

TABLE OF CONTENTS.

|  |           |
|--|-----------|
| Table of Statutes ...                                | (i)       |
| Abbreviations  | (ii)      |
| <b>" PROBATION IN NAIROBI WITH SPECIAL REFERENCE</b> |           |
| <b>TO CASES FROM KIBERA COURT".</b>                  | (iii)     |
| Introduction   | (iv)      |
| Dissertation submitted in Partial                    |           |
| Fulfilment of the requirements for the               |           |
| Bachelor of Laws Degree, University of               |           |
| NAIROBI  |           |
| (a) Definition of the term                           | 1         |
| (b) The position during the pre-                     |           |
| By. period   | 2         |
| (c) Observations                                     | 3         |
| (d) Introduction of Probation                        | 10        |
| GICHUKI, FELICINA WAIRIMU ...                        |           |
| (e) " "  |           |
| in Kenya   | 11        |
| NAIROBI  |           |
| Comment -  | MAY 1982. |
| (g) Footnotes  | 28        |
| Part II: Present formal structure and functioning of |           |
| the probation service:-                              |           |
| (a) Present structure                                | 31        |
| (b) Court inquiries and pre-sentence                 |           |
| report   | 36        |
| (c) Probation order                                  | 41        |
| (d) The supervision of Probationers                  | 43        |
| (e) Reporting  | 45        |
| (f) Entries in individual cases                      | 47        |
| (g) Return   | 49        |
| (h) Reviewing of cases                               | 50        |
| (i) Completion                                       | 50        |
| (j) Supervision of Probation                         |           |

Laws

ya

TABLE OF CONTENTS.

|                       |       |
|-----------------------|-------|
| Table of Statutes ... | (i)   |
| Abbreviations         | (ii)  |
| Acknowledgements      | (iii) |
| Dedication            | (iv)  |
| Introduction          | (v)   |

CHAPTER I : Tracing the Historical Background of Probation:-

|  |    |
|--|----|
| (a) Definition of the term                               | 1  |
| (b) The position during the pre-colonial period          | 2  |
| (c) Observations   | 8  |
| (d) Introduction of Probation                            | 10 |
| (e) " Critical " " " " at the probation service in Kenya | 11 |
| (f) Comment  | 26 |
| (g) Footnotes  | 28 |

CHAPTER II: Present formal structure and functioning of the probation service:-

|   |    |
|---|----|
| (a) Present structure                       | 31 |
| (b) Court inquiries and pre-sentence Report | 36 |
| (c) Probation order                         | 41 |
| (d) The supervision of Probationers         | 43 |
| (e) Reporting                               | 45 |
| (f) Entries in individual cases             | 47 |
| (g) Return                                  | 49 |
| (h) Reviewing of cases                      | 50 |
| (i) Completion                              | 50 |
| (j) Supervision of Probation                |    |

(k) Footnotes 53

CHAPTER III: Area of study and Cases

(a) Why choose Nairobi as an area of

1. Study with cases from Kibera Kenya. 53
2. Fire Arms Act Court 54
3. Criminal (b) Prob Kenya Penal System Laws of Kenya. 57
4. Child (c) What is probation? 58
5. Penal (d) Authoritan Aspect Kenya. 59
6. Prison (e) Guidance Aspect Kenya. 60
7. Probat (f) of Theories of Cansation 1981 Act. 69  
of Ken (g) Rehabilitayion 69
8. Subsid (h) Imprisonment e probation of officers 72  
Act (i) 198 Footnotes Laws of Kenya. 75
9. Detentio (j) Act Kenya Laws of Kenya

CHAPTER IV: Critical look at the probation service in Kenya 77

- (Conclusion)
- (b) Effectiveness 81
  - (c) Recommendations 84
  - (d) Conclusion 90
  - (e) Footnotes 96
  - (f) Bibliography 97
-

STATUTES

1. Borstals institutions Act. Cap 91 Laws of Kenya.
  2. Fire Arms Act.
  3. Criminal Procedures Code, Cap 75 Laws of Kenya.
  4. Children's and Young persons Act.
  5. Penal Code, Cap. 63 Laws of Kenya.
  6. Prisons Act, Cap. 90 Laws of Kenya.
  7. Probation of Offenders (Revised 1981) Act. Cap 64 Laws of Kenya.
  8. Subsidiary Legislation, the probation of offenders Act (Rev. 1981) Cap. 64 Laws of Kenya.
  9. Detention Act. Cap. 92 Laws of Kenya
- 
-

iii

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ABBREVIATIONS

- 1. L.L.B. - Bachelor of Law.
- 2. E.A.L.B. - East African Literature Bureau.
- 3. E.A.L.J. - East African Law Journal
- 4. E.A.L.R. - East African Law Review.

found time to type the paper in time for submission and reducing my otherwise illegible writing to what it is now.

When thanks also go to friends and my family, especially my mother for her moral encouragement during the difficult times while writing this paper.

However, the responsibility for the opinions and views expressed are entirely mine.

F. W. GIGIKI.

Nairobi  
Oct 1962.

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iii)

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F. W. GICHUKI.

NAIROBI  
MAY 1982.

The laws concerning the penal system in Kenya are found in three statutes; namely: the penal code which defines the criminal offences, as well as prescribing the maximum sentences which can be imposed by the courts; the Criminal Procedure code, which

DEDICATION

This dissertation is dedicated to my mother, Mrs. Jacinta and appeal, and finally the special statutes that deal with M. Gichuki, my two brothers, Daniel Mwangi and Joseph Kimunyu specific forms of treatment such as the prisons act and the and finally to my two sisters Lilian Wakarindi and Betty Njeri. Probation Act which is my main concern.

In the first chapter I will try to define the term probation and also examine the penal system in the Pre-colonial communities,

F.W. GICHUKI

the Kikuyu, the Kamas and the Luo. It will be my observation that these the kind of rehabilitation had an emphasis on the offender and the offender using a family/community affair, rehabilitation was done within the social fabric and it was only in extreme cases that more serious measures were taken.

In the same chapter I will go on to show that the present Kenya penal system is a colonial importation and that it is an entirely alien system of dealing with offences compared with African penal standards. Thus I will go on to show how probation became a part of our legal system.

In the second chapter my main concern will be an examination or rather a lay out of the structure and functioning of the probation service department. This involves how enquiries are carried out and how the decision to place one on probation is arrived at also. There will be a look at how supervision of the probationers is done and what it mainly comprises.

There will be an attempt to look at how breaches of probation orders are dealt with and finally the supervision of the Probation officers themselves by their senior.

In the third chapter I will attempt to look at specific probation cases. These cases will be from the Kibera court. The reason why I picked this court is that I did my second year clinical program in that court and I got interested in the kind of offenders who appear before the magistrate. The court covers many police stations and the case-load is quite heavy in view of the fact that there is only one magistrate at present; Miss Angawa District magistrate II. The court also deals with cases from slum areas like Kibera itself (line saba, Makina etc, Kawangware and Bulbul in Ngong town. So I wanted to find out how effective probation as a way or means rehabilitation would be instead of imprisonment. It was my feeling that there is more to an offence than the mere commission which I feel law tends to lay more emphasis on. This consequently means there is an emphasis on inflicting punishment than on looking for or at other factors which have contributed to the commission of a particular crime in the final chapter. I will look at the service or rather the probation department critically. The intention here is to find how effective the service is at present and whether there can be any improvements on the same. I will observe that the department has some very serious problems like that of transport and understaffing which it is my feeling inhibits the proper supervision of the probationers and consequently the effectiveness of the service. The offender is then in a position to hear how to cope with the situation in future and to realise that there are other more acceptable channels of doing things.

But these were factors outside the control of the probation officers. My examination over a long period led me to be very impressed with the service & the officer's themselves. The Government is trying to help but I am of the view that there should not only be pumping in of much more money in the probation service but that this money should also be combined with practical solution. Thus the proposed service scheme is vital to make the service more effective. I believe that such pumping in money would actually be a saving if it can be combined with effectively lessening the prison load of minor offenders.

In conclusion, I could say that at present probation service is the only penal system in our country which actually deals with the question of rehabilitation practically. Its the only one which seems to incorporate some of the original rehabilitative views of the African communities it serves. It tries to serve the problem the African communities it serves. It tries to serve the problem right from the source as opposed to imprisonment which in my view deals with the end result only. In Probation there is an examination of the life history of the offender, the circumstances surrounding the crime and the offenders attitude to the offence. This is quite practical, especially in view of the rapid social changes at present. Thus it is a system which does not remove the offender from the society with which he has committed the crime but rather tries to reform him within that social fabric which contributes in making him adjust. The offender is then in a position to hear how to cope with the situation in future and to realise that there are other more acceptable channels of doing things.

CHAPTER ONE

Channels which do not disrupt the society. So he/she learns how to live within the very socially in which he has committed the anti-social crime. And thus becomes again a useful member of that society.

DEFINITION OF PROBATION

The term has been used in various ways and the best way to define it is by saying what its term of reference is. It is to be used "to provide an individualized programme offering a young or unhardened offender an opportunity to rehabilitate himself without institutional punishment under the tutelage of a probation officer and under the continued power of the court to impose institutional punishment for his original offence in the event he abuses the opportunity".

It may therefore, be defined simply as the suspension of a sentence during a period of liberty in the community, conditional upon good behaviour of the convicted offender. Actually, I would say that it is a system based on the belief that many offenders are not expert or dangerous criminals, but are of weak characters and have times succumbed to temptations or that it is unfortunate that they committed the offence, and thus ought to be given a chance by being saved from possible contamination of the prison where hardened criminals are; and be encouraged to use their own sense of responsibility for their future.

The normal procedures takes any of these three forms:-

- (a) After conviction, sentence is suspended and the offender is placed on probation.
- (b) After conviction, sentence is passed and the execution of the sentence is suspended and the offender is placed on probation.

## CHAPTER ONE

In this chapter I intend to define the term " Probation " and trace the historical background and its introduction in Kenya, that is how it became part of our legal systems.

### DEFINITION OF THE TERM

The term has been used in various ways and the best way to define it is by saying what its term of reference is. It is to be used " to provide an individualized programme offering a young or unhardened offender an opportunity to rehabilitate himself without institutional punishment under the tutelage of a probation officer and under the continued power of the court to impose institutional punishment for his original offence in the event he abuses the opportunity ".

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The normal procedures takes any of these three forms:-

- (a) After conviction, sentence is suspended and the offender is placed on probation.
- (b) After conviction, sentence is passed and the execution of the sentence is suspended and the offender is placed on probation.

- (c) After conviction fines may be imposed as a condition for release or probation.

Before coming to the introduction of probation in Kenya, let us examine the pre-colonial societies.

#### THE POSITION DURING THE PRE-COLONIAL PERIOD.

Although punishment of criminals or more appropriately wrong-doers can be said to have been an accepted institution among various African societies and tribes, in Kenya; a fact that suffices is that imprisonment was a foreign institution.

To these societies the punishment of the wrong-doers was more of a family / community affair. The traditional societies emphasised was on compensation as being necessary for keeping social equilibrium between the parties to the suit, though serious steps could at times be taken as will not be seen below. Actually even among the Tsenga there is a proverb which goes " The redemption of crime is restitution " <sup>2</sup> Some societies may be looked at in some details.

#### KIKUYU<sup>3</sup>

Among the Kikuyus the rights of the individual were of minor importance in comparison with peace and equilibrium in the group, or between two groups bonded in some ways each with each, as by pre-puinquency or intermarriage. The procedure adopted to achieve this purpose may have had the appearance of a definite punishment for instance, corporal punishment or fine, and it doubtless had some functional value of the sort. Corporal punishment was intended primarily to act as deterrent to behaviour considered liable to interfere with peace and equilibrium <sup>4</sup>. It was usually the offended group which dealt with the offender. A boy or youth who brought trouble on the clan by stealing would be discouraged by being beaten, secondly with stingling beetles.

or by being soaked with water and subjected to the bites of tree-ants ( Kikuyu - Thambo , Meru - Mpambo ).

The essential meaning at the back of the " fines " as distinct from compensation to the injured party was that reinstatement of the offender in society, from which he was considered to have virtually expelled himself by some anti-social act. The method of the reinstatement was the eating of the animals paid as " fine " which was another instance of the binding force of the ritual meal. Close relations were expected to assist the offender to find wherewithal to pay the " fine " <sup>5</sup>, and compensation unless he could do so readily himself. It is this fact which to some extent induced a sub-clan to punish the offender when his offence was clearly repeated. In general the wider the group which suffered as a result of an offence the stronger the public opinion would be against a repetition of it.

The habitual offender whose actions were a constant threat to the wealth and well being of his clan, or sub-clan would at times be summarily expelled; or put to death from the premise that the country was tired of him. He could be burned alive and was normally burned in a big bundle of dry banana leaves and then set on fire. But it is notable that the occasion on which they might have resort to this kind of action were rare <sup>6</sup>.

The maintenance of peace depended upon the recognition of three principles; firstly, settlement by force, secondly the correction of imbalance by compensation rather than by talion; and finally an impersonal adjudication and assessment by the aged ( in social grade ) who were deemed to be beyond the partialities and impetuorities of self-interested youth.

The stages in the made settlement particularly in cases of homicide appear to be traditionally remembered ( these were settlement by force, settlement by talion and settlement by compensation ). The first of these involved the taking up of arms and generally ended in a blood feud. The second was an attempt to put an end to feuds by limiting the retributory action to the magnitude of the offence ( the murder of a man was settled by the killing of the murderer or of his agemate in the kinship group or alternatively by handing him or his son over for adoption into the damaged group). The third meant payment of compensation to the murdered man's group equivalent in stock.

The principal of adjudication and assesment by the aged was based on the belief that, as a man grows older he leaves the hot-bloodness of youth behind and is able to think and act impartially as indicated above. These elders engaged in litigation were supposed to be especially free from bias, impartially in arguement which was one of the qualities which had infact brought them to the fore <sup>7</sup> .

Thus the principle which emerges is that the administration of justice was based on equity rather than a codified law. The Kikuyu say " Tutiri na mutugo tiga kuigua uhoro wa mundu na mundu" meaning we have no code apart from hearing the words of person and person. This meant that there was no standard yardstic to be used in the melting out of justice, so they had only a code of general principles not of detail <sup>8</sup> . Every judgement must confirm to it, though the principles were with latitude unknown to English law as will become apparent in the other societies too.

arrived bringing a goat. If the two elders decided then the

THE KAMBA<sup>9</sup>

Among the Kamba theft of food crops or stock from one's neighbour in time of famine frequently took place. If such were not habitual, but manifestly due to hunger and need, it could be atoned for. A bull was paid over and slaughtered and the thief must also return the stolen property or its equivalent, though he might be permitted to postpone this until the famine was over.

The thief would swear the "Ndundu" Oath not to steal again<sup>10</sup>. He would do this before the "Kingore" which consisted of the male population of a group of "Motui", which was the largest Kamba group, that acknowledged a common institution including other people as well. It was a crude legislature, judiciary and executive all combined, this "Government's" jurisdiction was recognised. In case of a small theft, a goat might take the place of a bull.

If one was a habitual thief, albeit the theft were always small, and so annoyed his neighbours the elders of the "Utui" (or the area) might gather and burn his house down; or otherwise destroy it leaving all the man's property inside and order the thief to leave the "Utui". For a more serious habitual thief, or for a major single theft - say three cows at one time the offender might be executed.

In case of assault compensation was also used<sup>12</sup>. A minor matter such as a blow causing no permanent ill-effect but perhaps pain and swelling was dealt with by sending an elder to call the offender together with an elder of his own family who arrived bringing a goat. If the two elders decided that the

responsibility was truly that man's, but that the hurt was not of the serious kind, requiring marking with a knife, the goat was slaughtered and the matter ended there. For more serious hurts causing the loss of a limb or member, there was a fixed scale of penalties eg. A finger (any finger) - one cow a bull and a goat; one hand or arm - five cows, a bull and a goat.

For more complicated injuries the elders considered the clan as it arose and made a discussion using the above kind of scale<sup>13</sup>. A good example is that of ex-chieftain Mbithi who at Kangundo lost 3 fingers and was also cut on the arm - such a way as to sever a tendon. He was awarded three cows for the fingers, one for the tendon and a bull and a goat. The Kamba worked on the principle that if an arm or a leg was lost a man was only half a man and with both arms or legs he was said to be practically dead.

There was no difference if the injury was inflicted deliberately or if it was accidental, the payment was the same. But in the latter case there was in the past no bitterness or strife between the two clans. Thus the commission of any anti-social acts can be said to have been a community affair which was to be deterred in all possible ways.

#### N KALENJIN

14

Finally I would like to look at the Kalenjini. Among these people all offences were settled with the victim of the crime if possible the individual who had been wronged could bring up the charge against the person (5) who had wronged him, but the punishments were collective. The offences were sometimes regarded as unnatural, for instance stealing of property of another

Kalenjin or the practice of incest people who committed such offences were called " Sigoranit " or sinners. The punishments for such offences were strict because they were rare offences and were to be prevented from recurring. The punishment was also meant to keep the society from offenders by use of preventive measures, heavy punishments, restitutions, payments of heavy compensations and also the beating of offenders if they were persistent wrongdoers. This was meant to act as deterrent <sup>15</sup> .

Even though there were crimes in the Kalenjin society such as witchcraft, rape, incest, homicides and other anti-social offences; there was actually least incidence of crime because of the various sanctions, which were adopted by the society. The most deterrent punishment was the invocation of the curse against the culprit who committed crime and were not detected, eg. secret use of sorcery to kill people or theft of property.

Those who witnessed before the elders could be psychologically offended by the curse if they lied. Religious rituals were also performed when cursing the suspects. This was the type of punishment the Kalenjin feared most; the curse (Muma ) which was used against incorrigible criminals. <sup>16</sup> Also notable among those crimes where curse was employed were disclosure of circumcision rituals, marriage rites, cleansing rituals, committing unnatural offences like sodomy and the betrayal of the society customs and morals to the non-Kalenjins <sup>17</sup> .

Persistent and recalcitrant deviants of homicide, rape and arson, theft and sorcery were stoned. " Kalach " or sharp sticks " Mosigiek " were thrown against the offenders. These types of offences were punished by criminal sanctions of death penalty.

The rest feared to commit similar offence, censure and social ostracism of culprits also prevented incidents of crimes among the Kalenjins.

The award of criminal sanction had penalties of payment of blood money by the family and the clan of the murderer; in homicide cases, to the family and clan of the deceased prevented most offences of murder among the Kalenjins. The clan elders and family heads acted in suppressing undesirable behaviour of their sons and daughters. The culprit lost the shield when his clan and head of the family discovered him, because of committing several crimes and he became an outcast in the "Kokwet". He could be killed by "Kokwet" thereafter, elders verdict of death sentence unless he escaped and ran away to another "peroriet" where he could seek refuge as condemned man, otherwise he could be watched very closely for over a long time and could be punished for the offences.

#### OBSERVATIONS

It is of interest from the above analysis of the pre-colonial societies to note that there was no system of imprisonment among the African societies. Actually on Kikuyu lay Jomo Kenyatta<sup>18</sup> wrote "The chief aim in the proceeding was to get compensation for the individual or the group against whom the crime was committed since there was no system of imprisonment, the offenders were punished by being made to pay heavy figures to the Kiama and compensation to right the wrong-doers".

Thus the traditional sanction emphasis compensation as being necessary for keeping social equilibrium between parties to suit. The following sanctions were employed<sup>19</sup>.

RECONCILIATION : Between the offender and the victim and their families. This was placed first because it was important in the restoration of the social equilibrium between the parties. Most people would be satisfied with such reconciliation without any other punishment additional because after it, none has suffered penalty as to make one be an enemy of the other as it would be if one were sent to prison or fined heavily,

COMPENSATION : It was also another sanction which was important in the African traditional sanctions and ranked second in importance to reconciliation. It was good for the maintenance of social equilibrium. If somebody had suffered or lost something, as a result of wrongful act of another, compensation would put him back to the status quo rather than taking the person to prison or fined by which he gains nothing. ( as at present ) this only increases friction between the two parties because each has suffered due to the act of the other and nothing has helped make good differences.

CORPRAL PUNISHMENTS : It was rarely used. Capital punishment in many societies was reserved only for offences of extreme gravity, for instance witchcraft. Other types of punishments were social ostracism , public redicule , Religions sanctions for instance repudiation by elders by a formal curse in order to protect the community from the hostility of the Gods, spirits and so on. And lastly expulsion of the offender from the community in serious cases which yet did not merit execution. It was a form of outlawry.

Thus it is noted that the notion of loss of physical liberty in itself as a form of punishment did not exist. There were

no prisons in the modern sense of the word, but it should not escape our attention that though most of the traditional sanctions were able to preserve order in the small traditional societies, changing economic and social conditions make development like prisons inevitable. Some of the sanctions like settling disputes out of the court would be difficult if unattended with the factors which featured in the traditional societies.

Therefore in these traditional societies there was only family/community responsibility whereby the offender would be rehabilitated in the society as seen above. This can be equated to a kind of "probation" in that it was not until rehabilitation of this offender. In the social fabric failed that more serious steps like ostracism or death were resorted. Thus one would have been offered a chance just like an offender is by being placed on probation and thus being saved from prison. It is not until this fails that one should be imprisoned !!

#### INTRODUCTION OF PROBATION

Probation is a fairly new approach to crime, treatment. It may be traced to the year 1841<sup>20</sup> when John Augustus was allowed by a Boston Court to bail out a criminal at his request. Under his care then criminal became industrious and law-abiding. Following on the legal justification that the court has power to suspend sentence, many more people were released and placed under his care and he acted as a surety. By 1859 he had acted as a surety for 1152 males and 794 females and given less formal aid to many others. This success of this new approach attracted the attention of several voluntary organizations in and about Boston who then stepped in to boost its development. The 1897 established Kenya legal system on the machinery for settlement of disputes. It indicated that the laws which were to be

development of the behavioural science played a crucial role and enabled the approach to move from strength to strength.

In 1878 probation became mandatory in Boston and in 1891 in the whole state of Massachusetts. Where paid probation officers attached to court were appointed to supervise the offenders. The approach spread to other states, from the United States the system found its way to Australia, New Zealand in 1886 and to England in 1907 and it was from here that it was introduced to Kenya ( which was then a British Colony ).

#### INTRODUCTION OF PROBATION IN KENYA DURING COLONIAL ERA

The penal system presently in existence in East Africa was introduced by the British and modelled on the British penal system modified to suit the colonial administration.

The Imperial British East Africa Company was the forerunner of British rule in East Africa. The Company had tried to set up an administration in the interior. There is not much on record as to how the Company dealt with the administration of criminal acts and penal institutions. But when the Company handed over power to the British Government in 1894, it was recorded that Sir Arthur Hardinge inherited all the buildings erected by the Company including forts and prisons<sup>21</sup>. This shows that prisons were in existence even before official British Government rule, at least during the period of the Company and they continued even after the Company left.

The two parts of Kenya, the Coast and the interior became under direct British rule in 1895 and were called the East African Protectorate. No new machinery for the administration of justice was introduced. The East Africa order-in-council 1897 established Kenya legal system on the machinery for settlement of disputes. It indicated that the laws which were to be

applied by that machinery and made it clear that the legal theory that was to be used in was the English one. Disputes unlike the position under African jurisprudence and Islamic Jurisprudence ( at the coast ) were to be settled by institution called courts whose composition, procedure and law to be applied varied.

The 1897 Native courts regulations, made under the above order in council, made it clear that the native courts to be established to settle disputes of natives were of two kinds. Firstly Muslims and secondly other for real natives while there was thirdly the courts for the Europeans and Asians. However, the important thing is that there was introduction of the British legal system which was alien or foreign system to Africans and it is from this premises I proceed to discuss the introduction of probation in Kenya.

There was the importation of British Notions of crime and its punishments which, though these were different courts for different communities as soon above, were applied to all, this was where the governor ( as per native courts regulations ) thought that native law and custom was repugnant to justice and humanity.

I could therefore say that there were prisons where people were jailed since the application of English legal system went with this as seen even at the time of the imperial British East African Company. Fines could also be imposed by the court as can be detected from the famous Gwaobbin Kilimo<sup>22</sup> where the son had been convicted for conversion of ten shillings and ordered to repay it. The court said customary laws were repugnant to justice and morality and that the father's property could not be taken.

to repay his debts as in custom laws.

There is no indication that probation was one of the penal sanctions during this span of time, with the first world war, the inter war period was characterised by economic depression which affected Kenya as well. Thus the problem of crime became serious during this time. For instance in the period 1922 -1931 the offences of house breaking and burglary were 122 and those against persons had become 130 by 1931. This could also be said to have been probably due to population increase. So the situation merited serious consideration. This <sup>21</sup> committee was appted to inquire into and report upon the prevalence of crime in Nairobi and its neighbourhood. Its term of reference were " to make recommendations for dealing with the problems arising from the presence of large numbers of potential juvenile offenders, habitual criminals, vagrants and unemployed in Nairobi and the area bordering ".

23

The committee reported in May 1932, it had met on ten occasions and had heard evidence from the officers incharge Criminal Investigation Department Nairobi, labour officer, Nairobi, The superintendant of Native locations, Nairobi, the superintendant of Kabete Reformatory; the acting deputy commissioner of prisons, and the officer incharge of criminal records, Criminal Investigation Department.

The committee reported that there were 3,116 juveniles in Nairobi of whom probably a third were under no form of guardianship or parental control, so many of them had left their parents in the reserves and come to look for employment. Some were reported to be children of prostitutes while an increasing number

of women and girls were being sent out by their parents, to look for employment. Further the committee said mixture of different tribes in town precluded the possibility of any effective tribal control. The committee also noted that there was lack of adequate housing facilities and so on.

Thus the committee recommended that ( the bill relating to children and young persons under clause 9 - A salaried officers should alternatively be appointed to superintend the work of probation officers in Nairobi, but meanwhile statutory powers under the ordinance be given to some officers described in the bill as holding a public office.<sup>"25</sup> This clearly illustrated that the committee felt there was a necessity of a probation system but it had not been implemented as yet. The committee still recommended preventive detention for habitual criminals.

Further the committee noted that the juveniles who had been taken to the Kabete Reformatory school were not becoming any better. " But the general result is that the Reformatory is rather of the nature of a prison, than a school that there is little, if any reformation and quite inadequate education ". This indicated that no rehabilitation was taking place and consequently a concern with rehabilitation led to the consideration of other methods and it is here that the first serious consideration of and recommendation for the introduction of probation was made. This was through the work of the committee on Juvenile crime and Kabete Reformatory.

This committee was appointed on 9th August 1933 to consider the problem of Juvenile crime and the future of Kabete Reformatory. It met on five occasions between 14th September 1933 and 30th

January 1934. The committee was composed of S.H. La Fontaine the chairman, H.S. Scott, J.L. Willcocks, H.F. Ward and E.B. Beetham who was the secretary. It reported on 6th February 1934.

The committee also had to look at the juvenile offenders bill and Mr. La. Fontaine report on collective institutions in England " bearing in mind no measure could be entertained by the government which could involve any considerable expenses in the near future. It observed that at least 60% of children of school going age were not in receipt of any regular education and made recommendations accordingly. One of its most important recommendations was that " Probation officers be appointed to supervise young persons "

But the legal framework for this was not yet in existence, thus the committee also recommending further extensions of the idea said " We would also have recommended that their appointment to supervise " children who break the term of their recognizance ".

Further suggestions from the committee were that financial help be given to missionary societies for rehabilitation purpose - supervising boys committed to their care of a probation officer " however, it was not until 30th July 1941 that a committee was finally appointed to " consider the advisability of introducing a system of probation to the colony . Its terms of reference were :-

" To examine a memorandum prepared in the colonial office and report thereon confined to the question of probation for juvenile offenders. On this the answers displayed considerable differences of opinions as to the practicability of the system

The committee however had no doubt that the fullest co-operation would be received from the magistrates once the probation system was put into operation.

The commissioner of police at the time who had experience of the working of probation in Palestine, was of the opinion that probation system could be adopted in Kenya with advantage. He expressed the view that it be tried in Nairobi and gradually extended in the operation as experience was gained.

The committee also heard evidence from representatives of all sections of the community whom it had requested to appear before it, and the resulting interviews disclosed that the representatives were unanimous in their approval of the introduction of probation.

The committee was also acquituated with the fact that the during the years 1940 - 1941 no less than 16,400 first offenders were sentenced to imprisonment throughout the colony. To the committee it seemed reasonable assumption that a small percentage of these first offenders would have been suitable subject for probation orders had probation system existed in the colony.

The committee though still suggesting that the system be introduced in the colony noted that though there was lack of remand homes, this should not stand in the way of the institution of this essential service.

The prison and the system, so the committee noted, are very close associated. The former relies on the latter to reduce the prison population, thus leaving the prison authorities time to do their real work of segregating of providing

approved school. It was to be upon the magistrate to decide whether a probation order should be made, having taken into account the nature of the offense and the information.

suitable treatment for the vicious and dangerous criminals, while the latter relies on the former act as a sterner means of reforming the reclaimable offender who has failed on probation.

It went on to say that the conditions prevalent would affect the system, for instance, that fostering of crime due to the conditions which make reclamation while living in this condition impossible.

In its recommendation, after making the above observations the committee said that " after the fullest consideration of the evidence and the information " at their disposal " and not withstanding the present difficult economic and social conditions, we recommend that the probation system be instituted in Kenya without delay ", but that at its institution the machinery for carrying the system into operation be continued to the municipality of Nairobi. " This recommendation is subject to the previous to which we attach great importance that the right type of person for the post of probation officer be found ".

The committee went on to say that Lord chief justice of England Honourable Lord Hewart of Bury underlined the importance of the system in a lecture in May 1935 saying,

" Rightly used probation can save thousand of offenders every year from a repetitive of their crimes ".

Probation was recommended to apply to all races, to children, juvenile and adult offenders whether first or recidivists and to all offences against the law of Kenya for which an offender could be sentenced to imprisonment or fine or both or detention in an approved school. It was to be upon the magistrate to decide whether a probation order should be made, having taken into account the nature of the offence and the information.

which the probation officers placed at his disposal tending to show the likelihood or otherwise of the particular offender benefiting from the form of treatment.

The committee said that every offender to be dealt with on probation consisted a saving to the government, on an average of an approximately £59 during each year in which the offender was kept out of prison on the other hand, probation failures are costly, because not only was the probationer's liability but if his treatment on probation fails, his subsequent incarceration makes the total cost of dealing with the offender more heavy than it would have been had probation order been made.

But there was racial discrimination even in probation service if that voluntary worker would have to be made use of, by the probation officer, in any case where a member of the Indian or Goan community was placed on probation.

The committee report said a probation order would be beneficial where the probationer was under 14 years of age, if it contained conditions to effect that he attends schools for the offenders over 14 years, steady work for them might be found by the probation officer.

There was a recommendation that the probation officer be required to help in the after - care of prisoners or those from approved schools.

The report said, as concerned female probationers and probation officers " as the social work of the colony increases and a keener social conscience is developed by the resident of Kenya it may be found necessary to appoint a woman probation officer to deal with offenders of her sex " .

Therefore the committee recommended that probation service be introduced into the colony and it was from this premise that the probation system was introduced into Kenya in 1943. It was enacted into the Kenya legal system by the probation of offenders ordinance in December 20th 1943 and it came into effect on the 9th April 1946 by proclamation No. 14 dated 4th April 1946, when the governor declared that the ordinance should apply to the whole area under Nairobi Municipal Council.

In the course of discussion the bill on 10th November 1943 at the Legislative Council, the mover of the bill Mr. Harragin said the object of the Bill:

" is to endeavour or give a man a first chance, its like a dog having its first bite and its to prevent men, women or children who may have slipped once being forced into goal where they not unnaturally come in contact with the worst character and instead of coming out better men in majority of cases they come out worst. The object of the bill is to see that incase persons when apprehended the first time are placed under the protection of probation officers. They are subjected to certain rules and regulations contained in the probation order, and they are given a chance of making good ". He was of the view that the bill ( later ordinance ) be first applied in Nairobi and said:-

" I am strengthened in that opinion by the fact that a committee which was presided over by Mr. Justice Bartley a short time ago to report on this particular subject, suggested in main reports on this particular subject, that it first be brought in for Nairobi and

district and when it was possible to get the man and woman power necessary, and then extended from time to time as soon as it was found possible".

Mr. Harrigin reminded the council that :-

" this bill is entirely non-racial and it not confined ..... to Africans alone ".

This was because in the discussion on the bill most of the ministers seemed to think that it was for the " Natives " and that it would be of benefit to them alone. This was not suprising considering that everything was being done or looked at a social basis. This is clearly seen in Mr. Nicol's contribution in the debate, though he made very good comments on the bill.

" I welcome this bill, and I consider it shows a very material step in social advancement. It is undoubtedly going to be a benefit to the African community and there by is earnest of our desire to give every consideration to the improvement of the native and to give the less fortunate ones a real chance ".

I entirely agree with Mr. Nicol that the bill was a very material step in social advancement as I will attempt to show in the following chapters.

The Act, (then ordnance) set out the circumstances in which probation could be ordered and the consideration which the court was to keep in mind. It provided in S. 4 (1) that

" Where any person is charged with an offence which is triable by a subordinate court, and the court thinks that having regard to youth, character, antecedently-home surrounding, health or mental condition of the

offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court say:-

- (a) Convict the offender and make a probation order, or
- (b) Without proceeding to conviction make a probation order and in either case may require the offender to enter into recognisance, with or without sureties, in such as the court may deem fit.

"Provided that before making a probation order, the court shall explain to the offender in ordinary language and the effect of the order and, if he fails in any way to comply therewith or commits another offence he will be liable to the sentence as to be convicted and sentence from the original offence and the court shall not make a probation order unless the offender expresses his willingness to comply "

With the provisions of the order S.4 (2) provided that the same would apply to the supreme court. Though the probation system was introduced in 1943, due to the second world war it was not until 1946 that the first group of offenders benefited from it. In that year 39 offenders were released on probation. <sup>26</sup>

The committee on the habitual offenders which was appointed under government notice No. 270 on 16th March 1945, also considered probation vital. In their report, it was said;

" Much can be done for the juvenile offenders by probation <sup>27</sup> and that the first offenders who can't be adequately punished by fine or corporal punishment and for action buding over or probation is not suitable

The committee in essence was saying that the probation was to be tried out for the treatment of an offender before a more

serious step like imprisonment could be considered.

Again the 1953 Committee<sup>29</sup>, said that ;

" No child should be sent to prison .. probation should always be considered in preference to any form of detention".

This as time went on the importance of the system was realised as a form of treatment of offender, preferably to imprisonment or detention.

By a series of subsidiary legislations in subsequent years rules were made and the service took shape and expanded. ( Legal notices below). In the year 1947, 109 cases were placed on probation out of 352 cases inquired into<sup>30</sup>. Thus it is explicit that the number went on raising and the system found great boast during the emergency days 1952 - 1960. When many young offenders and suitable adult criminals were placed under the supervision of probation officers. Due to this expansion it was during this period that most of the present experienced officers were first recruited into the service.

In 1952, 553 cases were placed on probation, 1954, 926 cases were placed on probation and in 1955, 1550 cases were placed on probation<sup>31</sup>. In 1956 the court in Nanyuki used probation orders extensively for placing the first Mau - Mau Oath take's under the supervision of a probation officers were used to gather background information of various Mau - Mau suspects which could be used to make them more venerable as this probation annual report shows.

The system then spread out into the rural areas and new stations were opened. By the following subsidiary legislations the service was extended to the area as shown<sup>33</sup>.

they would come out of the prison and feel that they should never repeat what they had done

The former though, emphasizing the swelling of the budget realised that probation system was beneficial even to the offender himself. Mr. Nthenge, on the other hand was more concerned with the horrifying condition in the prison which made rehabilitation of the criminal a dream since he came out of these even worse than before he went. He referred to a "better treatment" of the offender (which could be attained by probation) whereby the offender was to be rehabilitated within the very society in which he had committed an anti-social offence.

In 1981 the 1943 probation of offenders ordinance was revised and got the new title of : The probation of offenders Ordinance (revised 1981) and is now the one currently in force in Kenya<sup>35</sup> (New Act).

The probation service has continued to report since it was introduced in 1943, as will be observed in the next chapter, even after Independence the service has proved invaluable so much so that by 1974,<sup>36</sup> there were 112 officers in Kenya supervising some 9,090 probationers. Most of the probationers were adults above the age of 18 years. 3,393 completed their periods at the end of the year leaving 5,697 to continue. Total on probation on December 31, 1974 were 5,697.

The average case load as per officer at that time was between 50 - 60 probationers. This is actually considered heavy work load by probation standards. For real effective supervision the work load should be somewhere between 30 - 40 probationers per officer. More officers were going under training at the Kabete Institute of Administration, however to cater for the envisaged expansion.

COMMENT

The basic assumption underlying probation treatment is that by counselling, guidance and assistance in the contact of one's (Offender) social environment (including the family) the offender should at the end of the probation period have adjusted himself to the norms of the society, from which he had been "uprooted" by the crime and thus become a law-abiding citizen. This can be effective. The offender is taught how to live within the society rather than being removed from it and confined in a prison, "rehabilitated".

Despite the reduction of the country's budget, probation helps where there are extenuating circumstances or factors in the offence committed. At times the offences even show the fitness of the society itself rather than that of the particular individual concerned. As I will observe in the following chapters. Many women are convicted on charges of changaa possession and selling at Kibera court. But these women in mitigation claim that they can't have any other means of maintaining their family except by selling changaa. Then the question arises should they be jailed. Here the woman is being encouraged to do other things like getting a licence from the City council and selling vegetables to keep their family going. So she takes the economic responsibility while on probation.

The annual report on probation in 1950 made a valid observation in which still holds true in the 1980's. It said that the number of married women of all races who are going to work in offices and industry and who do not provide adequate supervision for the children they leave at home was increasing. This obviously leads to children delinquency who later become social misfits. These might

be the same people, when they grew up, who commit offences and who might actually benefit from probation by being helped to adjust properly in the society.

Further, the Western influence through colonial rule has imposed the Western system of combating crime, which has notably failed even in Western countries; juvenile delinquency in most countries; building larger and larger penitentiary institutions of crime using up in the United States over £800 millions in New York ( which is a third of the budget ) after education and social welfare. In spite of this there is no progress in preventing crimes in youth and no real advance in rehabilitating sentenced prisoners<sup>37</sup>. It is this that Kenya should prevent in this Neo - Colonialism era.

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In the preceding chapter we saw that the probation of  
 offenders Act was enacted on 20th December 1961. The operations  
 of the department were inaugurated in April 1962.

The probation department is one of the four departments  
 the Vice-President's office and Ministry of Home Affairs. The  
 departments are 1. Prisons, Children's, Immigration and Probation.

They are under a permanent secretary and is responsible to  
 the Minister. The day to day activities of the department are  
 looked after by the Principal probation officer who sits at the  
 probation headquarters in Nairobi. To assist the principal  
 probation officer at the headquarters are a senior probation officer  
 in charge of training and one probation officer grade two in charge  
 of administration.

Out in the field the country is divided into seven large units  
 following on provincial administration lines ( except that North-  
 Eastern province has yet to be reached ). The seven units are  
 Central, Coast, Eastern, Rift Valley, Nyasa, Western Provinces  
 and Nairobi area. These are run from the provincial headquarters  
 by a senior probation officer in charge of the province. Below  
 them are the Districts headed by Probation officers grade one in  
 the case of the senior districts like Nyera and Siaya, the rest  
 are headed by Probation officers grade two. The smallest  
 administrative units are called sub-station and are run by  
 probation officer grade three.

In this chapter I intend to examine the formal structure and functioning of the probation service. The information in this chapter was gathered from the probation headquarters office Nairobi.

### PRESENT STRUCTURE

In the preceding chapter we saw that the probation of offenders Act was enacted on 20th December 1943. The operation of the department were inaugurated in April 1946.

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They are under a permanent secretary who is responsible to the Minister. The day to day activities of the department are looked after by the Principal probation officer who sits at the probation headquarters in Nairobi. To assist the principal probation officer at the headquarters are a senior probation officer in charge of training and one probation officer grade One in charge of administration.

Out in the field the country is divided into seven large units following on provincial administration lines ( except that North-Eastern province has yet to be reached ). The seven units are:- Central, Coast, Eastern, Rift Valley, Nyanza, Western Provinces and Nairobi area. These are run from the provincial headquarters by a senior probation officer in charge of the province. Below them are the Districts headed by Probation officers grade one in the case of the senior districts like Nyeri and Siaya, the rest are headed by Probation officers grade two. The smallest administrative units are called sub-station and are run by probation officer grade three.

Slightly outside the vertical structure there are two very important committees whose members are appointed by the Minister as per S.16 (2) of the Act.

"The Minister may appoint a probation committee or probation Committees consisting of such persons as the Minister shall think fit". They are appointed for three years at a time to help run the department professionally and not administratively. They are the central probation case committee at the National level and the probation case committee at the district level.

CENTRAL PROBATION COMMITTEE

According to S 3 (1) the committee shall consist of:-

- (a) A chairman, who shall be the chief Justice and
  - (b) Ten members appointed by the Minister representing respectively:-
    - (I) The Ministry for the time being responsible for probation services;
    - (II) The Ministry for the time being responsible for labour matters.
    - (III) The ministry for the time being responsible for social services.
    - (IV) The Kenya Police
    - (V) The Nairobi City Council
    - (VI) The Christian council of Kenya.
    - (VII) The Roman Catholic Church.
    - (IX) The Nairobi chamber of Commerce ; and
  - (c) not more than six other members appointed by the minister
- (2) The members of the Committee appointed under sub-paragraph (c) of paragraph (1) shall hold office for three years, but shall be eligible for reappointment. The rules go on to state

- (4) The principal probation officer shall be secretary of the committee.

The committee meets four times in a year, that is, at least once in every three months and at such times as the chairman directs.

The duties of the central committee include as per rules 4

- (a) To make recommendations to the Minister concerning the allocation of the service of probation officers to various areas.
- (b) To receive and consider the recommendations of the probation case committee of any area concerning the needs on working of the probation service, and to advise the Minister on all matters arising therefrom, other than administrative matters.
- (c) To make recommendations to the Minister relating to the duties of the committee and of the probation case committees.
- (d) To advise the Minister on any question of policy and open any other matter relating to the probation service as he may refer to it for advice.

CASE COMMITTEES . . .

The probation case committees are set out in the first column of the schedule and the area in which each committee is established is set out in the second column of the schedule. As per rule 3 (1)<sup>3</sup>.

" Each probation case committee shall consist of a chairman and seven members appointed by the permanent secretary, and the principal probation officer, who shall be an ex official member"

committees under rule 10 have the power to regulate their own proceedings.

(2) The member of a committee, other than ex officio members, shall hold office for three years, but shall be eligible for reappointment.

(4) A probation officer stationed within the area in respect of which a committee is established shall be secretary of the committee.

(5) All appointments to and recognition for a committee shall be notified in the gazette.

The duties of these case committees are also set out under file 4<sup>b</sup>,

(a) To examine and review the work of probation officers in relation to individual cases.

(b) To receive and consider the reports from probation officers.

(c) To make a direct the making of any communication which it may be necessary to make to the court.

(d) To make a direct the making to the central probation committee of recommendation concerning the probation

service.

(e) To advice and assist probation officers in the execution of their duties;

(f) To ensure that probation officer perform their duties in a satisfactory manner.

The committee holds its meetings for transaction of general business at least once every time as the chairman may direct. It is noted that the chairman is usually the District Commissioner of the area.

Both the central probation committee under rule 10<sup>5</sup> and the case committees under rule 10<sup>6</sup> have the power to regulate their own proceedings.

FUNCTIONING OF THE PROBATION SERVICE

Now we turn to the functioning of the service. I will look at this term<sup>10</sup> of how it handles the criminal from the time he first comes into contact with the probation officer to the end of his probation period which actually constitutes the main work of the department. Probation officer handle cases from District courts<sup>9</sup>, Resident Magistrate Courts and even the High Court as indicated by S 4 (1)<sup>7</sup> of the Act. The crimes they deal with include almost all the crimes under the penal code and those under Local Government acts. These includes theft, assault, murder, robbery with violence and manslaughter

OFFENCES FOR WHICH PROBATION ORDERS WERE MADE AT KIBERA COURT IN 1979 (INCLUDING MALE & FEMALE PROBATIONS)<sup>ERS</sup>

| SECTION<br>(PENAL CODE) | OFFENCE                                  | ADULTS | JUVENILES |
|-------------------------|--|--------|-----------|
| 105                     | Personating a public Officer             | 1      | -         |
| 162 (a)                 | Unnatural offence                        | 1      | -         |
| 183                     | Being a rogue and vagabond               | 1      | -         |
| 251                     | Assault                                  | 3      | -         |
| 275                     | Stealing or theft                        | 14     | 3         |
| 279                     | Stealing from person                     | 7      | -         |
| 280                     | Stealing by persons in the civil service | 2      | -         |
| 281                     | Stealing by clerks and servants          | 12     | 1         |
| 304                     | House breaking                           | 4      | 1         |
| 306                     | Workshop breaking                        | 1      | -         |

|          |                                 |    |   |
|----------|---------------------------------|----|---|
| 308      | Preparation to commit felony    | 1  | - |
| 317      | Conspiracy to defraud           | 1  | - |
| 330      | Fraudulent false accounting     | 1  | - |
| 349      | Forgery                         | 1  | 1 |
| 353      | Uttering false documents        | 1  | 1 |
| SL(2)    | Being in possession of firearms |    |   |
| Arms Act | without licence.                | 1  | - |
| Total    |                                 | 52 | 7 |

COURT INQUIRIES AND PRE-SENTENCE REPORT

The probation officers are attached to courts. The probation officers are as near the courts as possible to enable them to be in court as soon as they are called upon to report when a case comes up. The practice is that the court clerk either rings the probation officer or he can place the court file in a special tray that is always in the court for that purpose. The probation officer checks that tray everyday. This is normally termed as "Referring the case for a probation officer's report" It is only when the criminal has been convicted that the case is referred. This is done in lieu of sentence, hence the report is in U.S.A. and Britain known as Pre-sentence report. In Kenya Pre-sentence report is done in almost all juvenile cases as I was informed by the officer incharge of the service in Nairobi. But in writing the report the offender is not considered a criminal rather he is seen to be having problems. Home background is studied together with the history of his up-bringing.

The parents are interviewed and if he is schooling, his teachers and headmaster are also interviewed. In the report the possible causes of the instant problem (not crime) are outlined. Then follows what the officer considers to be the appropriate treatment to be given.

There are usually four possible recommendations the officer can give depending on home background, age, and the nature of the problem; Firstly probation treatment may be recommended and then the procedure of releasing offenders on probation is followed, except that with juveniles their cases are dealt with in the juvenile court, usually in the chambers and not in the open court. The preparation of this report orders and the placement and subsequent supervision is similar to that of adult

Secondly if the home conditions are not suitable for probation treatment then in cases of youth under the age of fourteen years the officer may recommend that the offender be committed to an approved school. Approved schools are under the children's departments whose head is the chief inspector of children. An application is made and then the child is sent to the nearest approved school.

Thirdly, in case of youth above fourteen years of age but below eighteen years, who are not suitable for probation treatment, it may be recommended that they be committed to a Borstal institution, for a period of two years. Borstal institution under the prisons department controlled by the commissioner of prisons. Presently there are only two such institutions, Shikusho-Western Province and Shimo la Tewa at the Coast. The probation officer

idea about his client - his name, father's name, location of his home, the offence, circumstances of the case etc.

then makes an application to the commissioner requesting for a vacancy in the institution. The commissioner sends back a report indicating where the vacancy is available, the officer informs the court and then latter arranges for transportation for him to the institution. If there is no vacancy in the institution then the court gives any alternative treatment suitable but not imprisonment because under children's and young persons Act no one under 18 years should ever be imprisoned. Finally the probation officer may recommend an alternative treatment right away. It is then up to the court to meet out the appropriate treatment.

Adult cases that are referred are those that the court feels would benefit when released and placed under supervision of a probation officer. The officer is usually given fourteen days to submit the report to court. If during the trial the offender was in custody then he remains there until the report is made in court. But if on the other hand he had been bonded, then the bond is extended.

On receiving the telephone call from the court the officer may report immediately if the would be client is bonded and has to leave for home. He has to meet the client before he leaves. The offenders particulars are taken and they arrange to meet at home.

If the offender is in custody the officer waits until a convenient day and visit him in custody. Before making the first visit the officer should have studied the court file and taken notes of all the particulars of the offenders, so he has by then a slight idea about his client - his name, fathers name, location of his home, the offence, circumstances of the case etc.

An important aspect of the first contact is that the officer must introduce himself to the client. ( This is the term by which the probation officer refer to the subject of the referred case ) later as probationer and explain to him what his work is and what it means to be placed on probation.

Then officer then asks the client whether he would be pleased to be placed on probation if he says No, then the officers work stops there, he reports back to court that the offender is not interested in probation treatment. The court then decided an alternative treatment.

If the client would be happy to be placed on probation (the majority are ) then the officer's work proceeds, taking the forms of an interview, which has to be done with the great deal of caution since the offender has had several of these kinds of interviews by the police during interrogation so they look routine to him and of no help.

The interview is carried out in private and not in the presence of prisons officer to enable the client to talk with some freedom. The officer questions him on matters surrounding the commission of crime. He studies the offenders temperament and his attitude towards the offence., finding out whether the offender is repentant or not. If he is that is considered positive as it may be easy to supervise as he/she has confessed his wrongdoing and promised reform. If he is not, then that indicates that he may be a difficult case to supervise. The circumstances that led to the offences are carefully recorded and later compared with the police statement; the charge sheet. At the end of the interview the officer takes the offenders home particulars and those of other adults in the locality that the offender

says they know him well. If the offender is employed, the particulars of his place of work, his employer and a few of his workmates are taken.

One or two days after the interview, and depending on the availability of transport, a visit is made to his home. The probation officer discussed the matter with the family to find out what really happened and if possible that the offender would benefit if released on probation. All along the officer attempts to unearth the social psychological, economic or environmental factors that led to the commission of the offence. His responsibility in the home are enquired into including his past criminal record. A number of independent people are also interviewed. These are normally the people the offender had given their particulars, but the officer may discover others by himself such as the assistant chief of the area of headman.

These people are interviewed to help the officer confirm the facts he already has. He then returns to the office with the notes. The probation officer may use the client's employer if any to find out whether the employer is prepared to take him back. If so this becomes a very good reason for recommending probation treatment as he will remain in his employment which he would lose if imprisoned. Workmates may also be interviewed if necessary.

#### PROBATION ORDER

After all these visits and interviews are complete another visit is made to the offender. A second interview is conducted to try and iron out any conflicting statements to enable the officer to build up one coherent picture about the offender. At the end of the interview the officer reminds the client of the date of the report and that they will meet in court, so the

inquiry is completed.

The same procedure is followed where the offender is bonded. That is the diagnosis.

Back at this office the officer is now ready to write a report based on his diagnosis. He makes his draft and gives it to the typist to type on a legal document known as PR1 form, two copies are made. In his report, the officer gives the home background of the offender, his attitude towards the offence, the circumstances surrounding the commission of the offence. As much as possible the report shows the social, economical, environmental and psychological factors that might have led to the commission of the offence. From that analysis then comes the recommendation as to the best type of treatment possible. The officer gives his recommendation as whether the case is suitable for probation treatment or not. If the report recommends a chance on probation for the accused, three copies of the probation order are prepared one of them in booklet form, the report and the orders are brought to court on the fixed date of the report. If probation treatment is not recommended, then only the report is submitted and no orders, in this case alternative treatment is recommended and it is up to the court to decide on what type of sentence to give.

#### PROBATION ORDER.

When the case comes up the probation officer, who then sits next to the court clerk, hands over the report to the court clerk who in turn hands it to the magistrate. The latter studies it carefully and looks at the recommendation. He then tells the offender what the recommendation is. If it is probation treatment, the magistrate tells him so and asks him if it would be

all rights with him.

" Before making the probation order under subsection (1) and (2), the court shall explain to the offender in ordinary language the effect of the order, and that if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence ".

The provisions normally made and which the offender is ordered to obey and to be found in the PRA I form are :-

- (1) You must be of good behaviour during the period of your probation.
- (2) That you report in person to the probation officer once in a month or more frequently if instructed by him.
- (3) That you do not associate with any one with whom you are forbidden to associate by the officer at your home or place of residence.
- (4) That you receive visits from the probation officer at your home or place of residence.
- (5) That you will answer truthfully all questions put to you by the probation officer with regards to whereabouts of your residence, your conduct or your employment.
- (6) That you will report to the probation officer any change of your employment or residence.
- (7) That you abstain from over-indulgence in intoxicating liquor.
- (8) That you endeavour to obtain and remain in regular employment and that you follow any direction and advice given to you by the probation officer with regard.

to your employment

- (9) That you reside at ..... ( home )
- (10) Additional conditions as ordered by the court .....  
(if any for example compensation to assault case )

The period of the probation is then entered in the three orders and signed by the magistrate. The offender also signs and the court clerk stamps them with the seal of court. The three orders, the original goes to the court file together with the original copy of the report, then the other two copies are as per S. 5 (3) of the Act.

" One copy to be given to the probationer and the other to the probation officer under whose supervision he is placed ". Under a probation officer appointed under section 16 of the Act.

The offender is placed on probation. He is referred to as the probationer, whom the act defines as meaning S. 2.

" A person placed under supervision by a probation order ".

Then the court probation order forms the legal basis of future rehabilitation of the offender. The Act provides the period to be of not less than six months and of not more than three years from the date of the order may be specified therein.

#### THE SUPERVISION OF PROBATIONERS.

Work of supervision starts when the criminal has been placed on probation. The probation officer takes him to his office for briefing and preparation of relevant supervision documents.

A file is opened in the clients name with a serial number given to it. This number appears in all the supervisions

documents including the booklet and the returns. A copy of the report and a copy of the order are files in the newly opened file. The officer then explains to the client very carefully the provisions of the order as they were read in court. He points out to the probationer that failure to comply with the provisions may lead him in trouble, it is in the interest of both that he complies, otherwise he can be sent back for breach of the order. Then the probation officer gives the date when he wants the probationer to make the first report. The date is entered in the clients booklet so that he doesn't forget. Newly placed offenders may be required to report more frequently eg. fortnightly for the first few months so that the officer gets to know them, the place of the first meeting is indicated and then the probationer is free to go home.

The officer makes further entries in the file, stating when the offender was placed on probation, by which court and for what offence. The period for which he is placed on probation that the provisions of the order were read and explained to the client. And that he understood them and agreed to comply and finally he enters when the first report will be made. As will later be seen if, when the person was placed on probation, any member of the family were in court, the officer would bring them to the office and all the discussions and explanations given in their presence, so that they co-operate and assist the officer in the work of rehabilitation. The officer would also talk to them on the form due supervision will take and how and where their co-operation will be required. All these are entered

officer can now supervise male probationers. Actually there is

no prohibition in the act, and so it can be thought appropriate

into the file. They are useful for future reference. The officer then signs the entry and proceed to the next case. Entries continues when the first report is made.

### REPORTING

Reporting is organised in such a way that the probationer in places like Nairobi might come to Nairobi or home visits can be made. This facilitates better supervision in remote parts of the districts where probationer have no easy means of reaching the probation station, the officers make themselves available at certain selected reporting centre, eg. at a chief's camp, a school etc. so probationers report to the nearest station.

At the office there is a time-table to be made by which the district divided into regions or areas dependion on the members of staff at the station eg. If in a given station there are five male officers and one female officer then there would be five regions, each of the five male officer would be concerned with one area while the woman officer would work in all the area since the female cases must be supervised only by a woman officer ; the act in S.14 (2) provides.

" Where a woman or a girl is placed under the supervision of a probation officer, the probation officer shall be a woman."

The woman officer may supervise juvenile male probationers but the male officers should never supervise females. There was a circular from the headquarters that the woman probation officer can now supervise male probationers. Actually there is no prohibition in the act, and so it can be thought appropriate

to do so.

As the magistrate refers cases for probation officers reports, they are entered in register in the probation officer and are accordingly assigned to the respective officers who then starts their court inquiry.

Transfer of cases from one officer to the other is discouraged and professionally improper. Once an officer started handling a case, he should continue with it to the end, i.e. including the supervision. Thus each officer builds up his own work-load as time passes. An average work load presently is 40 - 60 probationers per officer.

At the station the officer talks to or rather interview one probationer at a time and it is done in private and not in the hearing of the others. It is during such interviews that counselling is done. The officer and the probationer had free friendly discussions hinging on his problems at home or place of work, his health conditions, family relation, economic problems, his plans for the future and so on. During the discussion the officer attempts to make the probationer feel very free and become friendly and expose to the officer his own feelings. The officer attempts to understand him and his problems so that he can plan how to assist him. When the discussion is over the probationer is informed of the next reporting date which is entered in his booklet and then he leaves. The officer makes entries in the file and invites the next client for a similar interview and so on. An officer especially in the rural area may be in one reporting station in the morning and in the other one in the afternoon depending on his schedule.

ENTRIES IN INDIVIDUAL FILES

If the officer made the home visits or went to the station or region or even if the probationer reported in the office the probationer officer within the next one or two days gets the individual file and makes his entries following notes he took during the interview. He records what he discussed with the probationer and what new discoveries he has made about his life and how this would assist in the supervision. If there are any particular outstanding development or problems that cropped up, these must be entered in the report. Then he makes suggestions if any on the strategy he will take in future supervision. He does the same for every individual probationer.

For those who failed to report, the officer states so in the file. In such cases its the duty of the probation officer to visit the probationer's home and find out why the probationer failed to report.

Reporting should continue regularly as scheduled as the officer directs. After every three months the officer makes a "Quarterly Summary" in every file. In this he states the progress the probationer is making and then states his next direction of supervision. This is done in the case of each probationer.

BREACH OF PROBATION ORDER

When it appears to the probation officer that a probationer under his supervision has become too difficult for him to supervise, for example, if he failed to report or is un

co-operative, the officer may apply to court for a warrant of arrest to be issued. 3.8. of the Act provides in cases of failure by probationer to comply with probation order that,

" If after hearing information on oath, it appears to a judge or magistrate that a probationer has failed to comply with any of the provisions of the probation order, he may issue a summons to the probationer requiring him to appear at the place and time therein or may issue a warrant of arrest.

(2) A summons or warrant under this section shall direct the probationer to appear to or to be brought before the court by which the probation order was made.

(3) If it is proved to the satisfaction of the court by which the probation order was made that the probationer has failed to comply with any of the provisions of the order then:-

(a) The court may, if no moneys are liable to forfeit by the probationer under sub-section (1) of S.4, impose on the probationer a fine not exceeding two hundred shillings or

(b) If the probationer was convicted of the original offence in respect of which the probation order was made, the court may convict him and pass any sentence which it could pass as if the probationer had just been convicted before that court of that offence or

(c) If the probationer was convicted of the original offence in respect of which the probation order was made, the court may pass any sentence which it could pass if the probationer had just been convicted before that court of that offence.

Provided that, where a court has, under paragraph (a) imposed a fine on the probationer, then, in any subsequent sentence being passed upon the probationer under section 7 of this section the imposition of the fine shall be taken into account in fixing the amount of the sentence.

At time the court may simply warn an offender and tell him to continue reporting. All what happens must be entered in the file. It constitutes part of the supervision work and the records must be properly kept. This will be dealt with more when examining the effectiveness of probation.

#### RETURNS

Monthly statistical returns from every station are submitted to the probation headquarters for records. These returns show several things including:-

- (a) The number placed on probation during the month
- (b) The number of satisfactory and unsatisfactory completions.
- (c) The case load each individual probation officer .

The returns are done at two levels:-

- (a) Each officer prepares his/her own returns.
- (b) The station prepares its combined returns.

When completed they are typed accurately and neatly on appropriate forms, and forwarded to the headquarters, the station retains copies. At the end of each year the headquarters prepares and publishes an overall annual report.

There are also cases of absconding. This is where the probationer signs off and cannot be traced.

REVIEWING OF CASES

In exercising its powers, as was seen above the case committee meets twice to review all cases in the area. It reviews the progress of each individual case. Each officer presents his work load and the cases that appears difficult are discussed and recommendations submitted as to what is to be done. The committee may advice an officer to go and apply for a warrant of arrest, etc.

The committee also submit recommendations concerning the probation services to the central probation committee. It might advice and supervise the officers in the execution of their duties.

The central committee also review cases from the case committee and formulate policy concerning the working of the case committee and advice the minister on the policies governing the ruling of the department.

COMPLETION

Completions are termed satisfactory or unsatisfactory. There are also cases of absconding.

The probationer who report as directed by the probation officer and completes "satisfactory" so long as one completes his period he is signed off as having "completed satisfactorily"

Those probationers whose orders are discharged for breach or those that go to jail when the order is still in force are signed off as "Unsatisfactorily completion".

There are also cases of absconding. This is where the probationer simply just disappears and cannot be traced. When a warrant of arrest is issued and the person cannot be apprehended before the date his probation period ends, he is considered to have absconded. Therefore unsatisfactory completion and those who abscond constitute the failure rate during probation.

#### SUPERVISION OF PROBATION OFFICER

The principal probation officer appointed by the minister under S<sup>16</sup> (1), organises and supervises the probation service in accordance with the rules and inspects the work of the officers. Frequent inspections is however done by the senior probation officer in charge of the province. He visits the stations and reads all the probation files under the care of each officer. After visiting all the stations he prepares a report showing what he saw in each station and in the case of each officer. This is meant to enable those not doing very well to pull up.

The departments also undertakes other duties which do not actually appear in the probation of offenders act<sup>9</sup>, these are :-

- (1) PSYCHIATRIC REPORT The probation officers are occasionally called upon to submit a home report in psychiatric cases, this report is required when a patient is considered to have recovered and may return home enquiries and submits the report to the hospital eg. Mathare. If the report say that home condition is favourable the patient is then released.
- (2) BORSTAL INMATE REPORT Before a Borstal institution inmate is released, the institution requests a

probation officer in the home area to submit home report. This is similar as in psychiatric report cases, when a favourable home report is received an inmate is released.

- (3) LONG-TERM PRISONERS REPORT: There is a long term review Board for those imprisoned for many years say fourteen years. The principal probation officer is a member of the Review Board. Before these long-term prisoners are released the board may require home report. It is the probation officers that are called upon to submit such reports.
  - (4) AFTER CARE WORK: The probation officers can at times supervise voluntarily psychiatric cases release and Borstal institution inmates released on licence.
  - (5) ANY OTHER VOLUNTARY CASE WORK: For instance matrimonial conselling.
-

In this chapter I intend to show the real working of  
CHAPTER TWO  
probation. I will attempt to look at the causes of crime

having examined the FOOTNOTES: of the system in the previous

chapter. I will initially have a brief look at Nairobi which  
1. In this chapter the "Act" refers to the Probation of offenders  
Act (Revised 1981 ) Cap 64 Laws of Kenya.

2. Rules under S 16 (2) and S. 17 of the Act. Probation of  
offenders (central probation committee ) Rules.

3. Supra : (Case committee ) Rules.

4. Supra ,

5. Supra ,

6. Supra,

7. In chapter one,

8. S. 24 of the penal code, cap 63 Laws of Kenya

9. SUTHERLAND, E.H. and CRESSEN, D.H. Crimatology

J.B. Lippincott Co., 8th Ed. 1970.

In this chapter I intend to show the real working of probation. I will attempt to look at the causes of crime having examined the functioning of the system in the previous chapter. I will initially have a brief look at Nairobi which is actually a fast growing town and my area of study.

WHY CHOOSE NAIROBI AS AN AREA OF STUDY WITH CASES FROM KIBERA COURT

Nairobi started growing in early 1900's with the construction of the then Uganda Railway. It gradually became the capital of Kenya, actually it is mostly referred to by some as "City in the Sun".

However, all that glitters is not gold, which is true of Nairobi. Nairobi has had an ever increasing number of people coming because of the attractions it has to offer. The major part of industry and commerce in Kenya are located here. There are higher wages compared with the inequality between urban and rural wages, better facilities and services, job opportunities and services, failure of rural areas to offer attractions and opportunities make Nairobi a point of termination for a lot of rural urban migration from all over the Republic. The escalation in population and the failure to keep up with this increase has resulted in the uncontrolled settlements. Nairobi has an annual growth of 6 - 7% for instance the population increased from 266,794 in 1962 to 530,000 in 1970.

One of the factors delimiting immigration into Nairobi was the colonial administration due to its restrictive policies. These policies not only checked the growth of the African activities, but also restricted the attractions of rural population. One of the reasons for the influx into Nairobi can there-

... without the assistance of the government. They make situ-

for be said to be that after independence there has been the fact that, free movement has become everyone's privilege though there are still legislations like the vagrancy Act.

However, urbanisation and social changes are not to be seen as neutral processes. Rather the rate, level and form which they take produce particular hardships or benefits unevenly across individuals, social groups and societies. At the same time individuals are not simply victims of social and political situations. They often engage in action which may sharply alter their environment. Analysis of urban development in Africa and in this regard Nairobi, in Kenya, therefore requires understanding of the situational conditions which define an individual or group's relative advantage or group responds to that situation.

The Government and other social agencies can hardly keep up with the pace of change, as the cities lure more and more peasants from the rural areas. Consequently, social planners continually find themselves on a treadmill, the number of jobs and social services never seem to arise as quickly as the number of people seeking them, this is partly because of a shortage of money and partly because demand is conditioned by existing supply. If jobs were to be found for everyone seeking them in the city, a new wave of migration would be unleashed as people in the rural areas learned that there were jobs to be had in the urban area. In order to cope with the present situations, urban residents have begun to develop institutions to meet their needs. So there is squatter settlement: people who live in land which they neither own nor occupy legally; and who build their homes without the assistance of the government. They make size-

able proportion of the population in Nairobi and at times even seems to consist more than half the urban residents. These are the areas from where we have most of the offenders and it is my interest to examine these crimes, their causes and how they are dealt with. It is my genuine believe that probation is the only at present, penal system which faces the question of crime squarely.

Most of the squatters or slum dwellers in places like Kibera (Line Saba ) Ngong (Bulbul) and Kawangware are jobless and landless. Their daily existence is highly insecure because of the constant threat of arrest and harassment resulting from the most important local economic activity, the illegal brewing and selling of changaa or locally made beer for instance " busaa " and " Muratina ". Police intervene is frequent. Further the Mau-Mau. Mau-mau period ended with the break up of families, thousands of deaths and reallocation of a good deal of land in the central province. " Losers " drifted of to the cities and towns in the early 1960's and so a sizeable proportion of the squatters population today is the residue of the domestic turmoil of that earlier period.

It is from the above analysis that I got interested in the ~~fourth~~ probation service. During fourth term clinical programme at Kibera Court, where were most offenders brought from these slum areas. If not, they had been brought up in these areas. There were also cases of family background or break-ups and it was then I wondered whether imprisonment, perse, fines, conditional discharge, probation and others were really reformatory. So I decide to do some research on the service to come up with more

Magistrate or the trial judge can have a case referred for a concrete conclusions and find out how the department really functions.

### KENYA PENAL SYSTEM

The laws concerning the Kenya penal system - Kenya are to be found in three statutes namely, the penal Code<sup>4</sup> which defines the Criminal offences as well as prescribing the maximum sentences which can be imposed by the law courts; the Criminal Procedure code<sup>5</sup> defining the procedure of all the courts in trial, Sentencing and appeal and finally the Special Statutes that deal with Specific forms of treatment such as the Prisons Act<sup>6</sup>, Probation Act<sup>7</sup>, Detention Camp Act<sup>8</sup>, and Borstal Institution Act<sup>9</sup>.

It is only appropriate at this stage to remember that the Kenya Penal System is colonial importation and thus an entirely alien system of dealing with offenders compared with the African penal standards. The importation, introduction and establishment of the system was a gradual process. Therefore the imported system incorporated the western penal sanctions which included probation with which I am mainly concerned.

In law crime has been defined as contravention of the penal statute of a state<sup>10</sup>. There are two basic elements which must be established for an act to qualify to be a Criminal Act, omission or attempt. Firstly "Mens Rea" that is the evil intent in the evil intent in the criminal leading him to the commission of a crime and secondly is the "Actus Reus" that is, the evil conductor act itself !

It is only after this has been proved that one is considered guilty ( or uninnocent )- convicted. It is at this stage that the

Magistrate or the trial judge can have a case referred for a probation officers report, and if after the above procedure has been followed and the accused is found suitable, then he/she can be placed on probation.

It is my intention at this stage to try and analyse what probation is allabout.

### WHAT IS PROBATION ?

Notions of probation as either casework or administration, or a combination of the two are prominent. But all these three approaches agree that probation is a legal disposition and that probation is not to be thought of as a mere leniency or as a mere punishment, but in the first instance it is viewed as a basically casework treatment, in the second, administrative, supervision and the third, both of these, each containing elements of the other<sup>12</sup>. In general as Sutherland has pointed out casework in probation follows psychiatric conception in that insight by the probation into the reasons for his behaviour is the chief goal of treatment<sup>14</sup>. A person with such insight is felt to be unlikely to repeat his delinquent activities. The primary method, as seen in chapter two, consists of intensive through which the probation officer not only comes to understand the probationer but the probationer, to understand himself<sup>15</sup>, and thus can carry on normal and societal acceptable behaviour on his own.

Therefore, probation may be thought of as the application of modern, scientific casework to specially selected offenders. It is actually only those offenders whose cases have been investigated and found to meet the requirements of favourable progress set up by a particular court<sup>16</sup>.

Thus offenders placed on probation may be thought of as specially selected and placed by the court under the personal supervision of a probation officer and given treatment aimed at their complete and permanent social rehabilitation.

AUTHORITARIANASPECT

This is reflected in the conditions as laid down in the probation order as was shown in chapter two. The probationer is given rules that he must comply with. He is warned that if he does not comply he would be informed and the suspended sentence be imposed on him and executed. So this in itself compels the probationer to comply. The section in the Act <sup>17</sup>.

- (1) " If after hearing information on oath it appears to a judge or magistrate that a probationer has failed to comply with any of the provisions of the probation order, he may issue a summons to the probationer ... or may issue a warrant of arrest...
- (2) If it is proved to the satisfaction of the court ... by which the probation order was made that the probation has failed to comply with any of the probation order, then,
  - (a) Court may ... impose on the probationer a fine not exceeding Shs. 200/- or
  - (b) The court may convict him and pass any sentence .....

A good illustration of this is a case from Kibera DM II court. I do not intend to disclose the names of the probationers but rather to use fictitious ones. This is because some of the probationers are still reporting and could be detrimental to them or even to the service, further, the probation officer specifically of interview through which the probation officer act of

comes to understand himself.  
instructed me not to disclose any names, otherwise the cases themselves are not fictitious but gathered from the files available in the probation officer !

In the case of Wanjau, aged 26 years the DM II in Kibera and the probation officer had done her investigation and found Wanjau a suitable case for probation. Wanjau was charged with assault causing actual bodily harm under section 251 of the Penal Code. He was placed on probation for one year. He went with the probation officer to the latter's office so that he could be explained the conditions again and be issued with a booklet. Before this was done he (Wanjau) told the probation officer that he wanted to go for a short call. He disappeared and never come back at all. A warrant of arrest was issued but he was not traced.

However Wanjau, sometime later, was brought to court on a subsequent offence. He pleaded guilty and was sentenced to one year imprisonment with six strokes and another one year and two strokes for the breach of the probation order. The sentences were to run concurrently.

So the probation officer is an agent of the court and I could even suggest of the police as will be evident in cases below. Thus its not surprising that in our society probation officers are seen as policemen in plain clothes.

#### THE GUIDANCE ASPECT

This is where the real work of rehabilitation lies. The law requires, as seen above, that during the period the offender be guided or assisted to adjust to the norms of society and to become a law abiding citizen. The preliminary method consists of intensive interview through which the probation officer not only

comes to understand himself.

An identification with the probation officer then helps the offender emulate his behaviour until finally the point is reached where the probationer becomes independent of this identification and can carry a normal and socially acceptable behaviour on his own as was pointed out above.

Operationally, probation is primarily a process of verifying the behaviour of the offender, firstly through periodic reports of the offender and members of his family to the probation officer.

A good illustration of this is the case of Muthoni who was aged fourteen (14). She was charged with being in possession of chang'aa Act, she was from Kawangware village, she was an illegitimate child and still in school. When she was placed on probation her mother signed a surety and went with her to the probation officer to report and for interviews.

Secondly, by the incidence of absence of adverse reports from the police and other agents, secondarily probation is a process of guiding and directing the behaviour of an offender by means of intensive and guiding.

An illustration of this is the case of Onyango aged 21, who was charged with theft (x of a radio). When he was arrested and as the case was going on he lost his place of training at the Medical Training Centre in Nairobi, so when he was placed on probation there were a lot of problems as to his going back to complete the training. He was disturbed and anxious. The probation officer advised him to go and see the head of the Medical Training Centre and actually helped him along by encouraging him and giving him advice on how to go about it, the boy was reinstated and is still doing well in his training.

THE VIEW OF THE APPROACH

The clinical approach to psychiatry and casework views the individual offender, or his behaviour as abnormal such behaviour may reflect the character of group life. Given particular patterns of life, criminal and delinquent may be the type of adjustment to those patterns one could expect !

It may even be said that this approach or treatment of crime reflects the fact that the offender or the criminal has not committed the offence voluntarily or for the sake of it but rather that there are certain other factors which have contributed to the fact or offence. So probation tries to rehabilitate the offender by having him in that very society from which he has been " uprooted " by the offence and trying to help him cope with the factors within that society.

This can be illustrated by looking at the causes of offences as viewed by the author and giving illustrations of cases of those placed under probation. A study of causes of crime is vital if one is going to launch an effective to be imposed.

THEORIES OF CAUSATION

There is one single cause or crime that can solely and independently be taken to be the cause of crime. All contribute to explain causation though at unequal magnitude or degree.

The popular views of causes of crime in Kenya ranges from unemployment to impact of the overall economic as well as political system. Some people are of the view that unemployment is one factor to blame. In Kenya population growth has been projected to 3.3. to 3.5 % per annum. While wage earning employment grows at 1.9 % per annum. The position is worse now, with inflation and

and the economic crisis. In regard to this problem a commission of the international Labour Organisation ... Report has stated "As long as divergent growth rate continues the prospect of growth unemployment in the future seems inevitable"<sup>20</sup>. Lack of employment causes or creates a task for these people to get a means of income once these people loose hope of being employed, they turn to other illegal means since they have to survive somehow.

In the above, mentioned case of Muthoni, she is an illegitimate child, the mother is unmarried with nine children of different fathers. The offender is the sixth child and in standard six. Two of the younger children attend school in class two and three, this mother has to feed the children since only one of them works as a casual labourer. They all live in a rented house where she pays Shs. 150/- per month.

The probation officer in her report said that this woman seems to be a chang'aa brewer and seller.

The offender say that she decided to go and buy chang'aa for sale on her own. In any case this is the way the girl has been brought up. So can we really blame her or even her mother? I think not, since this is only the way she knows of earning a living. Even if the mother were to get a job, being illiterate her wages would not be sufficient. So she has to sell chang'aa regardless of what the law says since social forces are damn strong against her.

There is also the case of Judy who was placed on probation for twelve months. The offender's husband, who had been working as self-employed shoe-maker, was reported to be in remand. They have four children ranging from one to nine years of age. They are from Western Province where they possess only half-acre

piece of land. They were living in a single rented room.

Since the husband, then in remand, was the only breadwinner the lady had no food for her children. She was unemployed so she bought chang'aa with the little money she had so that she could make a profit to keep the family going. It was reported that she seemed to have realised the seriousness of the offence and promised she would not repeat it in future.

But realistically the woman had no better alternative. She was jobless. She could not go back to Kakamega on the half-acre of land which could not in anyway be enough to settle on. Somehow she had to feed the children and the easiest way was to sell Chang'aa which is lucrative business.

The seriousness of unemployment and hence its contribution to criminality is reflected in the economic position in Kenya. It has been said that economic growth of Kenya stands between six and seven per cent and cannot generate enough jobs<sup>21</sup>. Many school leavers every year are making this problem more and more acute. Even employed people still commit crimes to supplement their mere earnings<sup>22</sup>.

This I could refer to as the "illicit means" theory. Our society with its strongly democratic and egalitarian emphasis, indoctrinates all social classes impartially with a desire for high social status and a sense of ignominy attaching to the low social status. The symbols of high status to an extra ordinary degree is the possession and conspicuous display of economic inprecedented in other societies.

However the means and the opportunities for the legitimate achievement of these goals are distributed most unequally among the various segments of the population. Among these segments

which have the least access to the legitimate channels of "Upward mobility" there develop strong feelings of deprivation and frustration. Therefore there is a strong incentive to find other means to the achievement of status and its symbols. Unable to attain their goals by lawful means, these disadvantaged segments of the population are under a strong pressure to resort to crime, the only means available to them, at least to get the basic necessities of life as illustrated by the cases above.

Crimes can also occur due to "cultural conflict" as formulated by professor Thouston Sellin in the late 1930's<sup>23</sup>. This is where the cultural norms conflict with each other because of cultural mixture and contact. Some of the behaviour patterns may be defined as deviant by the superior cultural group and thus be defined as crime. Supporting this theory T.M. Mushanga in his book says "Since laws are supposed in general, to reflect the basic social values of the society, conflict in values of the society. Conflict in values of different cultures inevitably leads to one set of values, usually the subordinate culture, being defined as deviant... many countries in Africa.

Criminal laws that were made purposely to benefit the economic expansionists...<sup>24</sup> It has been statistically shown that this cultural conflict leads to a lot of problems in the law especially in the cases of juveniles in urban areas. Their parents were brought up in a total different way of the human environment and culture. In towns differences occur, so the children and grown up becoming mixed up. It has been said and appropriately so, any given year, a minimum standard for the cost

" Many of the issues that determine the fate of a child in many society are essentially economic: the financial resources of his parents, the health and educational facilities available to him and the later prospect of employment."<sup>25</sup>

Take the case of Buliva aged 30 years which illustrates the effect of a poor background. The offender's father is a polygamist with three wives. The accused's mother is the senior wife in the home and the offender is the first born in the family of four. His brother is undergoing training in Nairobi another works as a house servant but his younger sister stays at home with her parents. He was sent to school and sat for certificate of primary education in 1963. But he dropped out of school due to lack of school fees. He was charged with having broken and entered an office and stolen one imperial typewriter and two mattresses, property valued at Kshs. 1,500/- He worked for the complainant from 1973 - 1974 as a watchman, he was aware there was no watchman and so he opened the office door from inside and took the property in question. He wanted to sell it so as to go home and marry. So the poor man had dropped out due to the family's financial position and so this deprivation continued and ended in having to commit an offence and finance his needs.

Criminality can also be attributed to poverty. This is an economic explanation of crime. It has been statistically shown that the highest rate of criminality in Kenya is within the low income group.<sup>26</sup> Poverty may be defined to mean earnings insufficient for the maintenance of bodily health or basic human necessities. But taking the expenditure needed in a given family for food, rent, clothing, fuel among other things it is possible to calculate for any given year, a minimum standard for the cost

of living, which may conveniently be termed the poverty line marking the margin of a bare existence.<sup>27</sup>

However, no class of society is exempt from crime, the rich, the poor, the educated, the illiterate are all subject to it. In the upper bracket you can give smuggling as an example especially during the "Coffee era" or the Chepkube days. The only difference is that the rich have a way of getting away with it.

<sup>28</sup> Karl Marx, felt that crime, prostitution and moral evils were primarily due to the poverty produced by the general maldistribution of wealth and the inevitable class struggles.

Criminality has also been said to be a symptom of, or a method of coping with, some underlying problem of adjustment.

The criminal has insecurities, anxieties and so forth which have something to do with irresponsible parental care, belonging to despised or poverty stricken class, discrimination and suppression by family or society, being a moral or social penal code and so forth.

Felly was charged with stealing under sec. 275 of penal code; one female dress, one pullover the property of Jane.

The offender was first born in her family. The father was working with the Kenya Army for twenty years before he retired in 1975. The parents separated in 1972. He went and sold their 12 acre piece of land in 1974 when he left the Army, he became a chief; Kapsabet town but was relieved of his duties because of over indulgence in Busaa. He went to Molo and later Kiprumo where he lives with his sister. Maina who is only seventeen years old. He is from a polygamous family and his mother is the second wife. The latter works at a

On separation, mother of the accused worked hard to ensure that her children secure good education and engage in informal business. When the offender reached fourth form in 1972 she did not complete her education but vanished until she was arrested and charged with the above offences.

On being interviewed the mother said that her daughter used to spend her school fees whenever she could be given. She had fallen into bad company. The accused said that she bought the alleged clothes from a tailor at some market in Nairobi not knowing they were stolen.

However, the girl was put on probation. But it is obvious that the girl came from a broken home where the parents disagreed in the middle of her education and she ran away from school. She could not even keep a job and on investigation it was found that she had worked in various firms. Thus the problem here cannot wholly be attributed to her but rather her upbringing which contributed to her later life. She even seems like a social misfit.

I am of the view that her anti-social behaviour assuming she stole the clothes and her inconsistent behaviour is a disability to identify herself consistently, resulting in a sociological dualism that casts doubt in her mind as to what she really is and disrupts the achievement of balance and stability in character.

There are times when crimes are committed by young children just for fun, or in showing solidarity with their friends or just being mischievous. This was illustrated by the case of Maina who is only seventeen years old. He is from a polygamous family and his mother is the second wife. The latter works at t

Industrial area while the accused is still in school and he is an only child.

Maina admitted the offence. He was charged with assault causing actual bodily harm under sec. 251 of the penal code. But he said it was unintentional. There was a school friend of his who fought with the conductor. So Maina took a stone and hit the conductor. He was placed on probation and is still going on with his education. Now he is in fourth form. The probation officer's reports that he is well behaved even at school.

#### REHABILITATION

The Kenya Penal system is aimed at rehabilitation of the offender. This involves the change of the offender's belief and others as to the wrongfulness of crimes. Probation aims at teaching offenders to become habitually law-abiding citizens.

The approach gives attention to the root causes of crime which in most cases are outside the criminal or offender that is, economic or environmental factors. Since the offender is being rehabilitated within the society, probation is articulated not only with dealing with the criminal person but also at creating social security and harmony by eliminating criminality within society. Crime is an enemy of social integrity which is achieved through harmony with the members of any community. Though its impossible to wipe out crime in total, at least we can hope to regulate or control it, by maintaining it at a very low level.

This position is even made more explicit by the penalties among the pre-colonial societies as seen in chapter one. The penalties whether punitive or by way of compensation were

directed not against specific infractions but to the restoration of equilibrium. The central concept within the African system was the reconciliation of the two parties. Contran talking about the Bunyoro in Uganda said.

" There is no aim to " punish " a wrong doer, though penalty can be imposed; rather it is the object of the proceedings to dispose of quarrel between members of the community and to reinstate a wrong-doer into the community<sup>29</sup>".

I do not dispute the fact that in every society there is a need to protect the interests of the group and thus a requirement to a system of laws which states the accepted behaviour or conduct amounting to a crime.

The law provides various sanctions as punishment to wrong doing as seen in sec. 24 of the penal code. One cannot help noticing that this is all borrowed from the English system and it is therefore my contention that we develop criminal law suited to Kenya embodying principles based on our social - economic conditions. Thus we should aim at being original in formulation of our sanctions to cater for our needs.

Probation comes nearest to this, since it tries to reconcile the individual selfish wants with the general social interests. This aims at both treating the causes and the crime concurrently.

There was the case of Mwikali who was put on probation for one year and completed satisfactorily. She was charged with theft under sec. 252 of the penal code. The accused parents are alive. She was then 25 years old and had two illegitimate children. On investigation it was found that her employer was willing to take her back and so she was released and placed on probation.

When she came out she started operating her own business buying foodstuffs from Kinangop, bringing them to Nairobi for sale. She even rented a farm where she said to be doing very well. The probation officer, as deduced from the records, encouraged her all along, though as would be expected it was quite difficult. She is now supporting her children and her parents.

Is this not the kind of thing we should really aim at whereby the offender is helped to adjust and to live within the given society? She is also shown that there are other means of surviving through hard work which are legitimate and which will not land her in jail.

I strongly contend that an offender should not be subjected to punishment in the name of treatment. The penalty given for a crime should always be evaluated in the light of the weight of the crime in question. Only offenders who are beyond hope of correction should be taken to prison.

According to R.A. Watson, Professor of psychology and law of the university of Michigan,

"Punishing criminals gives the society the opportunity to get even, but it is not to serve the problem. The urge for retribution is biological and we cannot deny it, but retribution is dramatically opposed to what we should be trying to do in a civilised society - deter and rehabilitate. Prisoners are entitled to certain rights especially the right not to come out after a few months or years release him. There must be an assurance that the prisoner will come out a better person than when he / she went in."

When punishment is inflicted there is a guiding presumption that the convict acted wilfully, voluntarily of intent. As has been observed above in some cases a person is unable to resist the criminal forces which induced him to commit a crime. So then why imprison someone like that rather than enable him to control the forces ?

### IMPRISONMENT

Let us look at imprisonment briefly to drive the point home. This is alien to Kenya as was observed in chapter one. It is one of the various custodial sentences in Kenya, aimed at rehabilitating criminals ! This involves confinement of a person from the time of conviction to that of discharge from prison. So one is deprived of his liberty, compelled to remain where he does not want and go where he does not want to. Imprisonment as a form of handling offenders originated from an interest to put an end to inhuman brutality that was characteristic of punishment in Europe. It was a replacement to what was known as Lex Taliens of the law of Moses which was a guiding principle advocating an eye for an eye, a tooth for a tooth etc. So it marked a development in the penal system.<sup>31</sup>

From various researches<sup>32</sup> imprisonment seems to have failed since it does not investigate an offenders life status and especially the circumstances surrounding the commission of crime in question. The causes of crime must be eradicated.

If the criminal will be affectively treated. It is not enough to put a criminal behind the prison bars and then after a few months or years release him. There must be an assurance that the prisoner will come out a better person than when he / she went in.

The in-mate is denied his liberty, freedom of what he eats, wears or reads. He is deprived of his sexual gratification or his rights of consortium in case of a married convict. So he is physically and psychologically tortured. This kind of environment can not really make a prisoner have self-respect. It destroys his confidence in life. He sees himself as a social outcast and a failure in life.

The skills provided by the training programmes in prison are just temporary solutions. It is futile to give farming training to someone who has no farm, that is, an urban resident since he / she has nowhere to put his skills into practice on being discharged.

This becomes even more absurd as it is given all inmates irrespective of their crimes or sentences. It could only make sense if there would be a follow-up programme. Ex-prisoner with no employment ( self or otherwise ) should be employed by the government in areas of their specialization.

There was the case of Philip Makas<sup>33</sup> which shows how offenders are made to suffer extremely and unnecessarily for very trivial offences. The accused had attacked a man in Nairobi street and stolen from him Kshs. 7.65 and a piece of paper. The jail sentence given was extremely unwarranted seven years in jail and further police supervision for five years on completion of his jail sentence. This could only cause him bitterness against the society which deprives him of means to earn a living. The on top of the jailing him or punished him excessively.

FOOTNOTES : CHAPTER THREE

Further, the prisoner is even denied the fundamental rights which are accepted by our constitution. The right to privacy<sup>34</sup>, Rule fifty seven<sup>35</sup> provides,

" A prisoner on being visited, the police officer shall be within bearing distance and in case language is different, an interpreter must accompany such an officer ".

This is real violation of human dignity.

In an article recently, with which I strongly agree unless a prisoner is dangerous, meaning he can attack with intent to main or kill, there is no reason why prisoners should be modelled on a cage system.<sup>36</sup>

So as far as I am concerned prison can never provide the conditions needed for genuine moral improvement or in the case of mentally affected effective psychiatric treatment. The later is vital for prisoners ( or even persons ) whose problems seem to be more emotionally orientated. The government should intensify the teaching of psychology and mental health especially to all types of prison workers to help deal with prisoners. Otherwise any efforts at reformation in prison is not only a futile exercise byt a waste of valuable human resources available.

Actually this is all the more reason why I advocate probation as an important way of rehabilitating an offender since its done within the society from which one is considered to have been uprooted.

13. Supra P. 448

17. Probation of offenders Act. Cap 62, Laws of Kenya.

18. LEWIS DIANA, Supra P. 449

19. SUNGAI NATION, March 28th 1976, Article entitled " Bank robberies a startling new menace in Kenya" P. 28

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CHAPTER IV.

PROBATION

In this final chapter it is my intention to critically look at the service and examine the effectiveness of the same by looking at the cases, some of which I discussed in chapter three. This will be an attempt to look at the head-way make by the probation officers in the effort to rehabilitate. It is from this that I will proceed to make my recommendations and draw the conclusion to this desertation.

A Critical Look at the Probation service in Kenya.

Supervision records from the Kibera court seem to have been well kept by the probation officers (three). Thus a number of booklets and files were available at their office. Entries in these files were safe and none of the files studied had missing pages. Copies of the returns submitted to the headquarters were available and safely kept. Therefore the "paperwork" aspect of probation at Kibera court was good.

However, a careful and detailed scrutiny show that the officer have a host of problems to contend with and which, one can safely say, inhibit proper supervision.

1. Some probationers are unco-operative and give the officers a hard time tracing them and asking them to report. Others do not report regularly. For instance there was the Case of Akinvi who had been placed on probation for two years. The probation officer had managed to get a job for her as an office messenger.

Kisumu. She reported for one year, then got involved with some General service unit men and later went to Uganda.

This lady failed to report when she was supposed to and the probation officer had to go and look for her at her place of work. The officer went and found the lady, Upon being asked why she had failed to report she said that since it was over christmas she could not have reported and, in any case she had wanted to give the officer a christmas gift. But since she did not have it she decided not to report. This was interesting and it was not the first time she had failed to report when she was required to.

In some cases there were warrants of arrest applied for from the court. So the probationers were taken to court and warned before reporting could continue. At times the probation officers even went to the extent of asking for the extension of the probation term but the officer felt that an extension would be good for such a probationer. <sup>Section</sup> 8(3) of the probation of offenders Act provides.

"If it is proved to the satisfaction of the court by which the probation order was made that the probationer has failed to comply with any of the provisions of the probation order, then (a) without prejudice to the continuance in force of the probation order".

A good illustration is that of a case where a lady Rose, an adult who was placed a probation for two years. The mother is a business woman while the father has retired from his job and left for Busia where both parents live. She refused to join her parents at Busia but went to Kisumu and her probation order was transferred to Kisumu. She reported for one year, then got involved with some General service unit men and later went to Uganda.

She came back, by which time a warrant of Arrest had already been issued. Then she had got a job with the ministry of water development. The file had been sent to the probation officer at Nairobi by then. So she came to Nairobi and was arrested and taken to court.

The officer said she could, if the court agreed, continue with her probation term. The lady told the court she was sorry and that she be placed on probation so as to continue helping her family (She has a child). The magistrate agreed and she was placed on probation for a further two years. So, it all added to three years. She is so co-Operative now especially after the court warning and having been put in remand for some eight days.

2. The department is also beset by transport problems. So at times on probationer failing to report it takes a very long time before the probation officer can make a home visit to find out what happened. Thus it takes longer than necessary for the probation officer to meet the probationer.

In Nairobi, there are only two vehicles while there are about fourteen probation officers, at times. So the officers at Kibera court check or go to court twice a week while actually they should be going more frequently since the court handles very mainly cases. The court services many police stations, some of which are Kilimani police stations, Langata police station, Ngong police station and spring valley police station.

3. The transfer of cases or staff from one probation office to another in the course of supervision can affect the service adversely. This is because it takes time before the new officer comes to know his new probationer well enough to render some useful conselling.

Then there were two probation officers. In 1980 there were  
This is at times made even more difficult by the conduct of the  
probationer.

There was the case of JEREMY, a boy of about seventeen, who  
was placed on probation. He asked for a transfer to his home area  
at sotik. So an introduction letter was sent to the officer there  
and the file. He stayed in Sotik for about two months and came  
back to Nairobi and is here now. He went to the officer at Kibera  
and said that he came to look for a job and is living at Caledonia  
Shopping Centre with relatives. The documents are still at Sotik.  
How effective is this kind of transfer? The officer at Sotik had  
barely known the probationer for two months and so had the officer  
from the Kibera centre.

A. At times there can also arise the problem of language when  
the officer is doing his investigations (enquiries). It so happens  
the client can only communicate in a given language, for instance,  
Kalenjin. So the officer has to use the remand officers, remanders  
or other people to do the translating. So there is a kind of  
barrier.

As times when the probationer comes to report, especially in  
cases of married women, they come with their husband, so then the  
only bridge between the probationer and the officer is someone  
else. This I think is detrimental and does not really make the  
supervision as effective as it should be.

5) The case-load is also another problem. This can be seen from  
the enquiries and the Number of officers over the last three years.  
In 1979 there were about ninety enquiries and only fifty nine  
people were placed in probation.

Then there were two probation officers. In 1980 there were a hundred and seventy nine enquiries and then there was only one officer at the court. In 1981 there were two hundred and fifty-one enquiries with only two probation officers at the court. This is made even more complicated because in most of these enquiries the information is obtained from other areas outside Nairobi. Therefore the officer has to contact his counter part in that area to carry out the enquiries or the investigations. The case load at present is about fifty, which I consider to be heavy. Thus making court enquiries, returns and supervising a heavy work-load at the same time is a difficult task indeed. Further there is still more work to be done in connection with Bostal enquiries and psychiatric cases to be dealt with among others, as seen in chapter two. So Logically much of this boils down to paper work with little supervision.

However, the above criticism should not be construed to mean that the officers did not do their duties as required. It has only been an attempt to look at some of the problems the officers face and as will be observed later, the officers did very commendable work with which I was impressed.

#### Effectiveness.

In most of the cases in chapter three, we saw an illustration of people who continued with their responsibilities on being placed on probation. In the case of muthoni, who was charged with possession of changaa contrary to section three of the changaa Act, it is noted that she continued with her schooling and she is doing quite well. The same applies to Maina who is now in form four.

It is also noted that others were able to retain their jobs and thus continued catering for their families. This is an indication that probation in the course of supervision managed to rehabilitate the offenders. Take the case of Makhdia, in chapter 3, who retained his job with the Kenya National Library Services.

There is also another interesting case of Waitherero. She was aged twenty two and was charged of Assault causing actual bodily harm, which is contrary to section 251 of the penal code. She admitted having committed the offence freely. She stated that a quarrel started between her and the complainant. The two had met in a boyfriend's house. Waitherero took some tea which was boiling and poured it over the complainant. However, she said she was sorry about it and was placed on probation for two years. She was reinstated in her job and works with the city council of Nairobi as an Askari. The probation officer said she was a good probationer. Thus she says she is now able to control her temper and actually promised never to repeat the offence.

I would like to observe that when it comes to assault at times it happens due to provocation. There might be a lot of damage done but later the Assailant realises he/she has done wrong. Am of the view that by confining such people you are not helping them control their tempers or act more rationally next time. Even if it is a fine they are just left with a kind of bitterness. So when placed on probation by counselling the probationer is actually being helped or rehabilitated in the society. He is kind of being instructed on how to control himself and live in peace with others.

As was observed in an earlier chapter on completion, the cases are marked either "Satisfactory" "Unsatisfactory" or, (Where one has, "Absconded", From the reports which I gathered over the last three years my overoll view was that probation service has been doing very well at Kibera court cases as a whole. This goes to show that the officers can make rational decisions on suitable cases for probation . Lets look at this over the last three years. In 1979 there were thirty three satisfactory completion, no unsatisfactory completion or absconding. In 1980, there were thirty four satisfactory completions by adults, two by juveniles; one insatisfactory completion and three abscondings. In 1981, there were nineteen satisfactory completions (this included six Juveniles), two unsatisfactory completions (one adult and one Juvenile and one absconding (a Juvenile). I have attached this as Table A to this chapter.

To add to this there are also ecological factors, climate, home background and the dominant economic activities of the area which have a lot of bearing on the level of Income of a probationer. This in effect means that if a probaționer gets a job and can manage to carry on his respond positively.

It was my observation that in most cases where a Probationer had a job or good family backing actually it helped to get him rehabilitated. So the effectiveness of probation is at times determined by other factors which come into play.

The effectiveness was also to a certain extent determined by the attitude of the probationer. As was observed above, at times the Probationer may be just too, unco-operative. One of the probation officer at Kibera court, Mrs. Khaemba, said that most of these unco-operative probationers are the ones who actually commit (probationer order) breaches or if not they commit other offences and are jailed before their probationer period has expired.

However it is difficult to know what happens to the probationer after the period expires since there is no follow up. But the officer informed me that most of the probationer she had supervise over the period she was at Kibera were doing fine. She says she meets most of them around and they are quite grateful, so that some have become friends. But there are also cases where she meets her former probationers at remand or ever in jail-which is a case of recidivism.

Therefore, when it comes to effectiveness it can only be looked at from the previous cases in chapter three. So that we find some of the probationers over that period get rehabilitated. There is the case of Mwikali who became a business woman and she is doing well supporting her children. She is an unmarried mother.

#### Recommendations:

The department, as was indicated above, is beset by transport problems which makes the work of supervision difficult. Visiting a probationers home during the course of supervision is an integral part of rehabilitation strategy.

However, I realise that this is an intricate problem in that transfer of cases are done when the probationer asks for it or the officer feels it would be better if he was rehabilitated for instance, in his home area.

It enables the officer to deal with the client in the context of the family. It is by visiting the family or the home that one gets to understand the probationer's problems and thus meaningfully formulate methods of assisting him. But relying solely on verbal reports of the office might be misleading. It is then difficult to know whether or not the probationer is telling the truth concerning his problems at home. I am of the view that one has to deal with the probationer at close quarters and not at a distance, so as to be able to rehabilitate him.

Therefore, I submit that the department should be provided with more vehicles or means of transport. This will be quite helpful because then the office can make home visits any time he/she wants which makes him/her find the probationer at home and when he is his real self. Reporting can give rise to a lot of pretence.

The transfer of cases is also a problem which needs looking into. As was observed earlier it is inconvenient and inhibits rehabilitation. At Nairobi province there are presently two special officials dealing with transferred cases, that is, those transferred from other places to Nairobi.

The position could be further improved by adding more officers or even better by arranging about transfer of probation officers early. By this, let's say a year, the probation officer to be transferred will deal with cases of short-term for instance six months and complete the one's he has. If the period is longer they are given to other officers staying longer.

However, I realise that this is an intricate problem in that transfer of cases are done when the probationer asks for it or the officer feels it would be better if he was rehabilitated for instance, in his home area.

But the heart of the matter is there should be better ways of handling transfers of staff and cases.

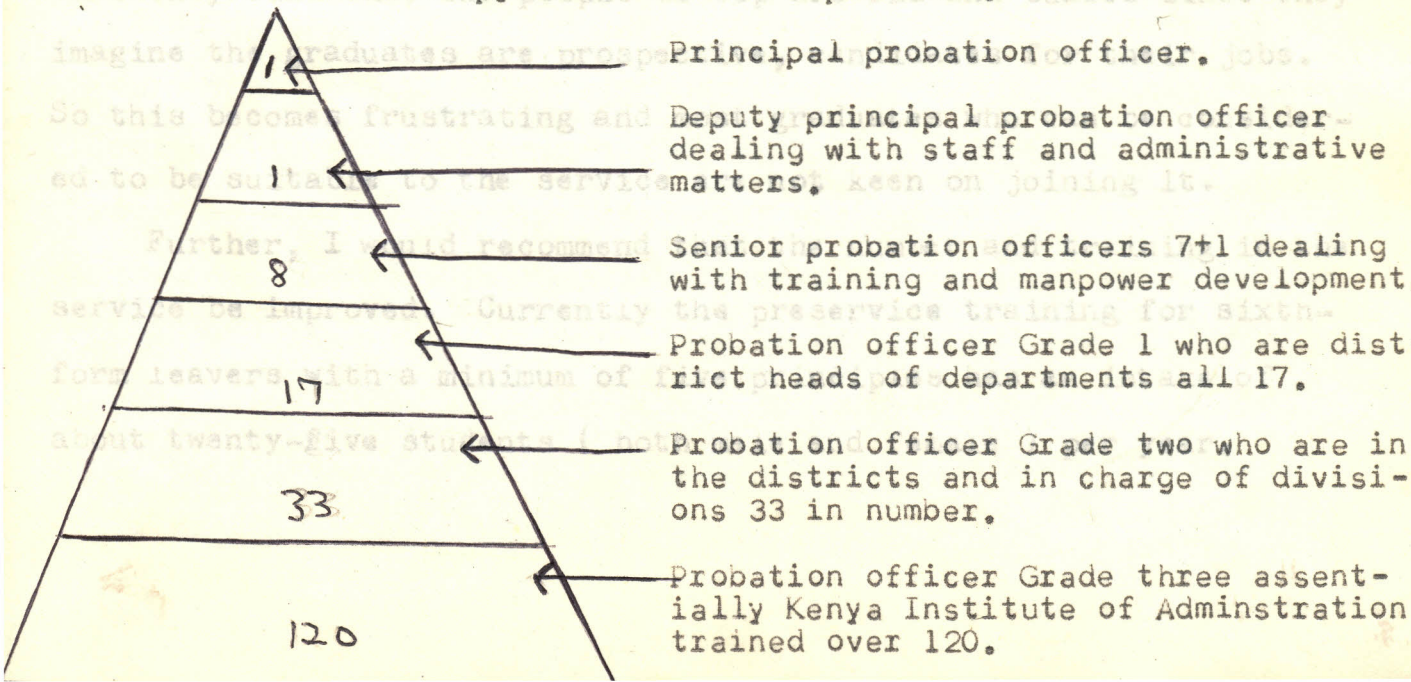
The problem of language needs attention. This can be by assigning officers who know a given language to a probationer who speaks that language. Conselling can only best be done through communication and if this is lacking then it is an impediment to rehabilitation. In a place like Nairobi, one would expect to find that most people know Swahili at least, and that communication is easy. But this is at times not the case. Since these situations are comparatively rare then the assigning of probation officers who knows a give language should not cause a lot of problems.

Alternatively, the probation officers should be encouraged to learn different languages as a part of their work, especially those spoke by many people in a certain area eg. Kikuyu, Luo, Luhya etc.

The case load problems is a touchy one. In Kibera court two of the three officers are handling sixty-seven and seventy eight cases respectively. So conselling becomes a real problem in such cases since only a little time can be afforded for each probationer.

But this problem is broader. The service is understaffed.

There is a kind of pyramind in the department.



The people who do most of the work of supervision are probation officers grade two and grade one. So we find even probation officers grade one who are supposed to be dealing with mainly administrative work are still dealing with supervision due to the inadequacy of probation officers grade three who should be dealing with supervision and release the probation officers grade one.

However, I would recommend that the proposed scheme on service be implemented so as to reduce the bulging at the bottom and the sharpness at the top. The recommendation is that probation officers grade two and grade three, enter the service as graduates and Kenya Institute of Administration training respectively.

The latter are from six school leavers who go for two years training. The other position in the service should also be considered and given on merit accordingly.

This would be better and make the service more attractive to the graduates, who refuse to join the service since they find the upward mobility unattractive and too competitive. The latter due to the fact that those already in the service have acquired knowledge of how to deal with probation while the incoming graduates are yet to be acquainted with it. Further the graduates claim that they find that the people at top are old and biased since they imagine the graduates are prospective candidates for their jobs. So this becomes frustrating and most graduates who can be considered to be suitable to the service are not keen on joining it.

Further, I would recommend that the number and training in the service be improved. Currently the preservice training for sixth-form leavers with a minimum of five principles has an intake of about twenty-five students ( both male and female ) per year.

This number is actually very small and should be increased so as to make the service adequately.

The training itself creates problems. The society must act alot of resources both human and material if the service is going to be effective at all. One of the most necessary pre-requisites for its effectiveness is the availability of well-trained and qualified personnel to do the actual work of guidance.

There is a need to have well trained psychologists and sociologists who are social workers. They must have experience and be keenly interested in the welfare of man in society. They must be resourceful, inquisitive, initiative, considerate, patient. fair and honest. These qualities are very rare and only helps to demonstrate the difficult of the work.

Thus am of the view that the probation officer has even to be more qualified than the magistrate who places the probationer on probation. It is the probation officer who has to diagonise his problem and find a cure. So the whole process of rehabilitation result with the probation officer solely.

The officers are taught too many subjects in too short a period. They are expected to master sociology, psychology, law criminology, probation, Economics, Social casework, social group-work, social welfare and administration, Community development, survey methods, history and Government of Kenya, adults education Health education and nutrition, English and Swahili. They are also expected to go for field work within that period. So each item is covered superficially to keep things going and thus the course leaves alot to be desired so as to equip the officers adequately. The training should be improved. It can not be disputed that the subject taught are good but more time should be made available to its teaching.

The department is doing its best and we find that they are presently recruiting Bachelor of Arts students from the University of Nairobi; who have mostly taken sociology and mainly psychology. These adequate education wise but currently the emphasis is a Bachelor of Arts social workers. These students are said to have been training Professionally and for a purpose. They undergo an induction kind of course. They are told what the department is all about and seconded to probation officers already in the field. After three months they are released and given assignments. Thus there is a kind of orientation their part and they don't have to go to the Kenya Institute of Administration for a two-year residential training. Am of the view that if this was further expanded and the proposed scheme, above, was put into operation then the service would be better equipped.

There should also be an expansion of in-service courses, this is normally arranged by the department but the Kenya Institute of Administration provides the facilities, for instance, teachers subject catering services and so on. The atmosphere at the Institute is mutually motivated to undertake the activities effectively.

These are workshops, seminars or kind of refresher cases. There have been two already and this should be expanded to equip the staff in the department.

The programme consists of lessons as will be indicated in the Time-table attached here Table B. This is on the five week workshop currently going on at the institute and ending on 4th June 1982.

The service does not at present have a after-care arrangement. That is, a program<sup>e</sup> whereby the Probationers who complete their probation periods are followed up to find out how they are faring. This means that at times it is really difficult to ascertain how effective the Probation term has been. Am of the view that if there was such a program, it would help the department in that it will be in a position to know whether the probationer was rehabilitated and if not, what actually went wrong. So it means that when dealing with Probationers they will be able to learn from past mistakes.

As was seen in a previous chapter crime is contributed to by both economic and social factors. Currently there are serious ~~problems~~ problems. To "cure" a crime, one need not only know the cause but also have a remedy to the same. Thus, when one is placed on Probation and he is jobless, actually this might not help and he might end up committing another crime. So I would recommend that Probationers with no employment (Self or otherwise) should be employed by the government in areas of their specialization in the public sector. For instance, the government could start factories or farms where they could be absorbed. If they are not specialized then they ought to be taught some skills and offered jobs. This not only helps the probationer himself but he is able to look after his affairs and family properly. He is actually being put back in the social public and rehabilitation in that case is actually a reality.

CONCLUSION.

Mr. Kibaki recently observed "The real test of any correction system is not simply what goes on inside but what happens when the offenders came out"<sup>5</sup>

When we take her to prison we have actually brought twelve more offenders to the society. Those children have been left without someone to care for them. Its only logical for them to turn to parking boys and girls, or even steal so as to survive. Have we then solved the problem and is this what we should be doing in the name of justice ?

Its not surprising therefore that in a survey published in July by the Nation Institute of crime prevention and rehabilitation it was indicated that Kenya was one of the seven countries in the non communist world with the highest per capital prison population. The survey gave Kenya's figure as 165 prisoners for every 100,000 population <sup>99</sup>.

It is the duty of the state to do what can be done to enable criminals to resume normal life, to give them psychological treatment if necessary, to retain them for suitable occupations and so forth.

Its my view that the criminals have the right to be given such aid as it possible to enable them to live useful lives. The reformative approach has proved of value, especially in the probation service by directing attention away from punitive to non-punitive methods of dealing with crime.

Probation has served to bring home the necessity of obtaining fuller knowledge on the question as to what extent criminals can be re-educated and by what methods. It has also stimulated inquiry into the psychological effects of different types of punishments on those whom they are imposed-probation has been shown, in chapter three, to be a more effective way of rehabilitating an offender.

This can be said to have contributed to changes in the law which makes it possible for courts to avoid sending first offenders to prison to ensure that young offenders should not be sent to the same institutions as adult criminals. So they can be placed on probation even if they are adults.

So, in reform the real question is whether punishment as such is reformative. It is doubtful whether prison can even provide the conditions needed for genuine moral improvement or in the case of mentally affected, for effective psychiatric treatment. So in most cases punishment may not only fail to effect a cure but may bring about a state of affairs likely to prevent a cure.

Therefore, unless an offender is dangerous, meaning he can attack people with intent to main or kill, there is no reason why prisons should be modelled on a cage system. I am of the opinion that there should not even be any justification for sending a person to prison where you intend to punish and not reform him as it should.

In any case, a prisoner with the tendency to harm a human limb is most likely to be a lunatic, but then a mental health centre is a different thing although not quite a different thing because here human conditions are also necessary.

In prisons the conditions are harsh and they are likely to bring resentment against authority in the minds of the prisoners, and this attitude could also be anti - social in nature. Such sense of hostility is likely to become more pronounced especially when the offences involved are of minor nature. So, in that case the justification of a prison sentence being protection of society against crime is really false.

Our prisons simply do not have enough facilities to enable the system to be reformatory rather than punitive. We just do not seem to have the resources to handle such a big prison population as is indicated above.

Therefore we should cut down the number of our prison population by introducing other forms of rehabilitation, the best of which is rehabilitation in a community under the supervision of probationary officer.

We need more qualified staff for the probation service. For instance, more graduates with the relevant knowledge for instance psychologists, sociologists, like it happens to countries like Britain. The government should more seriously consider probation and its various problems. It should make its immediate concern solving of the department's problems. The side effects of this are obvious, less people will go to prison, more people will therefore become law-abiding. In this the government can be helped by taking the traditional view of crime.

The work of rehabilitation or reform should be a kind of state affair not aimed at punishing but rather making people realise where they have fallen short and amend their ways in this way we do not end up with hardened criminals. There should be an emphasis on social welfare.

Even as long as 1920 it was said, " One of the most predominating features of the ... (Africans) ... intellectual endowment seems to be his legal mind.

department despite the many problems which beset it, I am of the view that the department be expanded even to the ... - ... province, where it has been excluded for a long time so that even those people from here can benefit from the services rendered by this department.

FOOTNOTES

1. Cap. 61, Laws of Kenya.

Thus ... Africans have legal customs and presumptions correlated with the administration of law, which testify to extreme penetration and a good power of judgement. The punishments instructed are ... humanic and just".

It has, for a long time, been argued that the reasons for this approach are: firstly that it is cheaper than custodial alternative treatment such as imprisonment and that the money used to keep one prisoner in jail is enough to enable the department to supervise many more offenders, as illustrated above chapters. Secondly, it enable the offenders to remain free in society and meet his/her social and economic obligations to his/her family and the society and finally that it is non-primitive and deals with the individual criminal cases - then own merit.

These should be only secondary objectives. The major objective as a penal system should be to "cure" crime. Otherwise if these are made the basic reasons for its retention then suspended sentence (without supervision) and conditional discharge would be the most efficient alternative.

Therefore there should be an emphasis on "curing" of crime at all levels. There is an urgent need for more qualified staff for this work of rehabilitation supervision should emphasize more interaction with the probationer.

However I was impressed by the kind of work being done by the department despite the many problems which beset it. I am of the view that the department be expanded even to the NORTH - EASTERN province, where it has been excluded for a long time so that even those people from here can benefit from the services rendered by this department.

PROBATION DEPARTMENT ANNUAL REPORT 1980-1981 TABLE A

FOOTNOTES

1. Cap. 64, Laws of Kenya.
2. Cap. Laws of Kenya.
3. Cap. 65, Laws of Kenya.
4. Probation Department Annual Report 1980; published by Nairobi Government Printers.
5. Article entitled " Law and Society " Sunday Nation 30th May 1982.
6. Editorial " Reform of Penal system - needed " Vice President at Kamiti Prison Daily Nation 21st May 1982 .
7. Supra
8. Daily Nation 21st May 1982 - Mother of twelve jailed
9. Article entitled " Law a society " Sunday Nation 28th March 1982.
10. Supra
11. A Clerk working with the Colonial administration in 1920 at Machakos District quoted in an article entitled Journal of African Research Studies January 1966.

|                            |    |  |
|----------------------------|----|--|
| Satisfactory completions   | 30 |  |
| Unsatisfactory completions | -  |  |
| Expired / Absconded        | -  |  |

1990.

|                            |    |   |
|----------------------------|----|---|
| Satisfactory completions   | 29 |   |
| Unsatisfactory completions | 1  |   |
| Expired / Absconded        | 1  | 2 |

1981.

|                            |    |   |
|----------------------------|----|---|
| Satisfactory completions   | 11 | 6 |
| Unsatisfactory completions | 1  | 1 |
| Expired / Absconded        | -  | 1 |

TABLE A.

KIBERA COURT PROBATION COMPLETIONS 1979-1981 TABLE A.FEMALE COMPLETIONS,

| <u>1979.</u>               | <u>ADULTS.</u> | <u>JUENILES.</u> |
|----------------------------|----------------|------------------|
| Satisfactory completions   | 3              | -                |
| Unsatisfactory completions | -              | -                |
| Expired/Absconded          | -              | -                |
| <u>1980.</u>               | <u>ADULTS.</u> | <u>JUENILES.</u> |
| Satisfactory completions   | 5              | 2                |
| Unsatisfactory completions | -              | -                |
| Expired/Absconded          | -              | -                |
| <u>1981.</u>               | <u>ADULTS.</u> | <u>JUENILES.</u> |
| Satisfactory completions   | 2              | 1                |
| Unsatisfactory completions | -              | -                |
| Expired/Absconded          | -              | -                |

MALE COMPLETIONS

| <u>1979.</u>               | <u>ADULTS</u>  | <u>JUENILES.</u> |
|----------------------------|----------------|------------------|
| Satisfactory completions   | 30             | 4                |
| Unsatisfactory completions | -              | -                |
| Expired Absconded          | -              | -                |
| <u>1980.</u>               | <u>ADULTS.</u> | <u>JUENILES.</u> |
| Satisfactory completions   | 29             | -                |
| Unsatisfactory completions | 1              | -                |
| Expired Absconded          | 1              | 2                |
| <u>1981.</u>               | <u>ADULTS.</u> | <u>JUENILES.</u> |
| Satisfactory completions   | 11             | 5                |
| Unsatisfactory completions | 1              | 1                |
| Expired Absconded          | -              | 1                |

Source: Interviews with the probation officer from Kibera Court.

TABLE B

DISTRICT PROBATION OFFICERS' WORKSHOP

T I M E T A B L E

|                            | 8.30 - 10.30 a.m.               | BREAK | 11.00 a.m - 1 p.m           | BREAK | 2.15 - 4.15 p.m                           |
|----------------------------|---------------------------------|-------|-----------------------------|-------|---|
| MONDAY<br>3RD MAY, 1982    | ARRIVAL                         |       | A R R I V A L               |       | REGISTRATION &<br>CLIMATE SETTING         |
| TUESDAY<br>4TH MAY, 1982   | PSYCHOLOGY<br>INTRODUCTIONS     |       | P.P.O.'S KEY NOTE<br>SPEECH |       | PERMANENT SECRETARY<br>V.P. & MOHA SPEECH |
| WEDNESDAY<br>5TH MAY, 1982 | DISCUSSION GROUPS               |       | MR. MAIYO GROUPS            |       | MR. NYA RIRO<br>(D.P.M.)                  |
| THURSDAY<br>6TH MAY, 1982  | PSYCHOLOGY<br>DISCUSSION GROUPS |       | DISCUSSION GROUPS           |       | PSYCHOLOGY<br>MR. MAIYO                   |
| FRIDAY<br>7TH MAY, 1982    | DIRECTOR OF STUDIES<br>K.I.E.   |       | DISCUSSION GROUPS           |       | PROF. MUGA<br>SOCIOLOGY DEPT.             |

|                             | 8.30 - 10.30 a.m.      | BREAK | 11.00 a.m. - 1 p.m.    | BREAK | 2.15 - 4.15 p.m.       |
|-----------------------------|------------------------|-------|------------------------|-------|------------------------|
| MONDAY<br>10TH MAY, 1982    | RESEARCH METHODS       |       | PSYCHOLOGY             |       | DISCUSSION GROUPS      |
| TUESDAY<br>11TH MAY, 1982   | PSYCHOLOGY             |       | SOCIAL WORK<br>METHODS |       | DISCUSSION GROUPS      |
| WEDNESDAY<br>12TH MAY, 1982 | RESEARCH METHODS       |       | DISCUSSION GROUPS      |       | SOCIAL WORK<br>METHODS |
| THURSDAY<br>13TH MAY, 1982  | SOCIAL WORK<br>METHODS |       | RESEARCH METHODS       |       | PSYCHOLOGY             |
| FRIDAY<br>14TH MAY, 1982    | CRIMINOLOGY            |       | PSYCHOLOGY             |       | DISCUSSION GROUPS      |

|                             | 8.30 - 10-30 a.m.               | BREAK | 11.00a.m. - 1 p.m.              | BREAK | 2.15 - 4.15 p.m                 |
|-----------------------------|---------------------------------|-------|---------------------------------|-------|---------------------------------|
| MONDAY<br>18TH MAY, 1982    | SOCIAL WORK METHOD              |       | PSYCHOLOGY                      |       | DISCUSSION GROUPS               |
| TUESDAY<br>19TH MAY, 1982   | PERSONNEL MANAGE-<br>MENT       |       | PERSONNEL MA' NAGE-<br>MENT     |       | CRIMINOLOGY                     |
| WEDNESDAY<br>19th MAY, 1982 | HUMAN RELATIONS &<br>MOTIVATION |       | HUMAN RELATIONS<br>& MOTIVATION |       | DISCUSSION GROUPS               |
| THURSDAY<br>20th MAY, 1982  | PSYCHOLOGY                      |       | SOCIAL WORK<br>METHODS          |       | DISCUSSION GROUPS<br>DR. GATERE |
| FRIDAY<br>21ST MAY, 1982    | DISCUSSION GROUPS               |       | DISCUSSION GROUPS               |       | OUTING                          |

|                             | 8.30 - 10.50 a.m.   | BREAK | 11.00 @ 1.00 p.m     | BREA K | 2.15- 4.15 p.m.                       |
|-----------------------------|---------------------|-------|----------------------|--------|---------------------------------------|
| MONDAY<br>24TH MAY, 1982    | DISCUSSION GROUPS   |       | CRIMINOLOGY          |        | DISCUSSION GROUPS                     |
| TUESDAY<br>25TH MAY, 1982   | DISCUSSION GROUPS   |       | CRIMINOLOGY          |        | DISCUSSION GROUPS                     |
| WEDNESDAY<br>26TH MAY, 1982 | COMMUNICATION SKILL |       | COMMUNICATION SKILLS |        | DISCUSSION GROUPS                     |
| THURSDAY<br>27TH MAY, 1982  | STUDENT SUPERVISION |       | STUDENT SUPERVISION  |        | MR. R. MUTUA COMMISSIONER OF PRISONS. |
| FRIDAY<br>28TH MAY, 1982    | OUTING              |       | OUTING               |        | OUTING                                |

22

|                                     |                          |              |                                  |  |
|-------------------------------------|--------------------------|--------------|----------------------------------|--|
| <p>MONDAY<br/>31ST MAY, 1982</p>    | <p>8.30 - 10.30 a.m.</p> | <p>BREAK</p> | <p>11.00 a.m. - 1 p.m. BREAK</p> | <p>2.15 - 4.15 p.m</p>   |
| <p>WEDNESDAY<br/>2ND JUNE, 1982</p> | <p>REPORTING</p>         |              | <p>REPORTING</p>                 | <p>REPORTING</p>   |
| <p>THURSDAY<br/>3RD JUNE, 1982</p>  |                          |              |                                  |  |
| <p>FRIDAY<br/>4TH JUNE, 1982</p>    |                          |              |                                  | <p>PRESENTATION OF<br/>CERTIFICATES &amp; CLOSING<br/>WORKSHOP</p> |

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