

3,1906

In the Privy Council.

No. 69 of 1905.

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA.

BETWEEN

MAX HERMAN WEHNER - - - *Appellant,*

AND

THE KING - - - - - *Respondent.*

RECORD OF PROCEEDINGS.

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RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 69 of 1905.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

MAX HERMAN WEHNER - - - Appellant,
AND
THE KING - - - Respondent.

RECORD OF PROCEEDINGS.

PROCEEDINGS BEFORE THE TOWN MAGISTRATE.

No. 1.

Out District Sessions, No. 1 of 1905.

In the Town Court at Nairobi, East Africa Protectorate.

Criminal Case No. 93 of 1904.

Crown - - - Prosecutor,

v.

(1) Max Herman Wehner (2) W. Gibson - - Accused.

Date of Hearing.—28th December 1904.

Charge.—Murder, 302, I.P.C.

RECORD.
—
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CEEDINGS
BEFORE
TOWN
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TRATE.

10 Mr. Barth for Prosecution.

Accused Max Herman Wehner and Gibson present—not represented by
pleader.

(Sd.) R. DONALD.

28th December 1904.

Evidence of Juma bin Arab Kirwi.

Juma bin Arab Kirwi, tribe Lumbwa, boy of Inspector Rayne, cautioned
to speak the truth states:—

No. 1.
Evidence of
Juma bin
Arab Kirwi

20 I worked before for Mr. Knapp (*witness points to Mr. Knapp*). I knew
a boy called Moharwin.* Mr. Knapp sent Jugona I and Karanga and Hamisi
to get porters. We stayed at Nakuro. The two accused and Mr. Knapp

* ? Mcharnia

RECORD. went into the bungalow and we stayed outside. Mr. Knapp left at 8 p.m. by train. The two accused stayed in the Dak bungalow. After a time the accused got a light from the Dak bungalow. We then proceeded to our tents which were near the lake. On the road the accused went into a tent of another person (name I don't know). Hamisi, Mcharnia, I and the two accused were the only persons. There was no one with us. I showed the accused the road. Accused No. 1 asked what the thing was ahead. I said trees. Accused No. 1 disputed the road I was taking them. We then went on the road pointed out by accused. Accused No. 1 then asked me where the lake was and the place where we drink water. Accused No. 1 asked me then where the Hitch hills were. I told him near the tents. Accused No. 1 then asked Mcharnia where the road was, he replied he did not know. He again put him the same question and got the same reply. We then got into long grass. Accused No. 1 asked where the tents were and Mcharnia pointed to a place about 300 yards off (*market from Court*). He again asked where the tents were and on being told that he did not know, when Accused No. 1 shot Mcharnia. Accused No. 1 first struck Mcharnia with butt of his rifle, Mcharnia then caught me; I got away from him, leaving Mcharnia standing when Accused No. 1 shot him with a rifle. On Mcharnia being shot I dropped the lantern and cap I was carrying. I was carrying Accused No. 1's cap. I ran away in direction of Nakuru and slept in a boy's tent there, he was a Mkamba. I don't know his name. We (Hamisi and I) slept till morning, when the two accused came there. Accused No. 2 told us and said Accused No. 1 was ill. The cap and lantern in Court I was carrying (Exhibits A and B). Accused No. 2 said to Accused No. 1 "No, no, no," before Accused No. 1 fired. He said this between the two events (1) of striking Mcharnia, (2) shooting him. The two accused had been drinking at Nakuru Dak Bungalow. Accused No. 2 asked his boy to catch him as he said he had been drinking. About 10 p.m. Mcharnia was shot. Accused No. 1 had the rifle and I saw him put a cartridge in it. He told me to put his cap over the lantern as he said he was looking for a lion. The rifle in Court is the one (Exhibit C). The Accused came at 8 a.m. to Nakuru. I went with Accused No. 2 to the bazaar and he bought ground nuts. Hamisi and I refused to go back to their tents. We looked out for work. I got work before Hamisi with a Babu (name not known). The Accused came together after the murder. Accused No. 1 stopped in a tent near the bazaar and Accused No. 2 then told me that Accused No. 1 was bad. When the askaris came from Naivasha I went with them to place where Mcharnia was shot. We brought Mcharnia's blanket, the lantern and cap in Court. I went with askaris about ten days after the murder. The blanket in Court belongs to Mcharnia (Exhibit D). A kunju and ear ornaments were also found. The ear ornament in Court is the one (Exhibit E). It belongs to Mcharnia. The bones in Court were also brought in (Exhibit F). These things were all taken to Naivasha. I also went there. All these things were found at a place where Mcharnia was shot. About two months ago Mcharnia was shot.

PRO-
 CEEDINGS
 BEFORE
 TOWN
 MAGIS-
 TRATE.

No. 1.
 Evidence of
 Juma bin
 Arab Kirwi
 —continued.

A. and B.

C.

D.
 E.
 F.

Cross-examined by Accused No. 1: I actually saw you shoot Mcharnia. I could see the lake from place where Mcharnia was shot. The night was dark,

but I could see the lake. The lake was about half a mile from place where Mcharnia was shot (*witness points out place before Commissioner's house from Court House*). The bones, hat and cap were found on same day. All these things were found close to place where Mcharnia was shot.

Read over 28th December 1904.

(Sd.) R. DONALD.

RECORD.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 1.
Evidence of
Juma bin
Arab Kirwi
—continued.

No. 2.

Evidence of Dr. Walker.

No. 2.
Evidence of
Dr. Walker.

Dr. Walker, medical officer, Naivasha, on oath, states:—

10 The bones (Exhibit F) were shown to me. The lower jaw was shown to me on 15th November. On the 17th the skull with a few teeth missing was shown to me. The lower jaw fitted this skull. The whole of the spinal column except the coccyx was divided into two portions in the mid dorsal region. Two collar bones and two shoulder blades, a pelvis, two femora, and nine pieces of ribs were also shown to me. I came to the conclusion these were the bones of a human being adult male. From the condition of bone I am of opinion he had been dead about a fortnight. I could not gather from the condition of body cause of death. The ribs gave me the idea that they had been eaten by jackals. Beyond this there were no other marks on body.

20 Not examined by accused.

Read over 28th December 1904.

(Sd.) R. DONALD.
S. R. WALKER.

RECORD.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 3.
Evidence of
Hamisi bin
Wanganga.

No. 3.

Evidence of Hamisi bin Wanganga.

Hamisi bin Wanganga, tribe Mzikuyu, age about 13 years (cautioned to speak the truth) :—

I was working for Accused No. 2 about one and a half month ago. I was with him at Nakuru. Accused No. 1 and Mr. Knapp came to Nakuru, we were all behind the lake Jugona, Karanja, Juma and I were sent to Nakuru to look for porters. We found none. At 6 p.m. the two accused and Mr. Knapp came to Dak Bungalow. At 7 p.m. they called Karanja and told him to bring a gun and blanket. He went and returned with Mcharnia. The gun in Court was not the one Karanja brought. We stayed in Dak Bungalow till midnight. Mr. Knapp left that night by train. Accused Nos. 1 and 2 after seeing Mr. Knapp off returned to Dak Bungalow. They drank sodas, we all then went to Mr. Groves' house. Mr. Groves loaded a rifle (*the rifle in Court*) he went with us about 300 yards and then returned, and after we had gone another 300 yards Accused No. 1 asked us where the lake was, he also asked where the little water was. Accused No. 1 said we were taking him in the wrong direction and on going a little further he showed us the rifle and said nothing. We got to two little roads. Accused No. 1 here again asked where the lake was. After this he struck Mcharnia on back of neck. I saw him do this. Mcharnia fell, and on his getting up was shot by Accused No. 1. Juma and I then ran away. Next morning Accused Nos. 1 and 2 came to look for us. Accused No. 1 stayed with Mr. Groves. Accused No. 2 met Juma and asked him where I was. I saw Accused No. 2 come with Juma in bazaar. Accused No. 2 asked me if I would go back to Kamshege (a place four marches from Satik). We then went to Mr. Groves' tent, he asked us where the lamp was. Juma said Accused No. 1 may have taken it. I asked where Mcharnia was, Accused No. 2 said he may have ~~gone~~ on safari to Njoro. I then went to relieve nature. I met Kamao and I stayed with him till Mr. Tulloch called me. I stayed with him for six days. I was then engaged by Mr. Mulsengo's cook. I got up one morning and I met two askaris, they asked me where Juma was. I told them he was with a Babu. The askaris asked us to show them place where Mcharnia had been shot. We went there and found body caten. We went about 16 days afterwards. We found lantern, cap (the cap belongs to Accused No. 1). The lantern belongs to Dak Bungalow. Juma was carrying lantern and cap. I was carrying a kiboko which I left behind. We found also a jaw bone. We found a blanket, ear ornaments, both now in Court. These things belonged to Mcharnia. The bones of leg and skull were there. The jaw bone in Court was brought away. I was then put in the train at Nakuru, taken to Naivasha.

Cross Examined by Accused No. 1 : The hat and lamp were dropped where you were standing.

Not examined by Accused No. 2.

Re-examined by Barth : The bones, hat and lamp were found in the same place.

Read over 28th December 1904.

(Sd.) R. DONALD.

No. 4.

Evidence of G. Tulloch.

Mr. G. Tulloch, land office, on oath, states:—

I am employed by the chief surveyor in Protectorate service. I was at Nakuru on 6th November last on which date I left for Molo. I was two months in Nakuru. While I was there a murder of an Mkikuyu reported to me. I think the murder was reported about the 20th October. I had started the survey of Mr Burnes' land at this time. One of my boys first reported the murder. About three or four days afterwards two watotos reported it to me. I would know one of the watotos. I can recognise Hamisi. He told me a Mkikuyu had been shot. I saw two boys the evening after the murder seated at my camp. I was told on that day by my boy of this murder. I recognise Hamisi as one of the boys seated at my camp. Hamisi told me he had been with the boy when he had been shot.

Not examined by accused.

Read over 28th December 1904.

(Sd.) R. DONALD,
G. TULLOCK.

RECORD.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 4.
Evidence of
G. Tulloch.

No. 5.

Evidence of Hamisi wa Mchio.

20

Hamisi wa Mchio, tribe Mkikuyu (cautioned to speak the truth), states:—

I was working as a porter for Mr. Knapp. I went with him to Naivasha. I was employed with him at Nakuru near the little water. I then went to Njoro with him. There we met the two accused. We returned to Nakuru. Mr. Knapp then went to Naivasha by train. He gave orders to Hamisi, Juma and Jugona to go to Nakuru and find porters. The two accused and Mr. Knapp went off to Nakuru, leaving me in camp. Karanja and Jugona came to tent and asked for a blanket and gun. Mcharnia carried the blanket and Karanja took a gun. Jugona did not go back with them. In the middle of night I heard a shot fired. Early in morning the two accused returned to tent. They told me then to take a box and a gun to Njoro and they were going to Nakuru. I pitched tent at Njoro. They came at 2 p.m. there. Next morning we moved to Njoro station and stayed there two days. The Accused returned to tent on night I heard the shot before sunrise. I saw them return. Accused No. 1 had the rifle in Court and Accused No. 2 had a revolver. Accused No. 2 had his hat on. Accused No. 1 had nothing on his head. I did not see him carrying it.

Not examined by accused.

Read over 28th December 1904.

(Sd.) R. DONALD,
Town Magistrate.

40

No. 5.
Evidence of
Hamisi wa
Mchio.

RECORD.

No. 6.

Evidence of Chukuna S/O Dekornia.

Chukuna S/O Dekornia, Goanese, steward, Nakuru Dak Bungalow, on oath states:—

I have seen the two accused before. About one and a half months ago I saw them last. They used to visit the Dak Bungalow every two or three days. They lived in the jungle. I know the lantern in Court. It is my property. I lent it to Accused No. 1 one night—the night before I heard that there had been noise from the boys. I don't remember what kind of hats they were wearing. I saw the accuseds leaving the Dak Bungalow. They had 10 boys with them. I cannot say how many boys they had. I have to-day for the first time seen the lantern since I lent it to them. Both accused were slightly drunk when they left the Dak Bungalow.

Not examined by accused.

Read over 28th December 1904.

(Sd.) R. DONALD.
D'CUNHA.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 6.
Evidence of
Chukuna,
S/O
Dekornia.

No. 7.

Evidence of Inspector Rayne.

Inspector H. Rayne, Protectorate Police, Nairobi, on oath states:—

On 26th November I received orders to investigate this case. I went to Njoro and I was accompanied by Serjeant Instructor Freeman. From Njoro I sent him back to Nakuru to get food. Mr. Knapp came past my camp. I called him in. I told him I was going to visit his camp and my reason for so doing. I proceeded with him to his camp. I found Accused No. 2 in charge of camp. I arrested Accused No. 2 and seized the carbine now in Court. I did not see any ammunition. I then proceeded to Accused No. 1 camp and arrested him. I brought the accuseds into Nairobi. I went on to scene of alleged murder after the bones were removed. Juma and Hamisi pointed out the camp to me and showed me place where murder was committed. This place was 30 anything between 500 to 800 yards from camp. The rifle (.303) was brought by Mr. Knapp. I fired a cartridge this morning from it, it is still in the breach. [Note.—Examined and placed along with case found on scene of occurrence.]

Examined by Accused No. 1:—The bones were found not on a path. In my opinion on a very dark night this lake could not be seen from place of alleged murder.

Not examined by Accused No. 2.

Read over 28th December 1904.

(Sd.) R. DONALD. 40

No. 7.
Evidence of
Inspector H.
Rayne.

No. 8.

Hamisi bin Wanganga re-called.

Hamisi (witness re-called) further states:—

Before Mcharnia was shot Accused No. 2 said nothing, he did not say anything when Mcharnia was shot.

Read over 28th December 1904.

(Sd.) R. DONALD.

RECORD.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 8.
Hamisi bin
Wanganga
re-called.

No. 9.

Evidence of G. C. Knapp.

10 Mr. G. C. Knapp, settler, Satik, on oath states:—

The rifle .303 in Court is mine. I did leave it in charge of the accused. On the 16th when I left Nakuru for Naivasha I took the rifle with me. I remember the occasion when I left the two accused at Nakuru and I went to Naivasha. I also remember sending a boy to get a blanket but not for a rifle. I did send on another occasion for a M.-H. rifle. I have three rifles, .303, 450-400, and a M. H. rifle. I don't know how long I remained away at Naivasha but I next joined the accused on the border of the Satik country. I also have a Snider rifle.

No. 9.
Evidence of
G. C. Knapp.

20 Examined by Court: The accused have no rifles. Accused No. 1 is a kind of partner of mine. I do not keep a diary. I have so frequently moved between Nakuru and Naivasha. I can positively state that when I left the two accused at Nakuru I took the rifle in Court with me.

Not examined by accused.

Read over 28th December 1904.

(Sd.) R. DONALD.
GEORGE C. KNAPP.

Note.—A shifty witness, with much hesitation admitted .303 rifle to be his, &c.

(Sd.) R. DONALD.

40 Mr. Barth withdraws the case against Mr. Gibson accused on a charge of murder. I accordingly order his discharge.

28th December 1904.

(Sd.) R. DONALD.

RECORD.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.No. 10.
Evidence of
Max Her-
man Wehner,
the accused.

Evidence of Max Herman Wehner, the accused.

Mr. Max Herman Wehner, Settler, Naivasha Province, states:—

Q. On or about the 26th October did you come in with Mr. Gibson to Nakuru? A. No, the last day was the 16th October.

Q. On the 16th did you and Gibson see Mr. Knapp off by train for Naivasha? A. Yes.

Q. After that did you adjourn to the Dak Bungalow? A. Yes.

Q. Did you have liquor there? A. Yes.

Q. Did you leave about 11 and 12 p.m. the Dak Bungalow? A. I left 10 between 10 and 11 p.m.

Q. After that did you see Mr. Groves in his tent? A. Yes.

Q. When did you leave his place? A. Between 10 and 11 p.m.

Q. Where did you go from there? A. I went to my tent which is about three to four miles from Nakuru, about one hour's walk.

Q. Did you have three Africans with you? A. I had Hamisi, Juma, and another Mkikuyu with me whose name I don't know.

Q. Did you have this rifle in Court with you on that night? A. I had no rifle, Mr. Gibson also had none.

Q. Did you borrow a lantern from Dak Bungalow? A. Yes. 20

Q. Did you have a cap or hat on that night? A. I had a hat.

Q. Is the hat in Court the one? A. Yes.

Q. What time did you get back to your camp? A. Just as the dawn was breaking.

Q. When you left the Dak Bungalow were you drunk or under the influence of liquor? A. No, I could walk straight.

Q. Can you explain, if you were sober, why it took you so long to get to your camp? A. Yes, because the boys misdirected me.

Q. When you returned to your camp were your boys with you? A. No, all three had run away. 30

Q. Did they start all right with you? A. Yes.

Q. Had they gone some considerable distance when they left? A. Yes.

Q. Can you give me any reasons why they left you? A. Because I threatened them with the kiboko, and also, I suppose, because I had fired three or four shots with my revolver in order to get help from camp.

Q. Is it possible that one of your shots with the revolver may have hit one of the boys? A. No.

Q. Did you ever see this Mkikuyu again? A. No.

Q. Did you see Juma and Hamisi the next day? A. Yes. 40

Q. Did you ask them where this Mkikuyu was? A. I asked them, but I don't know what they said.

Q. Did they tell you that you had shot this boy? No.

Q. Did you strike one of the boys with the butt end of rifle, and did Mr. Gibson call out "No, no"? A. No.

11

Q. Did Mr. Gibson have a rifle? A. No.

Q. Did you send Karanja to camp to get blankets and a gun or rifle? A. Only blankets.

Q. Did he with Mcharnia return with blanket and a gun? A. Only with a blanket and a boy.

Q. How came your hat to be left behind? A. The boy left it when he bolted.

Read over and admitted correct, 28th December 1904.

(Sd.) R. DONALD.
M. H. WEHNER.

RECORD.

PROCEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 10.
Evidence of
Max Hermann
Wehner, the
accused—
continued.

10

Mr. Barth applies for an adjournment till 4th January 1905 in order to get further evidence from Naivasha.

Order.

Remand granted till 4th January 1905.

(Sd.) R. DONALD.

29th December 1904.

No. 11.

Dr. Walker re-called.

No. 11.
Dr. Walker
(re-called).

Dr. Walker, Medical Officer, E. A. Protectorate, Naivasha, on oath states:—

20

The bones in box G are the ones referred to in my former statement.

Examined by accused :—Small portions of intestines would last exposed for two or three months.

4th January 1905.

(Sd.) S. R. WALKER.
R. DONALD.

RECORD.

No. 12.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

Evidence of. J. W. T. McClellan.

Mr. J. W. T. McClellan, Acting Sub-Commissioner, Naivasha, on oath states :—

No. 12.
Evidence of
J. W. T.
McClellan.

On the 11th November Mr. Knapp reported to me the porters would not go back to his land. I asked the porters and they said one of the previous lot of porters had been murdered. I told Mr. Knapp I would have to make an inquiry. I also told the porters as their month was not up they should go back. I sent a Masai boy, by name Mwe, to find out in bazaar if there was any talk of the murder. He returned from Nakuru with two boys and a lower human jaw bone which was submitted to M. O. I had the boys up that morning separately, and they stated that they were with two Europeans about 15 days previously. They gave their statements to me which I recorded and sent down. They said the rifle used was a short one, and on showing them a .303 cartridge they said that the murder had been committed by this kind of rifle. Their statements were taken on 15th November. Mr. Knapp registered porters on 26th October. By Mr. Story's books he was on the 11th November in Naivasha and left on 21st November. The Government books show Mr. Knapp was in 10th October and 19th October. He again was in on 20th November, 2nd December, and 17th December. Mr. Knapp got no permit at Naivasha for .303 cartridges. On the 10th October he asked me to lend him 50 snider ammunition. Between 10th and 19th October he bought a .400 cordite rifle with 500 rounds of ammunition. He took away 200 rounds of this ammunition, rest deposited in store. He had no other kind of ammunition in store. He told me he bought this .400 cordite with the cartridges as he could get no ammunition for his .303, but he said he had 10 to 15 rounds of .303 and he left this rifle at his farm. I don't remember date when he said this.

Not examined by accused.

Read over 4th January 1905.

(Sd.) J. W. T. McCLELLAN.

30

No. 13.

Evidence of Leto S/O Ligindi.

Leto S/O Ligindi, tribe Masai, askari, Naivasha (cautioned to speak the truth) states :—

I went with Mwe to Nakuru to see the place where Mkikuyu was shot. We went with two boys (identifies Juma and Hamisi). We found them at Nakuru. We found a blanket, hat, lantern, ear-ornament. The things in Court are the ones. We took lower jaw. There were many other bones there but we did not take them. We returned to Naivasha after this. I did not go
10 the second time with Mwe.

Not examined by accused.

Read over 4th January 1905.

(Sd.) R. DONALD.

RECORD.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 13.
Evidence of
Leto, S/O
Ligindi.

No. 14.

Evidence of Mow S/O Lagugo.

Mow S/O Lagugo, tribe Masai, interpreter Naivasha, cautioned to speak the truth, states :—

I was sent by Mr. McClellan to Nakuru. I went with an askari by name Seto. I got two boys from Nakuru, Juma and Hamisi. I found them in
20 Nakuru. I went with these two boys to place of murder. I was taken at once there. I found a lantern, hat and a blanket. The things now in Court. There were lots of bones lying. I took the lower jaw bone. The one now in Court. I also took the ear ornaments. The one in Court is the one. I did not take any of the other bones. I returned with those things and Juma and Hamisi to Naivasha. I again went back to Nakuru with a European, name not known. We collected all the bones and put them in a box. I also found an empty cartridge case which I brought also. The bones in Court are the ones. The empty cartridge is also the one in Court and it was lying three paces away from the bones. I also found a piece of Americani.
30 The cloth in Court is the one.

We brought all these things to Naivasha.

Not examined by accused.

Read over 4th January 1905.

(Sd.) R. DONALD,
Town Magistrate.

No. 14.
Evidence of
Mow, S/O
Lagugo.

RECORD.

No. 15.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

Evidence of H. R. McClure.

Mr. H. R. McClure, late R.N., Naivasha, on oath, states:—

No. 15.
Evidence of
H. R.
McClure.

On the 15th of last month I was directed by Mr. McClellan to go to Nakuru in company with the Interpreter Mwai and the District Clerk De Mello. On the morning of the 16th I went out from Nakuru with these two men and the Assistant Surgeon Part Wadai. The Court Interpreter took me to a place about 1½ miles from the Dak Bungalow east by north. At this spot I found a collection of bones, a piece of blanket, a piece of American cloth, a spent cartridge case (the cap was not struck quite in the centre). The Assistant Surgeon under my directions collected the bones and the blanket and put them in a box. I tied a label to the cartridge case. I then returned to Nakuru taking these things with me. I went back on 16th by train to Naivasha with these things and gave them to Mr. McClellan next morning. I found these things on a track. The hat and lantern were not found by me. I can identify the bone with a hole in it (Exhibit F). The bones distinctly were of some person or animal recently killed. The bones had blood on them and some entrails were lying there. There was also signs of blood showing as if the body had been dragged. The bones were scattered about. This may be due to wild beasts. The cartridge case shown to me is the one (Exhibit B).

F.

B.

Not examined by accused.

(Sd.) R. DONALD,
Town Magistrate.

Read over 12th December 1904.

(Sd.) H. R. McCLURE.

No. 16.
Order of the
Town
Magistrate.

No. 16.

Order of the Town Magistrate.

Order.

In this case Max Herman Wehner, an Englishman, is accused under Section 302, I. P. C., for the murder of a Mkikuyu by name Mcharnia either about the 16th or 26th October within a couple of miles from the Nakuru Railway Station.

The facts briefly are these:—

On the night of occurrence the accused with his friend Mr. Gibson had been drinking at the Nakuru Dak Bungalow. They left there about 11 p.m.,

accompanied by three boys, Hamisi, Juma and Mcharnia, for their camp, a distance of about four miles in direction of the lake. They borrowed a lantern from the steward of the Dak Bungalow. Accused is alleged to have been in possession of a .303 rifle. After going for a short time the accused owing to his somewhat inebriated condition questioned the boys as to where the camp was, &c., and apparently not being satisfied with the answers struck Mcharnia with the butt end of his rifle on the back of the neck, and just as the boy was recovering from this blow he fired a shot killing him, causing the other two boys to desert at once.

RECORD.

—
PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.
—

No. 16.
Order of
the Town
Magistrate—
continued.

10 The boys went to Mr. Tullock's camp where they gave information of what had taken place to Mr. Tullock's boy who informed his master. Mr. Tullock gave evidence of the report having reached him immediately after the murder, and recognizes Hamisi as one of the two boys who came to his camp. It is a great pity that Mr. Tullock on getting this information did not at once report it to the authorities. Ignorance, I presume, kept him from doing so.

Mr. Knapp (who is kind or sort of partner of accused) had occasion to go to Naivasha on the 11th November to see the Acting Sub-Commissioner Mr. McClellan regarding his porters who refused to work. The porters on 20 being questioned assigned as their reason for refusing to work the murder of Mcharnia. Mr. McClellan at once instituted inquiries, with the result that the bones of the deceased person were brought in together with his blanket and ear ornament, also a hat of the accused, the lantern of the steward of the Dak Bungalow, and an empty .303 cartridge case. All these things have been identified in Court. The accused admits that the hat is his. The medical evidence is that the bones are of an adult male having died or been killed some fifteen days previous to examination.

The empty .303 cartridge case was found about three paces from the bones. There is a peculiar point about it. The rifle which was used must have had a 30 most powerful striker and one which did not strike the centre of cap. The .303 rifle produced in Court, and with which the murder is alleged to have been committed, acts exactly in this manner. The rifle was found in Mr. Knapp's camp, which was in charge of Mr. Gibson who was with the accused at the time of the murder. Mr. Knapp has given evidence that this rifle was in his possession at time of the alleged murder. I may say I do not place the slightest faith in this man's testimony. It was with great difficulty and much hesitation he owned that the rifle was his. The accused denies having shot Mcharnia or had a .303 rifle in his possession on that night. He admits that he had three boys with him, two of whom were Hamisi and Juma, 40 and that they left him because he had threatened them with kibokos for leading him away from camp, and also because he had fired three or four shots with a revolver in the hope that the report of the revolver would bring assistance from camp. He also admits that he borrowed a lantern from the Dak Bungalow and that the hat in Court is his. Accused also admits having seen Hamisi and Juma the day after the murder and not the other boy. In fact the accused corroborates *in toto* the statements of the two boys Juma and Hamisi, except as regards the possession of the .303 rifle and the shooting of

RECORD.

PRO-
CEEDINGS
BEFORE
TOWN
MAGIS-
TRATE.

No. 16.
Order of
the Town
Magistrate—
continued.

the boy Mcharnia. It is a question whether the boys' statement or the accused is the true one as to the possession of this .303 rifle. I have little hesitation in saying that I believe the boys' statements and my belief is founded on the fact of the empty .303 cartridge case being found where the accused's hat was lying, the lantern and the bones of Mcharnia. I have alluded above to the peculiar striker of this .303 rifle. Besides there is no reason assigned why these two boys would fabricate this evidence. They gave their evidence in a very straightforward manner and as to what they saw actually happen. Their evidence is borne out by the search which Mr. McClellan caused to be made of the place where the murder took place, leading to the finding of the hat, lantern, &c. I don't think it could even be hinted at that these boys knew this search was going to be made and they therefore placed all these articles there. As to this being the spot where the murder took place I don't think there can be any doubt. The accused also admits that when the boys ran away they dropped his hat and lantern. Both these things were found where the empty cartridge and the bones of Mcharnia were found. Taking the evidence into consideration I consider the prosecution have established a good *prima facie* case against the accused and I accordingly commit him to the Court of Sessions on a charge of murder under Section 302 I.P.C.

(Sd.) R. DONALD, 20
Town Magistrate.

Nairobi,
6th January 1905.

Mr. Max Herman Wehner states: I have witnesses, their names are (1) W. Gibson, (2) Groves.

(Sd.) R. DONALD.

6th January 1905.

No. 17.
Charge of
the Town
Magistrate.

No. 17.
Charge of the Town Magistrate.
East Africa Protectorate.

The Crown, through Police - - - - Prosecutor, 30
versus
Mr. Max Herman Wehner - - - - Accused.

I, R. Donald, Town Magistrate, Nairobi, do hereby charge you Max Herman Wehner that you on or about the latter part of October in 1904 near Nakuru shot a Mkikuyu by name Mcharnia with a .303 rifle and thereby committed the offence of murder under Section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions and I hereby direct that you be tried on the said charge.

Dated 6th January 1905.

(Sd.) R. DONALD, 40
Town Magistrate.

Out-district Sessions Case, No. 1, 1905.

IN THE SESSIONS COURT OF THE EAST AFRICA PROTECTORATE AT NAIROBI.

RECORD.
—
PRO-
CEEDINGS IN
SESSIONS
COURT.

Crown (by Mr. Barth), Prosecutor.
Max Herman Wehner, Accused.

Nairobi, 30th January 1905.

Accused:—Max Herman Wehner.

Charge:—Murder.

Plea:—Not guilty.

Accused chooses to be tried by jury.

10 Jurors chosen by lot:—F. Watkins, R. J. Stordy, A. S. Cooper, H. A. Quinn, H. H. Heatley. Foreman, Mr. Watkins.

Mr. Barth, for Crown.

Accused, unrepresented.

Magistrates' marking of exhibits retained.

(Sd.) R. W. H.

Mr. Barth opens.

No. 18.

Evidence of Juma bin Arab Kirwi.

No. 18.
Evidence of
Juma bin
Arab Kirwi.

Juma bin Arab Kirwi, Nandi, boy of Mr. Rayne, warned to speak the truth, states:—

20 I was working for a European, Mr. Knapp, at Sotik. I was sent with Karanja, Hamisi, and Jugona to get porters about three months ago. We went to Nakuru. The accused, Mr. Gibson, and Mr. Knapp went with us. We stayed about 10 days there. They shot game for some days, then the Mkikuyu was shot. Mr. Knapp that day told the nyapara to bring a blanket, as he wanted to go to Naivasha. The nyapara went and came back with Mcharnia. Mcharnia had a blanket and the nyapara had a gun, a long gun not a carbine (*points to that in Court*). At 8 p.m. the blanket and the gun were put in the train with Mr. Knapp, who went off in the train. The other two Wazungu went to the club, and were eating and drinking tembo. The
30 cook brought out the lantern produced.

I, Hamisi, Mcharnia and the two Wazungu went along. We went a little way to a Mzungu's tent not far distant. We sat by the fire a

RECORD

PRO-
CEEDINGS IN
SESSIONS
COURT.No. 18.
Evidence of
Jumha bin
Arab Kirifi
—continued.

little then the Wazungu came out and said "Come along." We saw the owner of the tent. We started off for the camp. We passed a place where grass had been burnt, there were some trees in front of us. Accused said, "What is that?" I said, "Trees." We went into long grass. Accused said, "Where is the road?" I showed him. He told me to go before him with the light. He told me to cover the light with my hat as there were lions there. I did not hear lions. We found the road we used to pass every day. Accused said it was not the right road. We left the road and went into long grass, he said we were losing the way. He then asked for the road again; I pointed out the direction. He said, "No," it was somewhere else. He then asked the direction of the big water and the little water for drinking every day. We showed him the way. We went a little further on and accused took out his revolver and fired in the air. Then he called out for the M'kikuyu in the camp but he did not hear. He then asked Mcharnia where the road was; Mcharnia pointed the direction. He then asked him again. We then went to some little hills and I sat down to see if I could see the line of the hills. It was very dark and I could not see them but I saw the big waters. Then accused asked Mcharnia where the road was, then he shot him with the gun produced. First when Mcharnia said he did not know the road accused struck him on the back of the neck and knocked him down. As Mcharnia struggled up, catching hold of me, I said to Mcharnia he would not be beaten again and to let us go. He let go of me; I went on and then the shot was fired. Accused was about three paces off and Mcharnia was quite close to me. He said, perhaps, he would shoot us all. Mcharnia fell down when he was shot and groaned. I dropped the lantern and hat I was carrying and ran away. It was the accused's hat. I and Hamisi ran away to Nakuru; there we went to sleep in the kitchen of Mr. Tulloch. We told his boy what had happened. Next morning accused and Mr. Gibson came together. Accused stayed in the tent and Mr. Gibson came alone and found me in the bazaar. He put his hand to his forehead and said Max (accused) was bad (I don't know if he meant "sick"). Mr. Gibson bought me ground nuts. He had told me first to fetch Hamisi, who had gone to the Bazaar, myself. I eat a little. Then we went to the tent where accused was staying. The accused asked me where the lantern was. I told Mr. Gibson I would not go with him. Mr. Gibson told me the M'kikuyu was dead and not to make kelele. I did not tell Mr. Tulloch about Mcharnia. (Not admissible.)

By Court: Accused was not present when Mr. Gibson said the M'kikuyu was dead.

We went back to the spot where Mcharnia was shot, with askaris from Naivasha. We met them at Nakuru. That would be about 10 days after Mcharnia was shot. We found the lower part of a jaw, an ear-ornament and a blanket. I recognise the ornament and blanket produced as those we found; they are Mcharnia's. We also brought the lantern and a hat. We also found a lot of bones which we left there. The things we brought we took to Mr. McClellan at Naivasha. We returned to the spot another day with

Mr. Rayne. When the Accused said he would shoot Mcharnia Mr. Gibson said "No, no, no."

Cross-examined: I told the Magistrate I was Lumbwa because Nandi and Lumbwa were one.

I identify the earring and blanket as Mcharnia's as he wore them every day.

I could see the lake from where Mcharnia was shot.

By Court: Mr. Gibson said "No" in English, that means "Hapana." I don't understand other English.

10 Jury, through Court: We did not stop to see if Mcharnia was dead, we ran at once.

The first day we went to the spot the intestines were remaining and smelt badly. Hyænas had eaten the body. I saw accused shoot Mcharnia. I am certain.

(Sd.) R. W. HAMILTON.

Note.—This witness appears to be a boy of ordinary intelligence, and his demeanour is that of one telling the truth. Age about 12 or 13.

(Sd.) R. W. H.

No. 19.

20 Evidence of Hamisi bin Wanganga.

Hamisi bin Wanganga M'kikuyu, now working as a boy to a Babu, warned to tell the truth:—

I used to work for Mr. Gibson. I came with accused, Gibson and Knapp to Nakuru and we were camped near the little water, fresh.

We went to find porters. We stopped about eight days there. Knapp left one night about 9 o'clock. Knapp sent Karanja to the camp and he brought Mcharnia and a blanket and a gun, not that in Court. It was a gun like the Government askaris' guns, the gun in Court was brought by accused. The gun that was brought by Karanja was taken by Knapp to Naivasha.

30 When the train left for Naivasha accused and Mr. Gibson drank tembo at the club. Then they took the light from there and went away. They went to another tent and stopped chatting there, Mr. Groves' tent. Mr. Groves put a

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 18.

Evidence of
Jumta bin
Arab Kirwi

—continued.

No. 19.
Evidence of
Hamisi bin
Wanganga.

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 19.
Evidence of
Hamisi bin
Wanganga—
continued.

cartridge in the gun in case of lions on the road. Then we started and Juma was carrying the gun and accused had the lantern. The accused went in front and Gibson was behind, falling down. Accused then asked where the road was, he asked on three occasions and the third time we went a little down where the lake was. Accused took off his hat and covered the lantern; he wanted to see if the road was near. Then he took out his revolver and said we were losing the way and fired in the air. He then took his gun from Juma and hit Mcharnia over the back of the neck. When he fired the pistol in the air he had no gun in his hand. Accused gave the light to Juma the first time we stopped and told him to look for the path. He gave Juma the hat to cover the light with when he fired the pistol in the air. The accused after hitting Mcharnia shot him. Shows positions:—

~~Hamisi~~ ×
 Mcharnia × three paces × accused.
 Juma ×

Mcharnia fell down first when he was hit, he got up again and was shot. I saw accused shoot, I am certain it was he. Gibson was behind (shows) a few paces behind. It was the second time we stopped to look for the road that accused gave the light to Juma and took his gun from him. It was at that time he shot Mcharnia. When Mcharnia was shot we saw him fall, he groaned out "Oh!" and we ran away. We returned to Nakuru and slept at Mr. Tulloch's tent. The next morning accused and Mr. Gibson came, accused stayed in Groves' tent. Gibson came to look for us, I was in the bazaar and Juma was with his brother. Juma and he came to the bazaar together, then Mr. Gibson asked me to go with him on safari. We asked where Mcharnia was. He said he had gone on safari, to Njoro. Juma was there then. We went to Groves' tent and saw accused there. He asked Juma where the lantern was he was carrying at night. I said I was going to choo and ran away and went to an M'kikuyu named Kamao. I stopped two days there and got work. Mr. Tulloch told me to work for him. I worked for him six days. I told him what had happened on the night in question. I stayed at Nakuru till one morning two Masai askaris came from Naivasha. We went together and found Juma. They asked us to show the place where the M'kikuyu was shot. We found the bones but no meat as the hyenas had eaten it. We took the lower part of the jaw and the ear ornament produced, the light, the hat. I found my "rungu" and threw it there.

We also found a blanket, that produced. Both blanket and ear-ring were Mcharnia's; the light is the one we got from the Club; the hat is accused's; it was about 18 days after the event we went to the spot. I am sure Gibson said Mcharnia had gone on safari.

Cross-examined: Accused went from Nakuru to Naivasha with Knapp on one occasion and stopped two days, on that occasion Knapp took his own gun of 10 charges.

I do not speak English.

Mr. Groves spoke to us in Swahili about shooting a lion with the gun.

He also spoke to accused inside, but I do not know about what.

I might have forgotten about the pistol as I did not say anything about it to the Magistrate.

I was in the station when Knapp left to go down to Naivasha.

Re-examined: I went with Gibson and Karanja to the Station when Knapp left. Knapp was put into the train by Gibson, he was falling about. I was inside the station.

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 19.
Evidence of
Hamisi bin
Wanganga—
continued.

10 By Court: On the night in question accused was very drunk and could not see the ground. Gibson was also drunk, but not so bad.

The body was lying all together, that is the bones, they had been eaten and scattered by hyænas, but not far.

The place smelt very bad.

The light and the cap were where they had been thrown by Juma. The cap and light were a few paces from the blanket and ear-ring (shows about four paces) and the body had been dragged a little.

By Jury: We had no difficulty in finding the spot afterwards. I asked Mr. Gibson about Mcharnia to find out if he was dead or not.

20 By Court: It was about 12 o'clock the Wazungu left the Dak Bungalow.

(Sd.) R. W. HAMILTON.

Note.—This witness strikes me as of quick intelligence, but uncertain memory, but I think truthful. Age about the same as Juma.

(Sd.) R. W. H.

The Jury not having been sworn previously are now sworn.

(Sd.) R. W. H.

No. 20.

Evidence of H. R. McClure.

No. 20.
Evidence of
H. R.
McClure.

Herbert Reginald McClure, sworn, states:—

I am an ex-naval officer.

30 On 15th November last I was asked by Mr. McClellan to go to Nakuru with Masai Mwee. I went with him and station clerk de Mello the next day. Mwee took me to a spot 30 minutes about from the Dak Bungalow. The sketch shown me (*to be put in*) fairly represents the position. There we found some bones, a blanket, two ear drums and some bones which are in the box produced. I brought them to Naivasha as also the cartridge case produced. The bones were scattered and the cartridge case was about three yards off the skull. The striker has hit the cartridge rather to the side. I also brought the dirty

"Z."

RECORD. rag and one of the blankets produced. I think *that* (points to Mcharnia's as identified by previous witnesses). The ear drums were placed in the box. These things were slightly away from the track on the left looking towards the lake. The ground was long grass and small bush. I did not see hat or lantern. I examined the bones and found a round hole in one of the shoulder blades. The bones were bare of flesh but there were some entrails there apart from the bones, they were small bits. The bones were scattered over a space as large as the Court. I brought the exhibits I have mentioned to Naivasha.

PRO-CEEDINGS IN SESSIONS COURT.

No. 20.
Evidence of
H. R. McClure--
continued.

Adjourned for lunch.

Cross-examined: When I said to the Magistrate "on a track," I meant 10 by it the bones were a foot off it.

The bearings I gave to the Magistrate were wrong, the correct ones are about S.E.

I saw the Masai pick up the cartridge case.

The bones had the appearance of having been dragged by animals.

(Sd.) R. W. HAMILTON.

No. 21.
Evidence of
G. Tulloch.

No. 21.

Evidence of G. Tulloch.

Guy Tulloch, sworn, states:—

I am employed in the Survey Department. I was at Nakuru from 20 5th September to 6th November. A murder of an M'kikuyu was reported to me, on the 20th October, I think. Two totos came to the camp one day and while I was out in the course of the day I heard of it from my porters. I next saw the totos about three days later. I recognise Hamisi as one. I should not recognise the other one. No one else told me of the murder. I made no report to any one as I did not believe it. I thought if there had been a murder the other porters would have come in also.

No cross-examination.

By Court: When I said "one of my boys" to the Magistrate, I meant one of my porters.

(Sd.) R. W. HAMILTON.

30

No. 22.

Evidence of H. Rayne (Inspector).

Henry Rayne, sworn, states:—

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 22.

Evidence of
H. Rayne,
(Inspector).

I am Inspector, Protectorate Police. I received orders on 26th November to proceed to Njoro and that I would get instructions at Naivasha from Mr. McClelland. I went to Njoro and was joined at Naivasha by Sergeant Freeman. I got instructions there. From Njoro I sent the Sergeant back to to get food. In the meantime I camped about 5 miles from Njoro station to wait for him. About 10.0 a.m. on 27th, Mr. Knapp came along with his safari. He asked me who I was, I told him and said where I was going and why. I left most of my things behind and made a quick march with Mr. Knapp getting into his camp next day. It is about four ordinary days' march. There I arrested Mr. Gibson and seized the carbine produced in Court. I found no 303 ammunition but Knapp had a .303 rifle and some ammunition in his bandolier. I only stopped long enough for a cup of tea and then went on another 15 miles due south and arrested accused. I searched his camp and saw all his things packed and brought in. I only found ordinary kit. I then brought the two accused to Nairobi. About 8th December, I went to the scene of the alleged murder. I was shown the place by the two totos Juma and Hamisi. I made a sketch plan of the place which I now put in. I should say the spot is about $2\frac{1}{2}$ miles from the Dak Bungalow. The site of the old camp of Knapp was shown me by the boys. It was about a few hundred yards from the main caravan road and no track near. There was long grass there. When I saw the place there was some negro's hair there. I left it there. I fired a cartridge from the rifle exhibited on the morning of the 28th December. It is that placed with the labelled cartridge and now shown to me. The striker did not hit the centre of the cap, but a little to one side and made a deep impression.

"Z."

Cross-examined: The spot shown me was a couple of points, I should say, to the west of south from the Dak Bungalow.

(Sd.) R. W. HAMILTON.

No. 23.

Evidence of Hamisi wa Mchio.

Hamisi wa Mchio, M'kikuyu, warned to speak the truth, states:—

No. 23.
Evidence of
Hamisi wa
Mchio.

I was a porter of Mr. Knapp. I came to Makuru with him from Naivasha. I was told to stay with Karanja at Nakuru. Then Karanja went with Knapp to Naivasha and returned with some other porters. The Wakikuyu came first and my master followed. We took the loads to the camp near the lake. Then I was told to go from Kamshege with Karanja, Jugona, Hamisi to Nakuru to get porters. Then accused and the two other Wazungu followed after. I did not go to get porters with the others I was

RECORD.
—
PRO-
CEEDINGS IN
SESSIONS
COURT.
—

No. 23.
Evidence of
Hamisi wa
Mchimo—
continued.

left behind when the Wazungu went on. While I was there Karanja came and said he wanted an M'kikuyu to take a blanket and he was going take a gun to go back to Nakuru. Jugona came with him. Karanja took a gun and Mcharnia took a blanket. Jugona stayed there. This would be about 6 p.m. I was waiting for my masters and the boys, they did not come. I heard one shot in the night about 3 a.m. The two Wazungu came back to camp shortly before sunrise. I was woken up by a shower of rain. I found the two Wazungu talking. I was going out they told me not to. Accused lighted a candle. This was immediately they returned. I wanted to put a hat in a box to pack up. Accused told me not to as he had nothing to wear. 10. Accused was carrying a gun, Gibson had a revolver. I recognise the gun produced as the one, I know it by marks (*pointed out*), I carry it every day. Accused had no hat on.

I noticed nothing unusual in their condition.

Accused asked me how many of us were sleeping in the house. I said, "I and Jugona."

He told me to go to Njoro, he was going to Nakuru. Besides myself and Jugona there were porters and Kavirondo boys in the camp.

I took a long rifle to Njoro. Accused took the rifle produced.

No cross-examination. 20

Note.—This witness is of low intelligence, and very slow, and tells his story with an air of indifference.

(Sd.) R. W. HAMILTON.

No. 24.
Evidence of
J. F. Du-
kuna.

No. 24.

Evidence of J. F. Dukuna.

Joseph Francis Dukuna, sworn, states:—

I am Goanese steward at Nakuru Dak Bungalow. I know the accused. He used to visit the bungalow every two or three days. Two Europeans used to come with him, they lived in the jungle. (*Recognises Knapp and Gibson.*) I know the lantern produced, it is mine. I lent it to the accused. That was 30 the last day they were at the Dak Bungalow. I don't remember if Knapp had been there that day. The others left about 12 or 12.30 that night. They had dined there about 8 or 8.30. They sat afterwards drinking beer and whiskey till they left. When I lent the lantern they went away. I did not see that they had any boys with them. When they left they were slightly drunk.

The first time I saw the lantern again was in Court. I could not say the date on which I lent the lantern.

No cross-examination.

Note.—This is a stupid witness.

(Sd.) R. W. HAMILTON. 40

No. 25.

Evidence of Mwee S/O Latuku.

Mwee S/O Latuku, warned to speak the truth, states :—

I am interpreter at Naivasha. I was sent by Mr. McClellan to Nakuru many days ago. I and an askari, ~~Latuku~~, went. There we caught the two boys, Juma and Hamisi. They were wandering about without work. We went for about half an hour to a place where we saw a lot of bones, a hat, a lantern, an ear ornament. We also took a jaw bone and a blanket. I recognise the articles produced. We took them to Naivasha. We left the bones and some American cloth there. The hyænas had dragged the bones about. I went back afterwards to the same spot with a European. I found the way myself. We gathered the bones and put them into the box, that in Court. I could see where the body had fallen. I found a cartridge case, that produced, about two paces off it; the body had evidently been dragged by fisi a few yards away, this I could see by the way the thick grass had been laid. I found the Americani produced, also. We brought the bones, the cloth, and the cartridge case back to Naivasha.

No cross-examination.

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 25.
Evidence of
Mwee S/O
Latuku.

No. 26.

Evidence of Leto S/O Ligindi.

Leto S/O Ligindi, warned to tell the truth, states :—

I am an askari of Naivashi. I went to Nakuru with Mwee. There we found the boys Hamisi and Juma. They showed us the way to a spot half an hour from Nakuru. There we found a blanket, ear-ring, hat and lantern, and a jaw bone we took. I recognise the articles produced. We left other bones there, head, arms, and legs.

The lantern and the hat were together, the ear-ring and blanket together, and the bones apart. We brought the things back to Naivasha.

No cross-examination.

No. 26.
Evidence of
Leto S/O
Ligindi.

No. 27.

Evidence of G. C. Knapp.

George Carrington Knapp, sworn, states :—

I am a settler in Sotik, a few miles from Njoro. The rifle shown to me is mine. It is a Martini-Henry .303 carbine. I have at times left it in charge of the accused. Mr. Gibson has land adjoining. Accused is my partner, he helps me, we live together and he gets a share of the profits. We all three came in to Nakuru on one occasion. We were camped a little outside Nakuru. The sketch "Z" gives the general direction. I sent in Hamisi and

No. 27.
Evidence of
G. C. Knapp.

RECORD
 ———
 PRO-
 CEEDINGS IN
 SESSIONS
 COURT.
 ———
 No. 27.
 Evidence of
 G.C. Knapp
 —continued.

Juma, toots, with Karanja, I think, to get porters from Nakuru on 16th October, a Sunday. I am sure of this date. I followed in to Nakuru later on in the day. We went to the Dak Bungalow and waited, and finding we could not get boys I made up my mind to go to Naivasha. I sent back for my blankets, I don't know which boy I sent. He came back with my blankets and a boy. He did not bring a rifle to my knowledge, I did not send for one. I told Juma to go, but I do not know if he went. My order was executed, that is all I know. I took the rifle in Court to Naivasha, I am certain of this. I left accused and Gibson to go back without arms, I have also—

A .305 sporting,
 A Snider,
 A .400 rifle.

10

I have no Martini-Henry. On a previous occasion I took a rifle which I left with Mr. Rayne in Nairobi, about four months ago, to dispose of, I do not know if he has done so.

I stayed about ten days in Naivasha waiting for porters. From Naivasha I went straight out to my land with trained oxen. I had not oxen, it was pigs. The ordinary safari is six or seven days. That is about the time I took. I mean it is about four days to Njoro and my land is two or three days beyond. I stayed a day at my land and then came back.

20

Adjourned to 31st.

(Sd.) R. W. HAMILTON,
 30th January 1905.

31st January 1905.

Cross-examined Barth: I generally use whatever rifle comes to hand. I can usually get more ammunition for my .400 cordite. At this time I had not much .303 ammunition.

I went on 16th to Naivasha first. The second time was about the beginning of November, when the boys lodged a complaint before Mr. McClellan, and would not go back to my land. I stayed some few days, and left on the day I bought some trek oxen from the Government Farm; it was then I met Mr. Rayne. It was the next day that the subpoena was served on me by Mr. Rayne.

30

When I went to Naivasha and took the rifle produced, I left my .303 sporting rifle and a Snider at the camp. I bought my .400 cordite in the train on the 16th, on the way from Nakuru to Naivasha. I got the permit at Naivasha, and 500 rounds were sent up from Nairobi, of which 400 were lodged with the District Officer at Naivasha, and I took away 100. The permit for the rifle is registered at Naivasha. I asked Mr. Collyer if he could exchange some .303 ammunition for my .400 ammunition, as I could only get 10 rounds of .303. This conversation was a day or two after the 16th. I think I told Mr. McClellan it was difficult to get .303 ammunition. The 10 rounds I had at the end of November when I met Mr. Rayne I had borrowed from Mr. Hill of the Government Farm. I told him the rifle was practically useless, as I

40

could not get ammunition. I am positive I did not tell Mr. McClellan I had left it at the Farm. RECORD.

By Court: I took with me the only rifle we had between us when we walked into Nakuru. I had Snider ammunition at the Camp, but a Snider is an awkward weapon. I had one .303 cartridge and the rifle when I got into the train. PRO-
CEEDINGS IN
SESSIONS
COURT.
No. 27
Evidence of
G. C. Knapp
—continued.

Cross-examined: When accused and I went to Naivasha together the 303 sporting rifle was left at the Dak Bungalow. I think the two totos came on the platform with us at Nakuru to put the blankets into the train. I think I had a rifle with me then. I usually carry one.

Re-examined: It must have been the carbine produced, as I never carry the Snider on such occasions, and the .303 sporting was left at the Dak Bungalow.

Note.—This witness impresses me unfavourably, and as hostile to the prosecution.

In absence of Dr. Walker and Mr. McClellan, sick, adjourned to 1st February at 10.30 a.m.

(Sd.) R. W. HAMILTON.

No. 28.

20

Evidence of Dr. S. R. Walker.

No. 28.
Evidence of
of Dr. S. R.
Walker.

Sydney Robert Walker, sworn, states:—

I am a Medical Officer, E. A. P., stationed at Naivasha. I was asked to examine a jaw bone on the 15th November. I recognise that produced as the one. On the 17th I was asked to examine some other bones brought in by Mr. McClure. I identify those in Court as the ones I examined. I concluded they were the bones of an adult male probably died about a fortnight previously. A skull was among the bones. I found the jaw bone fitted the skull. The skeleton was incomplete, and many of the bones had been gnawed, leaving only the hard parts. I found no marks other than those of gnawing. In the 30 shoulder blade (produced) the holes and splintering are unusual; they are not normal. I came to the conclusion they had been made by teeth. The spinal column was divided in the middle; and the coccyx was missing. The division, I thought, had been caused by post-mortem decomposition. I also examined two collar bones, two femora, and the bones of the pelvis, and, I think, nine pieces of ribs. The hard middle pieces had been left, the soft ends had probably been eaten. I could form no opinion as to the cause of death from the bones. I had a conversation with Mr. Gibson (whether before or after-

RECORD. wards I cannot say), I believe about 2nd or 3rd December, I cannot say exactly. It was in the Dak Bungalow.

PRO.

PROCEEDINGS IN
SESSIONS
COURT.

Cross-examined: I cannot say there was any mark resembling a bullet mark in the bones.

No. 28.
Evidence of
Dr. S. R.
Walker—
continued.

By Jury: It is quite possible for a man to be shot and killed without any marks being left in the skeleton.

(Sd.) R. W. HAMILTON.

No. 29.
Evidence of
Dukuna (re-
called).

No. 29.

Dukuna (recalled):—

By Jury: On the night when I gave the lantern to accused and Mr. Gibson I did not see a gun with them or with their boys. It was near the steps of the verandah that I gave the lantern. I only saw the two white men leave the bungalow; I did not see any Africans with them. About seven or eight months ago Mr. Knapp left a rifle at the Dak Bungalow.

(Sd.) R. W. HAMILTON.

No. 30.
Evidence of
J. W.
McClellan.

No. 30.

Evidence of J. W. McClellan.

John William McClellan, sworn, states:—

I am Acting Sub-Commissioner at Naivasha. I remember Mr. Knapp coming to me about his porters. This was about 10th November. He said his porters refused to go back to the farm. I had the porters up and asked them why. They said that one of the previous lot of porters had been killed by one of the Europeans there. I told them if they did not go back they would get no pay, I told Knapp I would have to inquire into the complaint. I sent the Masai Mwee into Nakuru to make inquiries in the bazaar. This was about 12th November. He went to Nakuru and came back with two boys and a jaw bone which I submitted to the medical officer. I do not remember if Mwee brought anything else back then. I recognise Hamisi, I think, as one of the boys, he was wearing a blanket when I saw him. They made a statement to me on the morning they arrived, that would be on the 14th. As a result I sent out Mr. McClure and one of the clerks with Mwee to the place where the jaw bone had been found. This would be about 15th or 16th November. Mr. Story in Naivasha is licensed to sell ammunition. Knapp was in Naivasha from 10th November till he left about three days before Inspector Rayne followed him. Knapp was in Naivasha on the 10th October.

I refer to counterfoil book of gun registration where Knapp registered a Snider on 10th, and on the 19th he registered a .400 cordite. I can't say if Knapp was in Naivasha from the 10th to 19th. I think he was not.

By Court: The registration papers are sometimes sent, it would be possible, I can't say if they were given personally.

About that time Knapp brought two cases of 400 cordite ammunition to the Naivasha boma.

Knapp told me he had bought the 400 rifle on account of the ammunition in Nairobi, as he could not get any more ammunition for
10 a 303.

Cross-examined: The boys that complained to me did not belong to the same safari to which the alleged missing boy belonged.

They said they had heard the news but did not say from whom.

I sent to Nakuru as they said the murder took place there.

They said nothing about the two watoto.

Through Court: About the time Knapp registered the Snider rifle he bought 40 rounds Government ammunition.

(Sd.) R. W. HAMILTON.

No. 31.

20 G. C. Knapp (re-called) states:—

I bought the .400 cordite in the train from Mr. Munro. He was leaving the country. He had been an engineer somewhere up in Uganda. He said it had been registered, but I do not know if that is so. I registered it at Naivasha.

(Sd.) R. W. HAMILTON.

No. 32.

Statement of M. H. Wehner the accused.

Statement of accused before Magistrate read.

30 Accused: "I am calling witnesses."

Accused in his defence:

I adhere to the statement that has been read out, and I will now call my witnesses.

RECORD.

PRO.
CEEDINGS IN
SESSIONS
COURT.

No. 30.

Evidence of
J. W. Mc-
Clellan—
continued.

No. 31.
Evidence of
G. C. Knapp
(re-called).

No. 32.
Statement of
M. H. Weh-
ner, the
accused.

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 33.
Evidence of
D. J.
Groves.

No. 33.

Evidence of D. J. Groves.

Dudley John Groves, sworn, states :—

I live at 17 Government Road, Nairobi. I am a contractor. I was at Nakuru from the 14th September, till I came down for the Magisterial enquiry. I was living in a tent in Mr. Ortlepp's acre plot at Nakuru, about 300 yards from the Dak Bungalow, in a north-west direction. I know Mr. Knapp, I remember Knapp leaving Nakuru to go to Naivasha, but I don't remember the date. It was a Sunday. I was at the station that evening. I left the station about 9.30 and went home to my tent. I sat awhile in my tent and was preparing to go to bed when I heard Gibson and accused passing. They called in and it being a very dark night I persuaded them to stay as they had no rifle and I had a rifle but no ammunition. They refused saying they were anxious to get off the first thing in the following morning. We walked out together. I saw them past the stones just outside and went back to bed. Nothing further came to my notice that night. The following morning about 8.0 a.m. they called at my tent, I was not up. They said "good-bye" and left me. There was no conversation as to anything that had happened the previous night. I can speak a few words only of Swahili. There were three boys with accused and Mr. Gibson when they called at my tent in the evening. I am positive I did not speak to the boys. 10.

Cross-examined : When the accused and Gibson left I saw the three boys following behind.

One of the natives had a light. We three were close together in front and the boys a little behind. It was a very dark night. I should have seen by the light if one of the boys had a rifle. I am positive they had not.

The position of my camp relatively to Knapp's was on a line between the two, between the railway and the caravan road. The direction I gave before would be a rough direction.

The date was a Sunday about the middle of the month of October. 30
Sunday the 16th.

The accused and Gibson were slightly drunk when they called at my tent.

The direction of the accused's safari would lie directly away from my tent, it would not bring them into Nakuru. I manage to speak to my own boys in a little Swahili. On the night in question two of the boys were in white and one had a blanket.

The first news of any murder accusation was told me by Mr. Tulloch 10 days or a fortnight later. I attributed no importance to it. The totos that made the report to Mr. Tulloch pointed the direction, a little to the right of the lake, as where the murder had happened. Knapp's camp is not visible from mine. 40
I think they said it was about one hour's walk. I heard no shots fired during the night. A week or more after, Knapp passed through my camp again and and said something about pigs. He was going on the direction of his farm. I did not see accused from the time in question till they went through with Mr. Rayne, about four weeks later.

By Court: Neither accused nor Gibson had difficulty in walking when they called at my camp on the 16th.

By Jury: I had a .303 bolt action sporting rifle but no ammunition. I did not give or offer accused or Gibson my rifle.

No re-examination.

Note.—This witness gave his evidence well.

(Sd.) R. W. HAMILTON.

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 33.
Evidence of
D. J.
Groves—
continued.

No. 34.

Evidence of W. Gibson.

No. 34.
Evidence of
W. Gibson.

10 William Gibson, sworn, states:—

I am a settler, land south of Njoro. I know the accused and Mr. Knapp. I remember Mr. Knapp going to Naivasha from Nakuru, he went on board the train after dinner on the evening of the 16th. He took a .303 Martini action carbine. I and the accused then went over to the Dak Bungalow again and borrowed a lantern. About 10.30 or so we left the bungalow and went to Mr. Groves' tent as it was on our road to the camp. We stopped a few minutes there. Groves asked us to stop all night as it was very dark and we had no arms. We had two totos and a boy with us. We decided on going to the camp. We walked a good distance talking, depending on the boys for the road. They were leading. We got among some long grass and could see the lake. We saw we were going wrong and accused got rather riled and threatened the boys with his kiboko and asked if they knew where the camp was. The boys pointed out quite the opposite direction from the camp. Accused said he would take the lead himself. He stepped to the front and after walking a few yards he fired two or three shots with his revolver in the air. It was a Colt's revolver I don't know the bore. The shots were to attract attention in the camp. No sooner had he fired the shots than I looked round and could see neither boys nor lantern. I called on the boys myself and so did the accused but got no answer. We searched for the lantern and the accused's hat which one of the boys was carrying. After some time finding nothing we struck off in the direction we thought the camp lay. Eventually we reached camp just before dawn. We had arranged to take a safari up the line for Knapp, and after breakfast we started the boys off on the road to Njoro. After starting them we went over to Nakuru. Accused went to Groves' tent. I went to the Bazaar and found one of the boys, Juma. I asked him where the other boy was (corrects to "where the other boys were.") He said Hamisi was down at the bottom part of the Bazaar. I went down and got him and told them the safari had left and to follow me. I gave them a few pice for food. I took the boys to Groves' tent. Accused was there and asked about the hat and lamp and told them to go and fetch them. The boys went away and I did not see them again, till I was arrested by Rayne.

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.No. 34.
Evidence of
W. Gibson
—continued.

Cross-examined: It was accused who borrowed the lantern, I don't think he had borrowed one previously. We were about a fortnight, rather more, say 23 days, camped at Nakuru. We did not often come into Nakuru that was the first time I had camped there. I had only seen Mr. Groves during the time I was there. His camp lay almost in a straight line from ours to the Station.

About twice or thrice a week we used to go in to the Bazaar and Station. Knapp brought up the safari two or three days before the 17th, on which we left.

We sometimes used to call in passing at Mr. Groves' tent. I was sober on the night in question. I had only had three whiskies that evening, two before and one after dinner. I drank water at dinner.

Jugona a Nandi boy was carrying the lantern when we left Groves. (Points to Juma as the boy). He only had a lantern. I don't think accused took the lantern at any time between the tent and our camp.

At first accused had his hat on, after a time he took it off and gave it to one of the boys.

The boys had often gone back and forwards and there was a distinct track we used to follow.

I have not seen the spot of the alleged murder.

I could see the lake quite well from where the accused fired his revolver we were nearer the lake than we ought to have been. We were between the spot marked on the sketch as where the body was found and the lake. We had not a rifle at all. The one produced was taken down by Knapp.

Interval.

Accused asked the boys two or three times where the camp was. He asked generally.

By Court: There were three boys with us, Hamisi, Juma, and an M'kikuyu whom I could not recognise again.

We also asked where the lake and the small waters (creek) were.

Earlier in the evening one boy, Karanja, was sent back for blankets. He returned with another boy and blankets, but no rifle. This must have been the boy that went into camp with us later, as he stopped with us.

The accused did not and could not have hit any of the boys, as one was carrying his kiboko. He did not hit them with anything else.

I don't know if anyone was left in charge of the camp. I ordered one of the boys to carry a box and gun to Njoro. I could not recognise him.

I went back to get the two boys.

I say the two boys, as according to the loads there were none missing but the two watoto.

The fact that the two watoto were missing did not interfere with our safari.

The boys knew the road and so could go on without us. I can give no idea how long we were walking before the boys ran away; we walked on for a good time before reaching camp, but for a much shorter time.

I met Juma the next morning. I did not understand the boys to ask me where Mcharina was. I had very little talk with them. I only told them to get food.

I asked where the boys were. I said "Where is Hamisi?" When I got the two together I made no inquiries after the third boy.

I did not say he had gone on safari.

The two followed me to Mr. Groves' tent; there the accused asked for his hat and lamp.

I don't know what they said. They disappeared and did not come back.

10 I was brought down with accused under arrest. We stopped at Nakuru Dak Bungalow for food. I was under the influence of liquor there. I saw Dr. Walker there. I did not talk to him particularly. I cannot swear I did not talk about the charge. I am sure I could not have said the bullet entered the boy's chest.

By Court: We called at Mr. Groves' tent to say "Good-bye," and that we were off in the morning.

(Sd.) R. W. HAMILTON.

RECORD.

PRO-
CEEDINGS IN
SESSIONS
COURT.

No. 34.
Evidence of
W. Gibson
—continued.

No. 35.

Notes on Arguments in Defence.

No. 35.
Notes on
Arguments
in defence.

20 Accused in his defence:—

Hamisi's evidence is contradictory to Knapp's as to the rifle taken to Naivasha when I and Knapp went together.

Nothing was said by the boys about the revolver before the magistrate.

Boys' statements as to days between affair and report show variations.

Their story as to the positions differ, and as to who was carrying the hat and rifle.

Knapp, Groves, Gibson all show I had no rifle.

There is no fixed date given.

30 It appears that the man must have died later. Walker's evidence shows the date would be about 3rd November.

Death probably due to animals.

Accused left a month previous to examination of bones. The safari to which the missing boy belonged made no report.

The cartridge case might be any case.

Why did I not pick up hat and lantern which were thrown at my feet?

Various bearings given of the spot.

McClure as to path and bones.

Only native evidence as to hat and bones.

40 The two totos took the Masai straight to the spot, how could that be if it was a place in which they had been lost?

RECORD.

McClure as to position of bones contradicts native evidence as to spreading.

PRO-
CEEDINGS IN
SESSIONS
COURT.

As to drunkenness, I could locate my position.

The identification of the earrings and blankets is bad, as lots of natives wear such things.

No. 35.

Notes on
arguments in
defence—
continued.

Boys hearing and understanding English. How could they understand conversations?

No. 36.

Notes on Arguments for Prosecution.

No. 36.
Notes on
Arguments
for prose-
cution.

Barth :—

Origin of information independent and accidental.

Things found on the spot, particularly cartridge case.

Boys' evidence materially true largely admitted.

Hamisi Mchio's evidence corroborative.

Knapp's evidence as to the rifle he took improbable.

Why did Gibson and accused go back to Nakuru on the 17th? To shut the boys' mouths.

Gibson's evidence. He was in the same state as accused.

The old safari went off and might very well have not missed Mcharnia.

Lake was visible from the spot as shown by Gibson.

10

20

No. 37.

Charge to Jury.

No. 37.
Charge to
Jury.

(1.) This is a question of fact to be decided as reasonable men.

(2.) The verdict must be found without reference to black or white, solely on the evidence.

(3.) If the story of the prosecution is true the verdict must be "Guilty of murder."

(4.) If story is not believed, or there is any doubt, the verdict must be "Acquittal."

(5.) Consider if the allegation of the defence is true that story of the prosecution is concocted.

(6.) Consider the demeanour of the witnesses and how their allegations are corroborated by independent facts.

(7.) Were the watoto told their story?

(8.) The evidence of the Goanese steward is negative.

(9.) Groves' evidence may be honest, he may not have seen a gun.

(10.) Much evidence to show accused was under the influence of liquor.

30

(11.) The spot was identified by the watoto independently of any bearings given by witnesses.
 (12.) The facts to be found are to be found on the evidence only without bias.
 (13.) Gibson was arrested with accused, and his evidence as to the facts that happened in the night in question may have been vague owing to the influence of liquor.

RECORD.
 PRO-
 CEEDINGS IN
 SESSIONS
 COURT.
 No. 37.
 Charge to
 Jury—
continued.

No. 38.

Verdict of Jury.

10 Jury retired to consider verdict, 3.40 p.m.; return, 4.0 p.m.
 All agreed verdict: That accused caused the death of the M'kikuyu Mcharnia, but that he was not responsible for his actions owing to the influence of liquor.
 This is a verdict of "Guilty of murder."
 Accused states it is perfectly untrue owing to his having no firearms of any description.

No. 38.
 Verdict of
 Jury.

No. 39.

Sentence of Court.

20 Sentence of Court: Death by hanging.
 (Sd.) R. W. HAMILTON.
 1st Februry 1905.
 Accused informed that he has seven days in which to appeal.
 (Sd.) R. W. H., 1.2.05.

No. 39.
 Sentence of
 Court.

No. 40.

Petition of Appeal.

In the Court of Appeal for Eastern Africa.

Appeal in Criminal Case No. 1 of 1905 at the Sessions holden at Nairobi on 30th day of January 1905.

The Crown v. Max Herman Wehner.

PRO-
 CEEDINGS
 IN THE
 APPELLATE
 COURT.
 No. 40.
 Petition of
 Appeal

30 Petition of appeal of the accused Max Herman Wehner against the verdict and sentence.

The accused appeals from the verdict and sentence on the following among other grounds:—

1. That the jury should have consisted of nine persons under Sub-Section (1) of Section 274 of the Criminal Procedure Code, as there is no order

RECORD.
 PRO-
 CEEDINGS
 IN THE
 APPELLATE
 COURT.

No. 40.
 Petition of
 Appeal—
continud.

of the local Government reducing the number of a jury as provided by Sub-Section (2).

2. That the provisions of Section 276, Criminal Procedure Code, were not complied with, as the jury were not chosen by lot from among persons summoned to act as jurors.

3. That the provisions of Section 277, Criminal Procedure Code, were not complied with, the name of each juror not being called aloud and the prisoner not being asked if he objected to be tried by such juror.

4. That the provisions of Section 281, Criminal Procedure Code, were not complied with, the jury not being sworn when the foreman was appointed, and not being sworn till after two of the principal witnesses for the prosecution had given evidence, and that the trial did not commence anew when the jury had been sworn, and, consequently, that the evidence of the witnesses Juma bin Arab Ki vi and Hamisi bin Wanganga was not legally before the Court or under the consideration of the jury.

5. That the accused was stopped by the Court from making such comments as he thought fit on the evidence for the prosecution, or from stating the facts on which he intended to rely, and from examining the witnesses he required in contravention of Section 290, Criminal Procedure Code.

6. That the learned Judge misdirected the jury in not informing them that it was their duty to decide whether the offence was one of murder or of culpable homicide under Section 304, Criminal Procedure Code, or of causing death under Section 304A, or any offence, and further that the learned Judge misdirected the jury in not pointing out to them the legal definition of murder, of culpable homicide, and of causing death.

7. That the learned Judge misdirected the jury in stating that they must either believe the story of the prosecution and find a verdict of guilty of murder, or if they disbelieved the story they must find a verdict of acquittal.

8. That the learned Judge misdirected the jury in not informing them that even if they believed the death of the M. Kikuyu Mcharnia to be due to the hand of the accused, it was their duty to find what was the intention of the accused and whether he inflicted the wound with the intention to cause death or with the knowledge that it might cause death, or whether the wound was inflicted by a rash or negligent act.

9. That the verdict of the jury is incorrectly recorded inasmuch as the jury in reply to the learned Judge stated that their opinion was that the accused was the worse for drink and that the crime was not premeditated, meaning thereby that although the death of the M. Kikuyu Mcharnia was due to the accused, it was not caused intentionally but was owing to the rash and negligent act of the accused while in a state of intoxication in firing his revolver, and that the verdict was in effect one of causing death under Section 304A of the Criminal Procedure Code.

Your Petitioner therefore prays that this Honourable Court will be pleased to quash the conviction against him and to order a new trial.

(Sd.) M. H. WEHNER.

Nairobi Gaol, 7th February 1905.

Dated at Nairobi Gaol this 7th day of February 1905.

I, Max Herman Wehner, hereby appoint Mr. W. A. Burn, Barrister-at-Law, to be my pleader for the purpose of the above Appeal.

(Sd.) M. H. WEHNER.

Nairobi Gaol, 7th February 1905.

RECORD.
—
PRO-
CEEDINGS
IN THE
APPELLATE
COURT.
—

No. 40.
Petition of
Appeal—
continued.

No. 41.
Judgment.

No. 41.

Judgment.

The Appellant in this case appeals against the sentence of death passed upon him by His Honour Judge Hamilton sitting as Sessions Judge at Nairobi in the East Africa Protectorate.

19 The Memorandum of Appeal sets forth nine grounds for the Appeal. Counsel for the Appellant relies principally on such clauses as set up misdirection or non-direction by the learned Judge. The three grounds urged by him in support of this contention are :—

(1.) That in all cases of alleged murder the Judge must explain to the jury the difference between culpable homicide amounting to murder and culpable homicide not amounting to murder, and that the Judge in this case neglected to do so.

20 (2.) That, as there was some evidence of the accused being drunk and firing shots in the air, the Judge erred in not explaining to the jury the law dealing with death caused by a rash and negligent act (I.P.C., Section 304 A.), in case the jury might have thought after such direction that the case fell within this Section.

(3.) The Judge erred in not explaining to the jury the risk of convicting in a case where the actual body of the victim has not been found.

30 With regard to head (1) we think that if the prosecution's story was believed the offence must have been murder. If on the contrary the story of the defence was believed the accused was entitled to an acquittal. We think there was no evidence on which the jury could have found a verdict of culpable homicide not amounting to murder. Moreover the issue was never raised nor even suggested by the accused before the magistrate or in the Sessions Court. The learned Judge was therefore right in charging the jury as shown in heads (3) and (4) of his charge.

With regard to head (2) this issue was not only never raised, but the possible suggestion was expressly denied by the prisoner himself before the magistrate and the denial was adhered to in the Sessions Court. There was, therefore, no evidence on the point to go to the jury, and we are of opinion that it was not necessary for the Judge to direct the jury on the law relating to this Section.

40 With regard to head (3) we are of opinion that, in view of the fact that there was found close to the spot where the alleged murder was committed, the bones of a male adult, together with certain ornaments, identified as being those of Mcharnia, we do not think that any special caution to the jury was necessary. Generally, upon all three heads, we think that the learned Judge

RECORD.
 PRO-
 CEEDINGS
 IN THE
 APPELLATE
 COURT
 No. 41.
 Judgment
 —continued.

was under no obligation to explain to the jury the law relating to circumstances that did not come into the case.

Counsel for the Appellant has (we think properly) not argued any of the other grounds of appeal mentioned in the Memorandum. We presume, therefore, that he has abandoned them, and we do not deal with them in this Judgment.

As regards the special verdict delivered by the jury, standing alone, it might be argued that it was ambiguous. We think, therefore, that it would have been more satisfactory had the learned Judge exercised his powers under Section 303 (1) of the Criminal Procedure Code, and elicited from the jury whether or not they believed the story of the prosecution. At the same time the only issue raised, whether the accused actually caused the death of Mcharnia or not, and therefore the jury decided the only point in issue. *R. v. Maharao*, I.L.R., 19 Bombay 735, is an authority for the proposition that such a verdict, as explained by the issues raised in this case, is sufficient.

Further, it is clear, under Sections 85 and 86 of the Indian Penal Code, that drunkenness is no excuse for crime, and a person who is voluntarily drunk is presumed by law to have the same knowledge and intention as he would have had if he had not been intoxicated. (*See Mayne on Criminal Law*, page 424).

For these reasons we dismiss the Appeal and uphold the conviction and sentence.

In view of the express finding of the jury that the prisoner was not responsible for his actions owing to the influence of liquor, which practically amounts to a recommendation to mercy, we think the recommendation should be forwarded to the proper authorities for their consideration.

(Sd.) LINDSEY SMITH,
 SKINNER TURNER.
 J. W. MURISON.

7th March 1905.

No. 42.

Order in Council giving Leave to Appeal, 7th August 1905.

At the Court of St. James.

The 7th day of August 1905.

Present :

The King's Most Excellent Majesty.
 His Royal Highness the Prince of Wales.

Lord President.
 Earl of Kintore.
 Sir Francis Bertie.

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 31st day of July 1905 in the words following viz:

* * * * *

IN THE
 PRIVY
 COUNCIL.

No. 42.
 Order giving
 Leave to
 Appeal, 7th
 Aug. 1905.

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His Majesty having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that leave be and the same is hereby granted to the Petitioner to enter and prosecute his Appeal against the said Judgment of His Majesty's Court of Appeal for East Africa dated the 7th day of March 1905 and against the said conviction and sentence dated the 1st day of February 1905. And the Registrar or other proper Officer of the said Court of Appeal is hereby directed to transmit to the Registrar of the Privy Council without delay the authenticated copies under the seal of the said Court of Appeal of the record proceedings and evidence proper to be laid before His Majesty on the hearing of this Appeal upon payment by the Petitioner of the usual fees for the same.

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Whereof the Commissioner Deputy Commissioner or Officer administering the Government of East Africa for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

A. W. FITZROY.

RECORD.

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IN THE
PRIVY
COUNCIL.

—
No. 42.

Order giving
Leave to
Appeal, 7th
Aug. 1905—
continued.

In the Privy Council.

No. 69 of 1905.

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA.

BETWEEN
MAX HERMAN WEHNER - - - *Appellant,*
AND
THE KING - - - - *Respondent.*

RECORD OF PROCEEDINGS.

SANDERSON, ADKIN, LEE, AND EDDIS,
46, Queen Victoria Street, E.C.,
for Appellant.

TREASURY SOLICITORS (LAW COURTS BRANCH),
276, Royal Courts of Justice,
for Respondent.
p. 3213.