal code simply because such person cannot produce receipt or cash sale for the same. Such conviction cannot be sustained."

The relevance of these words to our present discussion need not be over-emphasized.

Two Webuye court decisions which illustrates some of the abuses are R-V-ANNA OTIENO, CRIMINAL CASE NO. 1393 OF 1981 and R-V-NJUKI KUNYIKHA, CRIMINAL CASE NO. 1490/81. In the former, the accused was charged with trespass upon private land contrary to section 3 (1) read together with section 11 of THE TRESPASS ACT (Cap 294). As the case progressed, we learnt that the accused was arrested on the orders of the officer commanding the Webuye police station (O.C.S The accused woman was a former, 'Mistress' of the O.C.S, with whom he had had a baby son. The kid being sick, the accused had brought him to his father for treatment. Fearing that the presence of the accused in his (O.C.S) house would cause some discord between him and his legal wife, the O.C.S. ordered for the accused to be arrested and charged with the offence in the indictment. She was however, discharged and ordered to be repatriated to Busia.

In the latter case, the accused was charged with being drunk and disorderly. During the cross-examination the presecution conceded the point that the accused was unlawfully arrested and charged. The arresting officers, while on patrol, entered the accused's house and arrested him on suspicion that he was drunk. He was later charged with being drunk and disorderly. Once again the accused was unconditionally discharged. This case may be used to illustrate the cardinal point, which most police officers forget, that to be drunk is not an offence. It only becomes an offence if someone becomes disorderly as a result of being drunk.

In the instant cases mentioned, though the accused were acquitted, damage on their repute had been done. They had spent a whole weekend in the police custody the atmosphere therein being so hostile. One is treated as if he is already guilty. This 'guilty' impression in a person's mind continues throughout the trial; so that when one is discharged (as in these cases), the feeling is not that justice is done but that he has been forgiven. The accused showers the magistrate with a lot of thanks. The thanks are not because it is a right to be acquitted if there are any procedural abuses in the criminal process, but rather that the magistrate by uncanny powers found something wrong with the police.

While being arrested or in custody or when the charge is being drawn up, the accused is rarely told of the grounds of arrest.

Yet this is a procedural right! In the circumstances, it is impossible for one to adequately prepare his defence or contact his lawyer should he wish to do so. The end result is to disadvantage the accused, to the extent that his chances of winning the case becomes really minimal.

During the so called interrogations excessive force is often applied to the accused by the police in order to extract a plea of guilty. Arrested persons are beaten up and treated as if the court of law has already pronounced them guilty and ordered that they be punished. Press reports of such incidents are numerous. For instance, THE STANDARD[8] carried an article under the title "DOG BIT PRIVATE PARTS" in which the accused told a Kisumu court that he was shot twice in the leg and police dog held him by his private parts at Obunga Estate in Kisumu District. In one case, R-V-EKULAN NAARINGOR, CRIMINAL CASE NO. 1105 OF 1981 heard before a Nakuru Resident Magistrate, the accused who had been charged with stealing alleged that the police used pliers and pierced his penis. The magistrate upon being shown the penis ordered for a medical examination. The examination vindicated the allegation. This is by no means an isolated instance. Every other day it is reported that a person died in the police cells.[9]

Perhaps the worst part of police excesses arise out of the so-called 'polic swoops'. Large numbers of people are indiscriminately arrested and locked up for days before being charged. Such people are rounded up without being told why, taken to the police station and it is only after they are about to appear before the court that they know why they were picked up. The exercise is unnecessarily brutal. Not all people arrested are criminals or even suspects. Police enter houses of law-abiding citizens and unnecessarily harass them. None is given time to explain. They are told to reserve their explanations for the magistrate in court the following day or a day after. And when they eventually give them, they are dismissally disbelieved by the magistrate;sometimes people so netted and against whom the police have no evidence to prove that they are thugs, are charged with the offences of either "being drunk and disorderly" or other fictitious offences such as "behaving in a manner likely to cause a breach of the peace." This latter offence is commonly invoked by the police at the Webuye law courts. As a matter of fact, this offence is of recent origin and has never been defied. Because the police are too anxious to charge everybody they pick up following such raids, they always fall on either of the two offences. It is immaterial whether one was infact 'drunk and disorderly', or 'behaved in a manner likely to cause a breach of the peace'. But somehow they will try to prove it in court. After all in both offences, the burden is on the accused to rebut that presumption and is not a light one. Since the fines for such offences are normally small, most accused prefer to plead guilty even if they are innocent rather than engage in a protracted litigation with undesirable consequence that they may lose their jobs, since their bail application may be

refused and be locked up in custody for long periods before their cases are finalised.

What is the overall effect of such police malpractices on the accused in our criminal process? One irescapable fact is that it thwarts the entire purpose of criminal justice. As illustrated in the preceding pages, the innocent are often driven into pleading guilty, in the hope that such a move will shield them from further police beatings. People tend to loose faith in the impartiality of the court when they complain about the legality of their arrest and Magistrates show no signs of concern. In most cases such complaints are treated as unfounded. The general impression left then although it may be a wrong one, is that a policeman cannot arrest one for nothing. This from what we have already seen is a totally wrong impression.

However, the view is nurtured and encouraged by magistrates who despite the complaint simply dismisses the allegation. The magistrates are not concerned with how the prisoner comes to court. Rather they adopt a wait and see attitude Such an attitude, it is submitted defeats the proper administration of criminal justice.

The other effect of police misconduct relates to getting evidence. More harm and greater obstacle in obtaining evidence rampant in our lower courts are as a result of bad handling of the suspects by the police. The accused may be tempted to tell untruthful information to stop further beatings or in the future he may not be willing to help the police at all in their investigations even though he could have been in a position to do so. The end result is that the police may proceed to act on half-baked information with undesirable consequence The spirit of mutual co-operation between the police and the accused or even the witnesses need to be nurtured. This can only be done if the police are made aware of the fact that their excessive use of force on the accused hamper the proper administration of criminal justice. That brutal force applied on the accused in order to obtain a plea of guilty can never be justified nor is it legal.

THE PROSECUTION.

Once the suspect has been arrested, a charge may be preferred against him in court. The court prosecutor leads the police case. The proper role of the prosecution is to see that the prosecution case is fairly presented and that all weaknesses in the defence are identified and fairly exposed to the court. On this basis, the object of the prosecution is not to get a conviction, without qualification, but to get a conviction only if justice requires it.[10]

It is not a rule that the prosecution must always obtain a conviction everytime a case is brought to court. Yet that is the belief among most prosecutors. They feel that their roles are enhanced with the number of convictions they obtain. Towards this end, unorthodox means for securing the same are

employed.

They may even fabricate or concoct evidence against the accused. This is easily done in the process of examining witnesses. Leading questions, for instance, are raised at various stages of the prosecution. Alternatively, the prosecution may also manufacture evidence against the accused, so as to sustain a conviction, by encouraging hearsay evidence to be adduced in court. Rules and principles concerning when and where to admit hearsay evidence as laid down in our Evidence Act is unknown.

At times "framed up" cases are preferred against the "accused." Thus in one such case, the Resident Magistrate at Nanyuki, Mr. Maurice Okaya, acquitted one, John Wachira who had been charged with stealing nine heifers valued at 16,000/-. The magistrate acquitted the accused because it was found that the case had been "framed against the accused."11 The funny part of this case is that somehow, the prosecutor had actually tried to prove that the "accused" perpetrated the offence.

Prosecutors, when summing up their cases, in order to give way for the magistrate's judgement, often make decparaging remarks against the accused.

Thus if a case involves a public figure, for instance, a councillor, member of parliament, and so forth, there is usual reference to the fact that the person involved is a public figure, or a legislator who should uphold the law more diligently than the other species of the mortal world. Or if the accused is a holder of a big public office, there is the reference of the accused's higher degree of responsibility. Such pronouncements in our view are not only unjust but also uncalled for; since they tend to encourage sentences commensurate with the accused's status rather than the offence with which he is charged. The same result flows where the prosecution alleges that the offence is prevalent in the locality and therefore a harsh and deterrent sentence is called for. Such sentence if given, will mean that the accused is being punished harshly because the offence is prevalent in the area. The sentence is therefore highly unlikely to be commensurate with the offence charged; and yet this is a basic sentencing principle.

During our stay at the Webuye Law courts, we witnessed a number of cases that resulted in convictions yet the very nature of the case demanded that exhibits be produced in court.

R-V-ELIZABETH MANONO, CRIMINAL CASE NO 1437 of 1981, was one such case. Here the accused was charged with being in possession of chang'aa contrary to section 3 (1) as read together with section 4 (1) of the chang'aa prohibition Act of 1980. She was fined 500/- or in default three months in jail. At the time of the pronouncement of the sentence, no exhibit of the said chang'aa was produced in court.

The prosecution gave the excuse that the exhibit had been locked up in a police store and the key misplaced. The presiding magistrate ordered the prosecutor to bring the exhibit to court anytime the key was found. It should be noted that the accused had denied the charge.

Despite this omission on the part of the prosecutor, the sentence was left holding. Was it just in the circumstances for the magistrate to make such a ruling; was it her fault that the exhibit was not produced in court? Though the exhibit was eventually produced the following day, one cannot rule out the possibility of foul play on the part of the prosecution. The exhibit may have been manufactured. After all the prosecution had a whole day to look for the same. Within that period anything could have happened.

One may also mention that, on a number of occasions, the prosecution lose cases merely because of their inardvertence. In some cases, a crucial witness may be left out. The conseqnence is that the magistrate is likely to arrive at a wrong decision, because of the insufficient evidence. This result is more likely unless the magistrate opts to supply the omission of the prosecutor, by ordering that such witness be summoned to appear in court to give evidence. Among such numerous cases, we only mention the case of R-V-HUDSON NATO, CRIMINAL CASE NO 1210 OF 1981. In this case, the accused was charged with indecent assualt on a young female contrary to section 144 (1) of the penal code. He denied the charge.

The prosecution had initially called only three witnesses:- the complainant, her brother (both aged under 10 years) and the complainants mother. The evidence of the three was quite unreliable since in case of the complainant and her brother there was no corroboration. Yet it is a basic rule of evidence that the evidence of children must be corroborated.[12] As for the mother, her evidence would have been inadmissible on grounds that it was hearsay, since she was not actually at the scene where the evil act was committed. She was told of the act by a third party, who had actually caught the assailant in the act. Yet this very important witness had been ommitted from the list of the prosecution witness. The magistrate had to step in and order the prosecutor to summon that person to come and give evidence. Clearly, conviction could not have been sustained on the evidence of the three.

As regards whether the accused should or should not be released on bail or bond, the prosecutor's views are very important. For in no case is bail awarded without seeking the views of the prosecutor. Although the case of ABDULLA-V-BIN MOHAMMED[13] laid down a rule that a magistrate is not bound by the prosecutors case but should exercise his discretion, when considering bail application nonetheless it is not usual for a magistrate to award bail if the prosecutor strongly opposes it.

Most prosecutors oppose every bail application often on unfounded grounds that the accused may abscond, or that he will interfer with the prosecution witnesses and therefore prejudice the prosecution case. However, we think that their opposition to bail applications is because, it is more convenient for them to have their victim at a disadvantage. It is easier while the accused is in custody, for the police to apply the necessary pressure in order to extract a confession of guilty from the accused. Due to this over anxiety to secure convictions, the prosecutor exagerates the bad character of the accused to the level where the magistrate deems it desirable to refuse the application for bail.

What is the real cause of all these malpractices on the part of the prosecution? It is because of their inadequate training. Most of the court prosecutors are police officers of the corporal rank, and with limited education. Due to this they fail to grasp their role in the criminal process - that of simply presenting the police casé accurately and fairly without employing unorthodox methods in order to obtain a conviction. With adequate legal education, the court prosecutors may come to terms with procedural rules regarding the conduct of a criminal case for instance, they will know when and where to ask leading questions, the need for corroboration in the evidence of children and when hearsay evidence is admissible. Otherwise as of now, such realization is lacking.

From what has been said, is it not true to say that the police malpractices, followed by the prosecution's incompetence and unorthodox methods, tilts the balance heavily against the accused in that it encourages the accused to plead guilty and be convicted even if he could have been found innocent. Indee I had this in mind, when in chapter one, I expressed the fears that the reknowned maxim in criminal law - "ACTUS NON FACIT REUM NISI MEN SIT REA" is at times superflous, mere rhetoric and meaningless in our lower courts. Where one is arrested unlawfully and then charged; but, before his case is dealt with in the court, he (accused) is kept in police custody where he is tortured until he pleads guilty; it cannot be said in the circumstances that the maxim has been invoked to the aid of the accused, and at the same time advance the course of justice. For in such circumstances, there is no criminal act nor guilt intention, the two most important elements criminal offence.

M A G I S T R A T E S

Of all the agents in the machinery of criminal justice, the magistrates, perhaps have the greatest impact on the final outcome of any given case. If they fail to address their minds to any material facts in a case, great injustice may be occassioned.

In the alternative, if they take into account irrelevant matters, then some injustice may be inflicted. Because of this special status, the position calls for honest impartial and above all men and women of good conscience. They should be persons who in the words of T.O. Geoerges will ensure that:

> "Every person who comes into our courts, whether he is an underprivileged peasant in rags or a powerful politician who happens to have transgressed the law received the same courtenous and human treatment....."14.

Magistrates are commonly looked upon by the citizenry as people who sit in judgement upon others. Therefore both on and off the bench the public expects from the highest standards of personal conduct. A spirit of belonging to a group of persons with a vital role to perform in society must necessarily be developed. It is expected that magistrates should be better than the rest of the population.

Our contention is that most magistrates do not measure upto that standard. This is because most of them engage in certain activities and vices that tend to run counter to what is expected of them. Such vices as corruption among magistrates are not unheard of. In one case, a Mombasa District Magistrate, Mr. Edward Jonathan Noi was charged that on June 23rd at Tononoka, being District Magistrate II, received from Salim a cheque of 1,000/- as an inducement to release six convicts from prison unlawfully.[15] Noi was found guilty and sentenced to three and half years jail. While sentencing him, the Mombasa Resident Magistrate, Mr. Stephen Mwangi made some remarks which are relevant to our presen discussion. He is reported in Sunday Nation of October 25th, 1981 as having remarked interlia:

> "The accused held a responsible office and was supposed to ensure that the court was a temple of justice and not turned into a den of vice, private mint for making money by his activities. He abused his oath of administering justice without fear, favour or ill-will, and we cannot have the rule of law and justice without men of integrity manning our courts."

Indeed to a common man, where criminal justice is meted out through corruption, cannot stand as justice. Often he might be given a bribe by the injured person in order that he may give a harsh sentence to the accused who might have injured the bribing party.

In yet another bribery case, a Karatina Magistrate was charged with receivin 500/- from Joshua Ndai on June 12th as inducement to help him in a criminal case in which he later had allegedly been assaulted. The Magistrate here too was foun guilty and convicted.16

Corruption, to our mind, is not limited to monetary exchanges, but comes in various forms.

Thus where a magistrate is bought beer as an inducement to enable him to give a ligher sentence to some people in cases they appear before him is just as corrupt as in the case where there is an exchange of monies. In a case appearing in 'The Standard,[17] the High Court refused an application lodged by a man facing an assault charge seeking to transfer his case to another court. The man was alleging that the magistrate and the complainant drunk together every evening and therefore chances of a fair trial were jeopardized. Though the application was rejected, it must be appreciated that some of the fears are often well founded. Naturally if one is constantly seen in the company of the magistrate, and a case in which he is a party comes before the same magistrate, it is possible that he may be influenced by their intimacy in reaching the decision. We are not suggesting that magistrates should not socialise with people (for otherwise they may loose touch with the society within which they are supposed to operate), but we are saying that in cases of that nature, the magistrates should feel free to transfer the case to another magistrate. That is the only way to ensure that justice is not only done but is manifestly seen to be done. Otherwise if the matter is not checked, it will mean that the rich, powerful and those in close proximity to the magistrate can easily buy their freedom, hence the public confidence in the impartiality of judicial tribunals is heavily imperilled and eroded.

Instances are abound in which the accused is charged with an offence and the case is set for hearing sometimes in future. Meanwhile, the accused having been denied bail, remains in custody, only to be produced in court every after fourteen days for the mention of his case. But everytime he is produced, he is asked in a rather deafening and frightening voice whether he is going to plead to the charge or not. If the accused maintains his previous plea of not guilty, he is thrown back into remand. If the practice is continuously applied, on the accused, chances are that in the end, he may break-down and plead guilty, even if he would have liked to maintain the previous plea. The magistrate's threatening voice can, in such circumstances, have a devastating effect on the accused, particularly to those accused not used to the atmosphere of the court. Where this happens then, such trial can be seen as a miscarriage of justice.

Closely allied to this problem is the question of delay in the criminal process. It is submitted that there is a lot of delay in disposing off individual cases. The accused ends up spending long periods in custody. In Webuye court, we counted no less than eight cases in which the accused had languished in custody for a period of more than five months because their cases had not been finalised. The net effect of such delays is that it results in loss of material evidence. Such evidence if it were available, would otherwise substantially affect the judgement. The evidence is also bound to become weak, for witnesses are bound to loose their memories as to what actually happened.

Where the accused is languishing in remand, as is normally the case, it may result in a trial that may not be as fair as it might otherwise have been if there was no delay. After all a long period in custody has been known to induc a change of plea from not guilty to guilty. The accused feels that a plea of guilty will bring a quick disposition of his case; particularly so, where the charge against the accused is a minor offence like being drunk and disorderly. The accused would prefer to plead guilty than engage in a tug of war with the police. Such a practice lends support to our contention in chapter one that although criminal justice involves discovering those guilty and dealing with them, there are instances where the innocent have had to suffer in the same way like the guilty due to the defective nature of our criminal process.

The matter is made worse if we examine how the magistrates view their role in the criminal process. Their view is tainted with the English conception of the role of the magistrate in the judicial system. The magistrate is viewed as an umpire or referee in tournament of litigation. That he is the person who should not enter into the arena, to use the well known words of an equally well-known English case, (cited in chapter 3). Otherwise if he enters the arena of the conflict, his vision is bound to be clouded by the dust of the conflict and therefore fail to arrive at a considered and just decision. In our present lev of development, for a magistrate to adopt a positi in anyway analogous with that of the umpire or referee is tantamount to giving in to injustice. One nee not to have read Aristotle well, to realise that to treat unequals as equals in court is to condone resultant injustice. Here we are of course alluding to a situation in which the accused who is not represented by a lawyer is pitted against a prosecutor. Though the prosecutor may be of inadequate training, he non-theless has an advantage over the accused in the sense that he is conversan with the court and its procedure as a result of his experience and constant exposure to the court, unlike the accused. The accused may be unable to expres in logical and coherent form a defence which he seeks to advance, this is a common occurence in our courts except where the parties are legally represented The accused may fail to cross-examine, not because he has no questions to ask, but because he is unable to articulate the questions he would like to put. To us therefore, it seems, there is a duty on the part of the magistrate to enter the arena of conflict and assist the accused in the interest of justice. It does not appear to us to be in anyway, incompatible with complete objectivity and neutrality in the process of actively arriving at a decision in the matter. Otherwise their role as umpires works unfairly against the unrepresented accuse

One inescapable and obvious fact is that courts are manned by human beings who like other mortals make mistakes, succumb to pressure from within and without. Is it proper to entrust the process of determining one's guilty in the hands of one person; the magistrate? We hold a contrary view.

Public participation in the machinery of justice is something desirable. It helps to identify the courts with the people. It is a primary security against hasty, malicious and oppressive persecution;" it has been seen as serving the invaluable function in society of standing between the accuser and the accused... .....and to determine whether a charge is founded upon reason or was declared by an intimidating power or malice and personal ill-will."18 We are here advocating for the extension of the court assessor system to our lower courts. In this country, there is a provision for assessors under section 263 of the Kenya Criminal procedure code. They are however, limited to the higher courts only. This is undersirable since the bulk of criminal cases are decided by our lower courts. The assessor system has a further advantage in that it attempts to curb the malady that sooner or later affects most men in the profession of creating a mistique that cuts them off from the common man. With our African background whereby there has been great stress on resolving disputes communally, the assessor system has obvious attraction. It seems reasonable that the verdict of assessor is more acceptable to the public. Certainly, justice discharged by the participation of more than one mind is much more acceptable justice than justice discharged by only one mind however, professionally qualified that mind might be. Certainly it gives ordinary persons a part to play in the administration of justice.

Admittedly, assessors may be too easily swayed by advocates or may be influenced by irrelevant matters in reaching their decisions. But surely there is hardly any system devised by man which hasn't got some loose ends and which has not proved expensive to apply. Accordingly, the introduction of assessor system to our lower courts deserves a reappraisal by the relevant authorities. We shall still come back to this issue in our next chapter.

THE COURT.

It is a shrine where the accused's criminality is determined. It should be a place, then, where any inhibitions on the accused in presenting his case should be kept to a bare minimum. But to any person who has ever attended some of our lower courts he will agree with us that the court setting, formalities and the technical procedures obtaining therein militate against the accused.

The courtroom atmosphere, is, forboding and loads the accused with unnecessary tension. Formalities inherent therein foster the tension. For instance, every time the magistrate enters the court or leaves, everybody in court must stand up and bow. The place where the Magistrate sits is special and sacred. It is slightly raised and when the magistrate occupies it, he assumes a position and status above common humanity. The accused, on the other hand, is normally locked away in a special place - the court cell, guarded by an armed police officer who acts as though the court has already pronounced the accused guilty.

In court the accused has a reserved place (accused's dock) where again a police officer keeps watch. Besides, all people in court turn their eyes on the accused. All these are tension forces that work on the mind of the accused. This explains why when the accused is asked questions in court either by the magistrate or prosecutor, the accused becomes incoherent and inarticulate in his answers. More often than not he shakes and sweats profusely. Yet the prosecutor is only too ready to point to the demeanour of the accused. The magistrate may in effect also infer the guilt of the accused, without considering the fact that the accused's mind is tormented by the unnecessary tension in the court and in his mind.

The court is also supposed to state and explain the nature and substance of the charge to the accused. Theoritically the charge must be stated in a language and manner in which the accused should easily comprehend. Rarely does this happen. Rather the magistrate simply repeats loudly the indictment to the accused without bothering to elaborate further. The result is that the charge many not be clear to the accused; in particular where the definition of the offence makes use of concepts and technical distinctions that cannot be readily understood by laymen even if translated in their first languages by court clerks cum interpreters. The interpreters at times churn out a totally different meaning. Such terms may not have an equivalent in Kiswahili or other local dialects. A totally contrary translation, therefore may be given. Consequently, when the accused is called upon to plead, it is possible to say that, he is being called upon to plead to a charge he does not understand.

Once the indictment against the accused has been read, he is then invited to plead either guilty or not guilty. Where he chooses the former, his case is summarily dealt with, the prosecutor having stated the facts regarding the offence.

At Webuye law courts numerous cases in which the accused had initially pleaded guilty to a charge, the plea was repudiated when the prosecutor stated the facts of the case. Such subsequent repudiation would be treated lightly by the presiding magistrate. It is possible to argue that such repudiation by the accused may be due to the pressure exerted by the police to obtain a plea of guilty, inadequate explanation of the charge to the accused by the magistrate and finally the unnecessary tension, in the courtroom. A difference in the facts surrounding the offence as stated by the prosecutor to what the accused knows, may surely point to the fact that the case against the accused may be a framed up one. We are of the view that where a situation of this kind arises, a re-trial should be ordered, but since it is rarely done, greatest injustice is thereby occasioned.

When a prima -facie case is established against the accused, he is normally called upon to defend himself under three options. He may give a sworn statement unsworn statement or he can elect to keep quiet. The relative merits and importance of each option is never stressed to the accused. The translation of the options by the court to the accused first language is so poor that it remains incomprehensible. From our observations at Webuye, the most commonly accepted option is that of giving unsworn statement. This is because the accused have inherent fear towards the courts. The fear of being asked questions by the court and prosecutor if the accused elects to give a sworn statement. The feeling is that such questions are tricky incriminating and calculated to get the accused off-guard. The accused feels safer if he elects to give unsworn statement since he will not be asked questions. It is our considered opinion that same weight should be attached to both sworn and unsworn statement of the accused. The reason why great weight is attached to sworn statements is that it is likely to be true because of the oath. This has now been proved to be a mere myth. The oath is no longer regarded as sacred and sure way of telling the truth. There have been cases in which perjury has been committed on oath. The oath, it is submitted is no longer binding on the souls of most people. Why then should statements made upon a meaningless oath and those not made on oath not be treated equally?

Rounding up our analysis of the court formalities and procedures, we can do no better than quote in full what cross says of the same:

> "Do not our inherited forms instead of inspiring irrational or undeserved respect make the law appear anachronistic, out of touch.....off, from the rest by a special style of dress and diction? Would not dropping this forms, dimming the lustre and the splendour, do something to lessen the risk of dissociation between law and the rest of the community.....
> Would it not be better to let judges and the lawyer appear, as Bentham wished, merely as a life-sized contemporary figures so that in entering a law court the plain man would no longer feel that he is entering a strange world of half-indimidating and half-historical Pantomine....."20 (emphasize mir

The relevance of these words to the Kenyan courts hardly needs to be emphasized. They are too formal and filled with incomprehensible technicalities to the common mwanainchi. If justice is to be done, adjustments in our criminal process must be made. It is unfair to make it appear that justice is only available when ther is a lawyer to demystify the law and court procedures.

NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY

This is the process of plea-bargaining.

It involves some arrangement between the prosecutor, the accused or his advocate and sometimes the magistrate. Normally the prosecutor agrees to make some concessions in return for which the accused agrees to enter a mutually acceptable guilty plea.

The prosecutor may opt to drop one or more of the charges.

It is a basic requirement in English law and therefore Kenyan law that a plea of guilty be made voluntarily. The same is required for a plea-bargain to be valid. Towards this end the English court in the case of R-V-TURNER[21] laid down principles which are supposed to govern the process of plea-bargaining. Our arguement however, is that the established practice of allowing some reduction of sentence in return for a plea of guilty has allowed a situation in which unfair pressures have been placed upon the accused to plead guilty. Further it is done in a rather haphazard and informal manner.

Abuse of the process of plea-bargaining may result when the magistrate becomes fully involved in the exercise. In Turner's case it was laid down that the magistrate should not in anyway indicate the sentence he is bound to give if the accused pleads guilty. In Kenya, it is hardly borne out in practice. To illustrate this point we shall once again refer to the case of R-V-BEATRICE NANJALA CR. 1384/81. In this case, the accused had been charged with being drunk and disorderly. At the same time she was also charged with behaving in a manner likely to cause a breach of the peace. In the course of the proceedings the magistrate said:

> "I am not going to advise you to plead guilty to something you didn't do, but the way it looks you are going to be found guilty on both counts and you will get a bigger sentence for wasting the court's time."

To us, no other single consideration acts as such a powerful inducement to plead guilty as the fact that accused may expect a lenient sentence if she pleads guilty than if she contests the matter. If the magistrate involves himself in this way, all talk of voluntariness of the accused plea becomes a myth. It would appear to the accused that she has already been found guilty by the magistrate. Her only remaining interest is to minimise the sentence and, given the magistrate's statement of intention on this, she has no alternative but to plead guilty. In the circumstances, the accused's freedom is limited to choosing between one form of sentence and another. The accused in our case pleaded guilty and one count was dropped.

Advocates also hasten their clients into plea-bargains probably against their wishes. While at Webuye, the writer had an occasion to hear a discussion between an advocate and his client outside the law courts during lunch break. The advocate told his client:

> "What I want you to do is plead guilty. If you plead not guilty, the trial will be put off and you will be remanded. But if you plead guilty we will try and fit it in this afternoon."

One point emerges from all these illustrations, that the process of plea-bargaining is a somewhat underhand method of administering justice.

No accused can resist pressures exerted on him to plead guilty by both the prosecutor, magistrate and often his advocate. One American writer reflected correctly on plea-bargaining when he said this about the prosecutor in a plea-bargaining situation:

> "It is trial by trick and deciet. In a typical plea-bargaining situation the prosecutor will pile on felony charges, regardless of whether he has evidence to support them in order to pose a threat of long years in the penintiary should the accused put the state to the expevise and trouble of a trial and he found guilty. The defendant who, unable to raise bail, has already spent months in jail under atrocious conditions, will be delighted to plead guilty to one of the many charges against him if he is infact innocent of any crime, in exchange for a promise of fine or a short sentence....."22

Although the writer was summing up the position in America, the same is true of Kenya, particularly in her lower courts.

Essentially then, plea-bargaining may not always be in the accused's interest. The process may be perceived by the accused as involving pressure to plead guilty to charge (s) to which he may regard himself as innocent. The result is perpetration of criminal injustice. We are of the view that the whole process of justice cannot be bargained but must be based on fair trial and congent evidence.

B A I L

From what we have said about the police, prosecutor, the courts and magistrate, it emerges that any measure aimed at securing the liberty of the accused before his case comes up must be selfishly guarded. Bail is one such measure since it ensures and shields the accused from pre-trial incarceration.

Granting of bail is a constitutional right[23] which should be denied only in exceptional cases. Further provision for granting bail are found in sections 123 (1) of the criminal procedure code and 23 of the Police Act. Despite this clear-cut and wide provisions regarding the granting of bail, in practice they are rarelly invoked. Magistrates have introduced their own conditions for awarding bail. Though the magistrate at Webuye ascribed to the notion that bail is a constitutional right, generally he does not award it in cases he calls 'serious'; for instance, in assault cases in which at the time of the hearing, the complainant has not come out of hospital or where the P.3 form has not been filled. Neither will he grant bail in cases of rape, indecent assault and theft. The provisions of the criminal procedure code, deny the right to bail in only two cases treason and murder. When a magistrate overlooks clear cut provisions as these ones, and introdruces his own conditions to the award of bail, it may be concluded that he would like to have many accused at a disadvantage, with the result that the accused may be bulldozed into pleading guilty.

Under section 36 of the Police Act, the police are endowered with powers to release one on bail for less serious offences. However, these powers are never exercised at all. Perhaps they are unaware of the provisions or deliberately overlook them in order to satisfy their desires for convictions. Having the accused in custody makes it easier for them to extract pleas of guilty.

The law implies that the duty to apply for bail is on the accused. From ou observations, very few people know or do so. The problem is accused's ignorance of his rights. At times there is outright victimisation. That is, before the accused can ask for bail, he is pushed out of court or he is not allowed to talk In the case of R-V-JOSEPH WASWA MAKATA, CRIMINAL CASE NO. 916 OF 1981, the accused was charged with being in possession of public stores contrary to section 324 (3) as read together with 325 (2) of the penal code. At the trial the accus indicated that he wanted to be released on bail, but before the accused could open his mouth to make the application he was quickly whisked out of the court and to the remande.

At times bail may be granted, but may be placed so high that the accused ma not be able to meet it. According to section 123 of the criminal procedure code bail is supposed to be fixed according to the circumstances of the case and shal not be excessive. In most cases, cash bail is alwa s insisted on. Surely, we cannot expect every person to have money anytime he is arrested. The practice of awarding bail in the Webuye court and by analogy in most of our lower courts is best summarised in the following quotation:

> "Bail is set mechanically without real regard for its being enough but not too much to achieve its objective....."24

Added to this, magistrates insist on sureties to be given. The requirement of sureties is, as a practice, made in all the cases despite the fact that the magistrates have a discretion, to dispense with it. Since the accused may not have able persons in court at that time willing to stand in as sureties, such demand may negatively effect the accused. Such demand surely stands as a Draconian horse in the process of granting bail. After all only responsible and reas nably wealthy people can stand surety. Most people coming before courts are poo and perhaps unknown to those rich and influential in our society, who can stand surety, therefore their bail applications are normally dismissed for want of surety.

We need also to repeat here that the practice whereby the prosecutors take upon themselves to oppose any bail application on flimsy grounds, that the accused will abscond, that he will interfere with the prosecution witnesses or that investigations into the case have not been completed, does not really help in advancing the course of justice. Our bail system therefore cries out loudly for refusal. Refusal to grant bail gives room for the police to exert the necessary pressure on the accused in order to obtain a plea of guilty.

This as we have indicated, plays havoc to the administration of criminal justice.

S E N T E N C I N G

This is the peak of the accused's long journey in the criminal process. Depending on the offence and the courts jurisdiction, various types of sentences can be passed. Most of the sentences are to be found in the penal code.

Our argument here is that even if the accused is rightly convicted but is given a sentence much severer and out of proportion to the offence charged, the accused will definitely have suffered some criminal injustice. We say this because a large bulk of sentencing powers are confered on the discretion of the magistrate. It is usual that wide discretion is open to abuse. This among other factors partly explains why there is great variation in sentences for two similar offences committed in the same District, and coming before the same magistrate on different occasions.

Magistrates seemingly tend to arrive at decisions on sentencing intuitively rather than logically, and one might say with justification that all depends on the luck of the accused. This breeds injustice. When a severer sentence is passed on the accused because the offence has become prevalent in the area and as such should be deterred, there is here a sacrifice of the principle of "treat like cases alike, and differently cases differently." This leads to disparity in sentencing where inordinately long prison or exorbitant fines are meted out to the accused in the name of deterrence.

There is also the practice where a magistrate orders a term of imprisonment in default of payment of a fine. This has the effect of increasing the sentence of imprisonment over and above the magistrate's jurisdiction. The practice is indeed very common in Webuye and has been going on unabetted despite what was said in the case of KARIUKI-V-R (1970) E.A 230. In this case, the appellant was convicted and sentenced to twelve months imprisonment and a fine of 500/- and in default of payment, a further six months imprisonment. The further six months imprisonment would have made the jail term be eighteen months, a term which was outside the jurisdiction, of D.M. II's court. Setting aside part of the sentence imposing a fine of 500/- or six months imprisonment, Mwendwa C.J. said:

> "The sentence imposed by the Magistrate in this case came within his powers but the fine was clearly added not because the circumstances of the offence and the capacity of the appellant to pay warranted the imposition of a fine in addition to imprisonment but with the sole object of increasing the term of imprisonment. This practice is becoming prevalent in subordinate courts of the second and third class. In our opinion it is an undesirable practice and should cease."

The warning seem not to have been heeded. Since it is in these subordinate court that most of the criminal cases are finally dealt with, it means that most people have suffered criminal injustice as a result of this oversight on the part of the

sentencing magistrate.

Injustice may also be suffered where consecutive and concurrent sentences are imposed. This is more serious when it comes to concurrent sentence. It is preferred where a person commits more than one offence at the sametime and in the same transaction. Looked at from a different angle, strict adherence to such practice may result in double jeopardy. This may arise where the facts establishing two or so counts as preferred against the accused are precisely the same, in which case, one charge should have been preferred. But instead two counts are brought and the accused is convicted on both of them and told that the sentence is either to run concurrently or consecutively. This results into a person being punished twice for the same offence and is unconstitutional. The net effect of this practice is that though the original conviction may be lawful, an omission like this one on the part of the magistrates while sentenging may really lead to grave injustice on the accused. Most of our people are unaware of such technical rules of sentencing and therefore we can rightly presume that many accused have had to suffer more than their due share because of this oversight on the part of magistrates.

We also reiterate here the issue of compensation we laboured on at the close of chapter one. We content that a person injured as a result of the criminal act of the accused, must surely be compensated if there is to be justice on his part. Otherwise there is no gain, material or otherwise, a complainant receives when a convict is given a custodial sentence or ordered to pay a fine, which fine goes to state coffers. The order to pay compensation is morally good. The award, it is submitted, gives effect to the traditional views of crime as outlined in chapter one.

When sentencing, magistrates are greatly influenced by the previous convictions record of the accused. Normally they view prior convictions as a good reason for imposing a heavier punishment than would otherwise be the case. The fact that prior offences alleged might have been committed in circumstances warranting a lenient sentence is rarely considered. Neither are the previous convictions consideration limited to those of relevance to the one with which the accused is faced, but are considered generally. This amounts to punishing the accused over and over again for previous offences. In other words, it really amounts to punishing a man a second time for earlier offences. It also defeats the general principle of sentencing, thet the sentence should be commensurate with the offence. Sentence in those circumstances may be excessive in relation to the facts and circumstances of the case. As a result the accused suffers most in the process. This can be used as an illustration to our earlier contention that institutions originally aimed at ensuring that justice is done, have failed disastrously in that mission.

As a conclusion to this chapter, we must assert that the underlying augument all through has been that there are manifest defects in our criminal system. Such defects have helped to perpetuate criminal injustice, for it has often resulted in the innocent suffering under the harsh rod of criminal justice. It is also hoped that fears raised about our criminal system in chapter one have been vindicated in this chapter. One such fear concerned the place of the maxim 'ACTUS NON FACIT REUM NISI MENS SIT REA" in our criminal process. This is a very important maxim in criminal law. It is a general requirement of any developed legal system that Mens rea and Actus reus be present before one can be convicted of a criminal offence. It is designed to secure that those who offend with carelessness be punished and those who offend unwillingly, or in conditions in which they lacked the bodily and mental capacity should be excused. This chapter has sought to show that this maxim is at times overlooked with undesirous results. A legal system like ours is therefore open to serious moral condemnation for its disregard of this important maxim in criminal law.

Such critical evaluation may be incomplete unless recommendations for reform are suggested. In the subsequent chapter, we offer some which we think, if implemented, will ensure that proper and speedy administration of criminal justice is attained, and that a steady balance between the accused and our criminal process is struck, as opposed to the balance tilting heavily against the accused, as we have tried to show in the preceding pages.

CHAPTER 3

CONCLUSION AND SUGGESTIONS FOR REFORM

In this part of the dissertation, we attempt to give a conclusion based on a summary of the arguements advanced throughout the dissertation. This is then complimented with practical suggestions for reforms.

It will be appreciated that the work has been a culmination of a strenous observation of the process of administration of criminal justice in our lower courts, with special reference to Webuye court. It is a known fact that when crime is committed, justice must be done. Though it is easy to create an appearance of justice, mere appearance may turn out to be only an illusion. In this dissertation we have examined main features of criminal justice. Official deviations from the principle are everywhere and we have highlighted. This has been done in an attempt to support the thesis formulated at the beginning of the dissertation. The thesis was that as things are now, there cannot be administration of criminal justice.

An examination of the preceeding critique leaves the reader in no doubt that the writer does not regard the existing criminal justice machinery as being satisfactory. Far from it, it leaves a lot to be desired and helps to perpetuate injustice. Have we not seen that there is a sharp divergence between law and practice?

In chapter one, we scaried from the premise that the system of criminal justice obtaining in Kenya as of today is a replica of that of England. It (the English regime) is the result of both a lengthy period of development, and peculiar conditions and circumstances which have been prevalent in the course of this development. Kenya being a country with different peculiar conditions, the adoption of the English criminal system was an irrational move. Difficulties recurrent in the administration of criminal justice in our lower courts, are in our view, traceable to that fact.

The foreigness of the system is not ameliorated in any way. It is made worse by the common law presumption that every person is presumed to know the law. In England, the presumption may be valid because the law thereto is basically common law derived from their customs. Since the law is derived from their own customs, it is obvious that they should be presumed to know. Also their degree of literacy is high. This is not the case in Kenya. It is not possible to apply the presumption where the law is foreign in origin and which the majority of the people have but a little grasp. In effect therefore this presumption does have an adverse effect on the unrepresented in our courts of law. It is obvious that the majority of the people appearing before our lower courts are those that are unrepresented.

In the same chapter, we argued that if certain aspects of the African customary criminal law, had been synthesised with the English criminal system, they should have enrichad it and to some extent localized it. One such aspect was restitution or compensation. A wrong doer in African jurisprudence was forced to pay some compensation to one who suffered some loss as a consequence of his unlawful act. In this way, the law was satisfying. However, with the imposition of the English criminal system, this valuable concept was tramped under-root. Compensation was replaced by prison. We submitted that the victim or his family may feel that no criminal justice has been done, whatever penalty is imposed on the offender while compensation for the injury is ignored. Law can only be respected if it meets the requirements of the people it is supposed to serve. This is not the case with our present system. There is therefore need for re-examination of the whole system with a view to reinstating this valuable concept of African extraction.

In chapter two we came down to a critical analysis of the machinery for the administration of criminal justice. We started from the premise that the majority of the offenders brought before these courts come from the lower echelons of our society. We advanced some reasons for this. Basically focusing on the fact that though poverty could be seen as the key influencing factor of crime, much more could be attributed to the different treatment they (poor) receive from the police, courts and the society generally unlike our more affluent members of society who through unorthodox means (corruption) can buy their way to freedom.

It must also be added that nearly all cases in which parties are not represented by a counsel are heard before this court. But the irony of the whole situation is that most of unrepresented are usually Africans mostly laymen and in most instances illiterates. Yet the basic assumption which has been made generally in the framing of the rules of criminal justice is that persons with professional training will be involved. Since this is not the case the poor Africans, who are unable to pay for such skilled services of lawyers, mean that their defence is inadequately prepared and therefore chances of success in their cases are heavily minimised. Such state of affairs does not augur well for the administration of criminal justice in this country and therefore calls for some re-evaluation.

The police, as we noted, play a very important role in the entire machinery for the administration of criminal justice. We asserted that it is the police who initiate into action the entire machinery of justice by arresting and subsequently charging the accused in a court of law. We further submitted that whatever happens to a suspect while he is in police custody will very much affect the final outcome of his case. Thus if he is tortured, or exposed to a rather unfriendly and hostile atmosphere while in the cell, he may be driven into pleading guilty though he might be in all respects innocent.

Towards this end, we offered a number of illustrations which went to prove our allegations. Thus the arrest may be unlawful or unjustified in that it is done on the instigation of a person who hates you and has bribed the police, or the person is arrested simply for fun by police on patrol and then subsequently charged with being drunk and disorderly. We also emphasised arbitrary arrests of innocent peoples by the police during swoops. In certain cases, outright violence is applied by the police on the suspect while under custody in order to obtain a confession. We gave some illustrations of this. To those illustrations we must as well add a recent case which was decided after we had written chapter two and which addressed itself squarely on the question of police brutality. In the case of PAUL NAKWALE EKAI-V-R (unreported) CR APP. NO. 115 of 1981, the court of appeal said:

> "The allegations of ill-treatment in this case have caused us much concern..... Accusations of ill-treatment are often made against police officers, sometimes with justification. In fairness both to the police and to accused persons we would like to suggest that consideration be given to amending the evidence act to provide that no statement in the nature of the confession made to a police officer of whatever rank be admissible in evidence against a person accused of a criminal offence. Such statement should be admissible if made to a magistrate, no policeman being present, and a carefu- prescribed procedure should be followed by the magistrate, including giving a formal charge and caution, followed by questions as to whether the accused person has any complaints relating to his treatment or his suffering from any injuries, and if apparent a note should be made of such injuries, and of any complaint which may be made."

In this case, the accused had been charged with murdering that reknowned wildlife conservationist and writer - Joy Adamson. At the trial, the appellant alleged that he was tortured before he gave the confession. The tortures took the form of kicks, whips, applying hot iron rod to his body and finally tying a string round his testicles and pulling them, consequently causing great pain. The appellant allegation's were corroborated by one of the doctors who examined him. However, the court in its wisdom refused to believe the allegation. This is expected since we know that sometimes the judiciary tends in most cases to believe what the police say as the Gospel truth.

The end result of such police malpractices is that it leads most people who may have been acquitted by the court to plead guilty in order to save themselves from further police torture. In effect this thwarts the course of criminal justice. It is therefore not surprising to find the appearance and demeanour of a man who has spent some days in police custody reflecting his recent torture by the police.

In the same breathe, we critically examined the role of prosecution. We saw that though their role is to see that the prosecution case is fairly presented and that all weaknesses in the defence case are identified, fairly and dispassionately exposed to the court, this is hardly borne out in practice.

Rather they always strive to obtain a conviction. Towards this end, evidence is concocted to achieve the desired end-result. Some of these shortcomings we attributed to the low level of education on the part of the prosecution. We further advanced the contention that the police malpractices coupled with prosecution malpractices, tend to work a lot of injustice against the accused, promoting in a way the administration of criminal injustice.

For the magistrate we were of the view that he should be a man of moral integrity, willing to lead a pure and blameless life. They should be persons who will commend themselves to public respect through their conduct in and out of court. In a word they should not be corrupt. Otherwise if they are the citizens whom they are supposed to serve will always be left with a feeling of injustice having been done; however, much the said magistrate will apply strictly the letter of the law. Corruption comes in various ways, monentary, sexual proponsity of the magistrate (extra marital) and many other vices.

We asserted that the English conception of the role of the magistrate as umpire, holding the balance between contending parties and himself taking no part in the deputations of the parties is a wrong one. The theory being:

> "lest he descend into the arena and liable to have his vision clouded by the dust of the conflict....."1

To maintain that the role of the magistrate is that of an umpire, more so where one side is represented and the other unrepresented, surely one does not have well read Aristotle to know that to treat unequals as equals is to condone resultant injustice.

The court and the atmosphere obtaining therein, accompanied with the unnecessary formalism was said to incapacitate the dispensation of justice. The procedure of the court is foreign and the accused is not able precisely to anticipate what will happen next as all others involved in almost any court room drama can. He is unlikely to be able to understand in more than a superficial way what is taking place, let alone engage effectively in the complex business of cross-examination that is at the heart of Anglo-American adversery system.

The matter is worsened by the court clerk cum the court interpreter. If this personality is found to be wanting, lacking in efficiency and given to churning out only the tainted substance of what was said, or when some information is translated and is given slightly different stress or connotation; will affect to a considerable degree the direction in which the balance is going to tilt. We stressed the fact that the way the interpreter tells the accused how he is going to defend himself is so mechanical as to be meaningless.

Next plea-bargaining, aspects of bail and process of sentencing were examined and found wanting in certain material aspects. The consequental result is that innocent people are made to suffer and often are led to plead guilty for

offences they did not commit. These descrepancies are a breach of public belie in the criminal justice system and the faith placed in the judicial system.

Hoping that our working hypothesis has been proved beyond any reasonable doubt; we now proceed to hand down our considered avenues for reform. We are convinced that a combination of any or all of the reforms will surely go a long way towards improving the present system for the administration of criminal justice.

R E F O R M S

It is clear from what has already been said that the present system is defective and one might be tempted to call for the total overhauling of the system. Having regard to the prevailing legal and political thought, such call is futile. Our leaders sometimes believe in piecemeal reforms. The reforms we are giving hereunder must be considered that light.

From the start we said that our present system of criminal justice is of foreign extraction. The matter is aggravated by the fact that African concepts like compensation, were discarded. It was contended that the accused does not derive any gain when a convict is given a custodial sentence or ordered to pay fine, which fine goes to state coffers. If such person is really to appreciate that justice has been done, then he must be compensated for damages incurred from the criminal conduct of another. This therefore calls for the reinstatement of compensation as part and parcel of our criminal system. Such reinstatement will give effect to the traditional views of crime. It was noted that the present statutory provisions regarding the award of compensation are largely a dead letter, for magistrates rarely invoke them. The government should therefor introduce a mandatory provision in our criminal procidure code, that a victim who incurs loss as a result of the criminal act of another, and the criminal is apprehended, convicted and fined, part of the fine should go as compensation to the injured party. Another possibility is for the government to set aside, a special fund within the judicial department for reimbursing persons seriously affected by a criminal act. Such is the position in England. There a victim of crime may apply to a criminal injuries compensation board for the award of compensation for personal injuries sustained. There is no reason why we should not have the same here. The arguement against the suggestion may be that such a idea may impose extra drain on our already depleted treasury. To counter that, we contend that people must have a law which they respect and which they will regard as working for their benefit and if it is only through compensation that the goal can be attained there is no reason why such a measure should not be adopted. Justice must not only be done, but must also be seen to be done. Compensation is one step towards creating the impression that justice is being seen to be done. It is morally and socially good.

Another African concept which can be usefully incorporated in the presen criminal system, is having more persons participating in the exercise of admi nistering justice. It will be remembered that under African customary crimin law, not a single person could act as an arbitrator in a criminal matter. Instead the matter was dealt with by a group of persons. Yet our present cri nal system places the matter in the hands of one person; - the magistrate. Th aspect makes the system appear detached from reality and foreign. Is it not therefore worthwhile to extend the system of court assessor to our lower cour After all Tanzania has just done that. That is, trial with the aid of assess has been extended even to the magistrates courts? In Kenya, this is not the case.[3] It is submitted that public participation in the machinery of justice is something desirable; for it helps to minimise the mistique that tends to c the court from the common man. Assessors will therefore be regarded by the public as their representatives in the judiciary and will be instrumental in administering justice that will be more acceptable to the public rather than the times abstract justice handed down by courts as presently constituted. I is common-sense to suppose that justice discharged by the participation of mo than one mind is much more acceptable justice than justice discharged by only one mind, however, professionally qualified that mind might be. Introduction of assessor system in these courts, will go along way in eradicating the prev lent view among the public that the courts are alien institutions. The asse- ssors may help in watering down the long and technical procedures prevalent in our courts. The only guarantee to the much cherished and cardinal princip of criminal law that justice must not only be done but must be seen to be don is the assessor system. The remuneration of the assessors should pose no pro blem since it will have to be done along the same lines as that adopted for t assessors of the high court.

The foreign-ness of our current criminal system can be limited by taking the law to the people. The law should be reduced into a form in which it wil be easily comprehensible. Why not reduce the penal code, criminal procedure code and many other related statutes into Ethnic languages, so that people ca be able to know what is expected of them, in case they find themselves in cou Though the exercise of translating the statutes will be a costly one, however it is worthy the effort. Otherwise against this background, one must view th presumption that everyone is presumed to know the law as meaningless. In thi circumstance, this presumption becomes legal fiction. If the wanainchi canno read and understand what they are presumed to know, is this requirement not a wrong yardstick. It need not be added that the presumption is like the law, foreign.

As for the police, we have noted that they sometimes use their power, un form and weapons, to satisfy petty hatreds, personal grudges and in a way have failed to appreciate the fact that the acquittal of an innocent accused should be as important as the conviction of the guilty person.

The abuse and disrespect for the law goes on unchecked partly because of lack of effective control of police practice. The legislature could be a useful avenue for such control. We noted earlier that the highest judicial organ of this country expressed a wish that the law provisions regarding the admission of confessions in the law of evidence should be amended. The view was expressed in the unreported case of Paul Nakwale Ekai-V-R. The court was moved to express such sentiments following allegations of police violence in that case. Its recommendations should be seen as tacit admission on the part of the judiciary that police heavy handedness have reached an all time alarming proportions. Most criminal cases are dealt with in our lower courts and very few reach the appellate stage. It is anybody's guess that if the court of appeal can express such sentiments as regards police brutality then the position in our lower courts is far much worse. Here allegations of police violence are rarelly investigated. Because of this, the police act as if they have a free licence to do anything on the accused.

Parliamentary attempts to implement some of the recommendations of the court of appeal were however, recently thwarted by the combination of the front bench and nominated members of parliament.[3] Nakuru North M.P., Koigi Wa Wamwere sponsored a private members motion seeking to have the evidence act amended so as to enable suspects to make statements before magistrates and judges, instead of police officers. However, typical of our executive, the motion was opposed and eventually defeated. We need not to add that opposition was done in very ecclectic, pedantic and cavalier manner.[4]

Though the motion was eventually defeated one hopes that, that was not the end of the road - leading to police reforms. One hopes that when the law reform commission is eventually set up (the Bill setting it up is presently before the parliament), it will consider some of the country's laws that are defective and which have made our police act as though they are not human beings, with a view to remedying them. Meanwhile, what is to be done?

The courts should make it as a rule that once there is an allegation by the suspect of police brutality and is established, then the accused should be set free. The police powers of arrest should also be pruned. It should no longer be on the grounds" reasonably suspects or apprehends" but on well established and founded grounds. This can act as a deterrent to the overzealousness of the police.

As for the brutality reasons can be found in their colonial status. They were a cog in the colonial administrative machinery. It appears that with the coming of independence, no attempts were made to re-orientate their role. It should be done now. It can only be done through their training college at Kiganjo. The instruction should emphasise human rights and the rights of the accused in the criminal process. It is also possible to argue that police brutality is due to the fact that they know that the state will be vicariously liable for

acts. We suggest that the state should disown liability in cases where a police officer deliberately tortures and maims a suspect. The officer should be personally liable for his acts. The state should only step in where the acts are purely accident.

Next, is probably the obvious concern to expand facilities of legal education in the country to reach a stage where it can be possible to have a lawyer at all interrogations of suspects by the police as well as throughout the criminal process. We must applaud Lee Muthoga, Chairman of the Kenya Law Society for his efforts in this regard. In a dinner speech, he said:

> "We recognise that legal services are quite expensive and are beyond the reach of a large section of our people. The society has therefore, formulated 'a Duty Advocate Scheme' by which members of the society will volunteer their time to attend courts, see, interview and advise, free of charge, the people who are about to appear before the courts charged with criminal offences.[5]

Such scheme if implemented will help to alleviate the problems and help to curb police brutalities. Finally, one might recommend the establishment of Public relation office with a staff to deal with the complaints like is the case in Nigeria in every police station.[6]

For the prosecutors, it is recommended that they should be recruited from those people versed in law. Those in charge of prosecution in most of our lower courts are police officers of the corporal rank and with very limited education. Because of these handicaps, they are unable to prosecute efficiently. No wonder they are fond of violating procedural rules of evidence, for instance fail to produce exhibits in certain cases, overlook central witnesses, conconct evidence and unreasonally oppose bail. All these acts and omissions are geared towards attaining what they normally see as their role, albeit a wrong one, that of procuring a conviction at all costs. It is recommended that the duty of prosecuting should be entrusted to a body of professionally qualified lawyers. It is conceded that such would be much more expensive, but is it not worthy the effort? Surely, it is the only way that fair trials can be ensured. In any case if advocates have been allowed to appear before these courts, it is only logical that they should also be confronted by well qualified prosecutors.

Reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court who is too poor to hire a lawyer cannot be assured of a fair trial. Even the intelligent and educated person invariably has little and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally of determining for himself whether the charge is good or bad, unfamiliar with the rules of evidence, put to trial, he may be convicted upon incompetent evidence or evidence otherwise inadmissible.

Added to this is the fact that the atmosphere in the court is simply forebodi-ng - loaded with unnecessary tension. Some of the formalities in the interest of justice should be watered down. Other matters can be dealt with free legal services if introduced. It is suggested that when the options open to the accused when a prima facie case has been established against him are being mentioned to him, merits of each option should be emphasised to the accused. At present, the options are expressed in such mechanical manner that the accu-sed does not know the weight attached to each by the court. In most cases they opt for unsworn statements since in so doing they are not bound to be asked any questions by the court or the prosecutor. This defect must be corrected on the lines suggested above. Alternatively same weight should be attached by the court on both sworn and unsworn statements of accused.

Good communication and articulation in court is very crucial. Because court proceedings are normally in English, and most people being illiterate, the services of the court interpreter comes in handy. It has been shown that most of the interpreters are found wanting in certain aspects. To correct the anomally, it is suggested that interpreters should be picked from the neighbour-hood of the courts, among persons who are well conversant and proficient in bot English, Kiswahili and the Ethnical language thereto.

A trial within our adversary system can be compared to a boxing match between a professional and an amateur. While the legal battle is on, the magis-trate acts as an impartial referee, carefully watching ready to intervene only if he observes illegalities. The philosophy behind the adversary proceedings is that the contest between the two, fought in the presence of an impartial referee, will cause justice to prevail. This we have established is a myth. We prescribe therefore that the magistrate should freely descend into the arena of conflict to do justice. Otherwise to stick to role of an umpire among un-equal parties is tantamount to condoning resultant injustice.

Magistrates it has been noted, practice double standards when dishing out "justice". Thus his extra marital girl friend brought before him is bound to receive a lenient sentence, yet other people unconnected to the magistrate in anyway are given severe sentence over the same offence. To avoid this patent injustice, it is proposed that magistrates should not be allowed to stay in one particular station for more than two years. This will help against the creatio of 'enclaves' or 'empires' by the magistrate; in which people close to him receive different justice. It will also help to curb the menace of corruption among the magistrates. We are also of the view that there should be strict rules governing the conduct of magistrates. One such role should be to the effect that the magistrate should not take beer in public places like bars. Rather they should be made to take the same, if they have to, from their own houses. Alternatively, if such restriction may appear to be harsh on the

magistrate, then allowance can be made for them to take beer in public places on certain conditions. One such condition should be that, such a public place should be far from the magistrate's station of operation - i.e. far from his place of work. Otherwise it is this intense socialisation in public places by magistrates that breeds corruption. It is admitted that such restriction will run counter to their constitutional rights. But it is submitted, that one who opts for a profession that calls for honesty, and integrity must necessarily agree to forego some of his inherent rights; if he expects to be accorded some respect. Otherwise it is wishful thinking to expect a magistrate to be respected by the citizens if the latter are clearly of the view that some of the magistrates' decisions are tainted with corruption. A magistrate worthy his salt must rise slightly above society. This can only be done by strict adherence of professional ethics and self-restraint. It is a high price to pay but for the sake of justice, it must be done.

Delays in the criminal process often result in injustice. Waiting in custody is hard on any person; and may seem a lifetime to an innocent person who cannot afford bail. After 'sleepless nights listening to inmates snoring, crying, vomiting or even being a victim of a jailhouse assault, it is not unrealistic to expect to find many innocent accused pleading guilty to a crime they did not commit. If that happens, as it does in most cases, such person loses his respect for the system. In order to achieve the purpose of the criminal law and to maintain fair balance between the interests of the community at large and the criminal offender, any steps which assist in speeding up the disposal of criminal cases should be carefully considered and if shown workable adopted. The delay is sometimes caused by the police, the bar, the bench and even the accused himself. It is submitted that to curb this, the Kenyan law should incorporate a provision similar to section 72 (a) of the magistrates act of Uganda which restricts the period of remand to a total aggregate of 365 days in murder cases and 182 days for any other offence. It is further suggested that if the period elapses before the accused case has been heard, then the accused should be set free. Such a legislation will definitely push all the agents in criminal process to work harder in order to beat the deadline. Some of the delay is due to formalities. Thus in cases of murder, preliminary inquiries must be held to establish the truth. It is submitted that such formality is unnecessary. Rather the feeling we have is that wherever one is suspected of an offence, be it murder or any other, he should appear before the court without necessarily going through the rigours of preliminary inquiry which infact is a trial in itself. The other practice which has become rampant in Kenya, and, which should be discouraged is the 'holding charge'. It is normally invoked by the police, who arrest one while looking for a preferable charge. It is indeed a concept unknown to any school of jurisprudence. People so arrested suffer a lot, and in a way contributes to the delay in criminal justice. The practice must be got rid of.

The problem of delay is attended with far reaching consequences for the accused. It may be attributed to the shortage of magistrates. Webuye court for instance, has only one magistrate yet its area of jurisdiction is very wide. This means that a lot of cases are brought before the magistrate which he cannot possibly dispose on the same day. It invariably follows that some will be deferred until a future date with resultant delay. We submit that more magistrates should be appointed and posted to these stations. Otherwise we do not believe that the cause of justice and the interests of the community as a whole are best served by such delayed penalties. Efforts to ameliorate the problem as outlined must of necessity be welcome.

The process of plea-bargaining has been deplored. The process requires the defendant to waive an entire array of constitutional rights, including the right to remain silent, the right to confront witnesses against him, the right to be proven guilty beyond a reasonable doubt and above all the basic and constitutional presumption that every person is presumed to be innocent until proven guilty in a court of law. It is also a practice that is frequently abused; for instance, prosecutor overcharges crimes so that he has superior bargaining power and can offer one sided deals. With numerous charges against him, the defendant is coerced into pleading guilty to a charge, though he may otherwise be innocent. Often also, the magistrate in order to lessen his work, readily invites the accused to plead guilty by threatening him with long sentences if he does not. The advocates on the other hand also coerce the accused to plead guilty. All these we have seen is procedurally wrong. Although plea-bargaining may be a common solution to reducing the court's burden, we do not however, believe that justice should be thrown overboard for the sake of expediency. The plea-bargaining process in its present form does just that. We believe that justice cannot be negotiated. The process of plea-bargaining has been found wanting in countries with a developed legal system - like U.S.A. and Britain. If that is the situation there, then the position in Kenya is far much worse. We are of the view that the process should be stopped once and for all. Justice means that one's case is heard in court without any inhibitions. The practice of plea-bargaining militates against this. It should be stopped in the interest of justice.

Refusal to grant bail plays a significant part in disadvantaging the accused person in several ways as we have tried to illustrate elsewhere. It is my considered opinion that there is an urgent need for reform in our bail system. Though bail is supposed to be a constitutional right, very few accused are informed of this right. It is therefore necessary to introduce a legislation similar to section 75 of the Magistrate's Courts Act of Uganda. This section provides that magistrates should inform accused persons of their right to apply for bail. Something has been done in England in 1976.[6] Why not Kenya and yet the Kenyan bail law is a carbon copy of the British bail law.

The discretion given to the magistrate in bail matters has been the real source discontentment. This discretion has to be pruned. We therefore suggest that a list of bailable and non-bailable offences should be drawn. The magistrate should be told to strictly adhere to that list on bail matters. The requirement of a surety, it is submitted, should be limited to very serious offences, unlike the present practice where it appears that surety is necessary for every offence however minor. The magistrate should not always believe allegations against the accused by the prosecutor when opposing an application for bail. Allegations such as the accused will interfere with the prosecution witnesses or that the case is still under investigation and that the release of the accused on bail will prejudice the investigation; should be tested and clearly established before the magistrate can refuse bail application on that basis.

When it comes to sentencing, we also saw that the magistrate court is bequethed with very wide discretion any power. As such there is very wide disparity in sentencing. Depending on the mood in which the magistrate is in, or the accused relationship with the magistrate or his relationship with other people who are friends of the magistrate, the accused may receive inordinately long or short prison sentences. Nobody could have given a better view than Lord Scrutton C.J, of the way a judge's (Magistrate's) background can influence a sentence. He said:

> "The habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas, of such a nature that when you have to deal with other ideas you do not give a sound and accurate judgement as you would wish.....It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one who is not of your class."[7]

It would be blind to reality to disagree with this proposition in view of what we have already said about magistrate courts. Disparity in sentencing is a manifestation of the magistrate's biases in life. This is enabled through the wide discretion given to them in matters pertaining to sentencing. We therefore suggest there be a maximum sentences act, that will act as a ceiling to the sentencer's discretion such an act will point out clearly that one convicted of such offence will be sentenced to such jail term. Thus such an enactment will help to prevent the sentencer from abusing the discretion. This will also check the tendency of magistrates to believe every thing the prosecutor say as regards the character of the accused. It is not unknown that the accused's previous criminal record plays a big role in determining the sentence which the accused is going to receive. Yet the previous offences might be radically different from the present one. Both may have been committed under different circumstances. Yet they have the same effect on the accused when it comes to sentencing. For instances, how relevant is the previous indictment for being drunk and disorderly to a present charge of theft. Yet the magistrate when sentencing is bound to take such previous convictions into account.

Is that justice? Obviously no. We said and we repeat here that having regard to accused previous record when determining sentence is tantamount to punishing someone twice for the same offence. This is unconstitutional and is not justic at all.

By way of concluding our suggestions for reforms, we assert that there is a strong case for our courts to use Kiswahili in their deliberations. In approaching the use of Kiswahili in areas like medicine and law, we are usually met with views that Kiswahili is not capable of communicating.

> "The subtlities of connotation nor the fineness of denotation which is demanded of a language to be used by a cultured, intellectual and sensitive people."9

There is also another arguement advanced against the use of Kiswahili to the effect that Kiswahili does not possess the necessary technical vocabulary for the modern age and cannot produce it overnight.

The above arguements can easily be dispelled. In the first place, to imply that Kiswahili is not a language for a "civilized" society is to exhibit remnants of intellectual emasculation occasioned by colonial rule. It is a pit to the Africans who feel that you can only "intelligently communicate" in foreign languages like English, French, Italian and portuguese. This is really warped thinking trapped in neo-colonial mire. It is this sort of thinking whic has hindered the promotion of Kiswahili to a position that it can function in specialised fields of study like law, medicine, engineering, to mention just a few.

Can Kiswahili effectively function as a medium of communication in legislature debates, in statutes and subsidiary legislation, and in the courts? The answer is of course yes.

Looking through the publication, "DICTIONARY OF LEGAL TERMS" one especially a lawyer, would be surprised to see how rich Kiswahili is in the field of law.

One of the greatest advantages of translating our law into Kiswahili as already indicated elsewhere, is of course that the myth so characteristic of la is unmasked. As such, then, law becomes available in our books in a form that is relevant and understandable. A complete understanding by the layman of the intricacies of law in the courtroom may be impossible, but a certain minimum comprehensibility can be achieved.

A step towards that direction has been made positively in Tanzania. The dictionary on Swahili terms of law produced in Tanzania contains about 3,300 words which cover practically all the important terms appearing in dictionaries compiled in English compiled by Osborn Jowitt or Black. Kenyan courts can easily use.

Kiswahili has been used as a language of administration in East Africa since 1880. Since simple things, like debates in Parliament are now easily and effectively carried out in Kiswahili, proceedings in the courts, could as well be carried out in Kiswahili without much difficulty with all the nec ssary commitment and support. In Tanzania, the language is the only medium of communication in that country's Parliament and is also being used in most judicial proceedings. If this is the case in Tanzania, why not Kenya.

We firmly believe that if these recommendations are implemented withou delay, then our system for the administration of criminal justice will be ac ded the respect it deserves. If the criminal law is to be a reflection of t social, economic and moral ideas, principles and feelings of a given communi is not such wholesale reform necessary?

CHAPTER ONE

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