Kenya GT 2 G 4

8 v 1955

IN THE PRIVY COUNCIL No. 48 of 1954

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

B E T W E E N:

MATAIO Son of KILONZO Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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1. This is an appeal in forma pauperis by Special Leave, granted to the Appellant by order of Her Majesty in Council dated the 19th day of October 1954, against an order of Her Majesty's Court of Appeal for Eastern Africa (Sir Newnham Worley, Sir Enoch Jenkins and The Honourable Mr. Justice Briggs, a Justice of Appeal), made on the 31st day of May 1954, dismissing the appeal of the Appellant against a conviction and sentence of the Supreme Court of Kenya, (Mr.Justice Connell). whereby on the 10th day of May 1954 the Appellant was convicted of the murder on one KIBELENGE Son of MUTUA on or about the 27th day of September, 1953 and was sentenced to death; and against the said conviction and sentence. Pp. 55,56,57. Pp. 53,54. P. 49.

2. The circumstances out of which this appeal arises are as follows :-

3. The Appellant is the son of one KILONZO who lived at the material time on the MASII Location in the MACHAKOS District of the Southern Province of Kenya. There were also living on the said Location one MUTINDI, the wife of an older brother of the Appellant and two other brothers of the Appellant. named MUNYAO and MUTUA. The Appellant worked at MACHAKOS.

4. On the 27th September 1953, after sunset, a stranger, a member of another tribe, came to the

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Evidence of MUTINDI and GRIKOLI at Pp. 30, 31, 32, 33. and JUDGMENT Pp. 44, 45.

hut on the MASII Location of the said MUTINDI, who was alone at her said hut save for two of her children who were with her. the older being a boy named GRIKOLI, aged about 10 years. The stranger greeted GRIKOLI outside the hut and asked where the other people were. GRIKOLI replied "in the hut" and the stranger asked whether it was a man or woman in the hut. Grikoli replied "a woman". Mutindi then came to the door of the hut, the stranger asked her whether the owners of the hut were there and she replied that she and her children were inside. The stranger went off but returned shortly afterwards to Mutindi's hut and when asked by her why he had come back and where he was going to stay, he replied "here". Mutindi asked him to sleep in the granary but he refused. Mutindi and Grikoli said that it was dark, they were afraid of the stranger, and they thought he was a bad man, and Grikoli said that he appeared to be somewhat drunk. Because she was afraid, Mutindi left her hut taking her children with her and went to the hut of her Mother-in-law, the Appellant's Mother, which was about 300 yards away from her own hut. During the evening the Appellant and his brothers Munyao and Mutua also came to the vicinity of the Appellant's Mother's hut, and they were subsequently told about the stranger and that Mutindi had left her hut because of him and that she was afraid of him.

P.30. L.25-28.

5. According to Mutindi. her son Grikoli and the Appellant and his two said brothers, said they would like to see the stranger and went off, returning immediately with a cycle.

P.32. L.31-40.

6. Grikoli said that he and the Appellant and the said Munyao and Mutua went, with a hurricane lamp, to Mutindi's hut. They saw a cycle outside the door and on entering found the stranger asleep on the bed inside. He said that the Appellant touched the stranger, found a notebook in his pocket opened it and produced 30/- (10/- and 20/- notes) and put these and the notebook in his pocket. They then left the hut and MUNYAO took the cycle with him. They returned to Kilonzo's hut. It was apparent that at the time when Grikoli and the Appellant and his said brothers left Mutindi's hut on this occasion no physical harm had been done to the stranger and he was then alive, and, in the proceedings hereinafter referred to, no point was

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made upon this visit by Counsel for the Crown, save that in his final speech at the trial before Mr. Justice Connell, Counsel for the Crown submitted P.43. L.4. that the motive for the alleged murder was the theft of the cycle. This submission was not however relevant to the case against the Appellant as there was no evidence that he had ever suggested or taken any part in stealing the cycle and on the contrary Grikoli said that after he and the Appellant and his brothers had returned from Mutindi's hut he heard the noise of the cycle being pushed and that the Appellant had said "we are returning P.33. L.4. the cycle to the owner".

7. On the 8th October 1953 a body, which the Learned Trial Judge found to be that of the stranger, was found buried in a contour ditch. A post mortem examination was carried out by Dr. Dawson who expressed the view that the cause of death was a fracture of the left parietal region of the skull with underlying brain damage and further expressed the view that this injury was caused either by direct force by a blunt weapon on the skull or by the deceased being thrown forcibly on the ground, falling on the left side of his head. He said that there was also evidence of pressure round the neck caused probably by rope or cloth on which pressure was applied, and burning on arms and legs, but said that in his opinion neither of these did cause, nor could they jointly have caused, death.

8. On the 8th day of October 1953, the Appellant made a statement to one Alan Farrar Sagar, Pp. 36,37. first class Magistrate at Machakos, in which he ad- Pp. 63,64. mitted that he had killed the stranger in Mutindi's hut and at all times the Appellant admitted that) he had killed the stranger but said, in substance,) that he went to Mutindi's hut to see who the) P.16. L.25-35. stranger was who had caused her and her children) P.17. L. 1-27. to leave her hut, that the stranger threatened to) strike and/or struck at him whereupon he struck) P.39. L.22-37. back at the stranger or threw him to the ground) P.40. L. 1-15. and the stranger died, that he later dragged the) stranger's body from the hut, realised he had) Pp. 63,64. done something bad unintentionally, told his) brother Munyao to report the matter to their chief) and returned to his work at Machakos where he was) subsequently arrested.)

9. On a date or dates at present unknown

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being between the 7th day of October and 19th day of November 1953 the Appellant and his brothers Munyao and Mutua were charged with the murder of one Kibelenge Son of Mutua contrary to Section 199 of the Penal Code of Kenya (Laws of Kenya 1948 revised edition, volume 1, Cap.24).

Pp. 3-21. 10. On the 19th 24th 25th 26th and 27th days of November 1953 a preliminary enquiry into the death of the said Kibelenge on the 27th September 1953 was conducted at Machakos by and before one Noel Guy Hardy first class Magistrate and on the P.20, L.1-6. 27th day of November 1953 the said Magistrate committed the Appellant and his said brothers to the Supreme Court of Kenya for trial in accordance with Section 236 of the Criminal Procedure Code of Kenya (Laws of Kenya 1948 revised edition vol. 1 cap. 27).

P.3, L.16. 11. Neither the Appellant nor his brothers were represented at the said preliminary enquiry but nevertheless on the 26th day of November 1953 Pp.16,17,18. each of them gave evidence on his oath and the Appellant and Munyao were cross-examined on behalf of the Crown.

12. The whole of the record of the said preliminary enquiry, including the aforesaid evidence of the Appellant and his brothers as recorded, was produced and proved at the trial by the said Noel P.37, L.22. Guy Hardy and put in evidence.

Pp.22,23,24. 13. On the 2nd and 8th day of February 1954, the said Magistrate at Machakos recorded further evidence as required by Counsel for the Crown.

Pp. 26-43. 14. On the 29th day of April and the 6th and 7th days of May 1954 the Appellant and his two said brothers were tried in the Supreme Court of P.25. Kenya by Mr. Justice C.P. Connell with assessors upon an information alleging that on or about the 27th September 1953 at Masii Location, Machakos District in the Southern Province they jointly murdered Kibelenge son of Mutua.

15. On the 7th day of May 1954 the Appellant's P.44, L.24. brother Mutua was acquitted of the alleged offence.

Pp. 44-49. 16. In and by a reserved judgment given on the 10th day of May 1954 Mr.Justice Connell found

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the Appellant guilty of murder and his brother Munyao not guilty of murder but guilty of being an accessory after the fact to murder contrary to Section 218 of the Penal Code of Kenya.

17. The Appellant being convicted as aforesaid was on the 10th day of May 1954 sentenced to death.

18. The Appellant appealed against the said conviction and sentence to Her Majesty's Court of Appeal for Eastern Africa, with leave, on fact and law, and on the 31st day of May 1954 the said Court of Appeal dismissed the said Appeal but gave no reasons. Pp. 51, 52, 53, 54.

19. Section 199 of the Penal Code of Kenya is as follows:

"199. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder".

Section 202 of the Penal Code of Kenya is as follows :-

"202. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) An intention to cause the death of or to do grevious harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grevious harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death of grevious bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

Section 5 of the Penal Code of Kenya provides as follows -

"5. In this Code, unless the context otherwise

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requires -

.....

.....

"grevious harm" means any harm which amounts to a main or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;

"harm" means any bodily hurt, disease or disorder whether permanent or temporary;

.....

.....

"maim" means the destruction or permanent disabling of any external or internal organ, membrane or sense;

.....

Other Sections of the Penal Code of Kenya and the Criminal Procedure Code of Kenya relevant to this appeal and referred to in this case are set out in the Annexe to this case.

Annexe.

20. The principle contentions to be urged for the Appellant are as follows :-

21. It is respectfully submitted that there was no evidence before the learned trial Judge and the assessors upon which the Appellant could properly be convicted of murder contrary to Section 199 of the Penal Code of Kenya. In support of this submission reference is made to the whole of the evidence as recorded but in particular and without prejudice to the generality of the foregoing the following submissions are made as to the evidence of individual witnesses and the evidence in general.

P.26. L.30,31, 32.
P.27. L.1-24.

22. Ian Easton Dawson M.B., Ch.B. The evidence of this witness was the only evidence direct or indirect, other than that given by the Appellant in his statements and sworn evidence, of the manner in which the stranger met his death and it is

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submitted that the evidence of this witness gave strong support to the evidence given by the Appellant on oath at the preliminary enquiry of the 26th November 1953 that is to say some six months prior to the giving of this evidence by Dr.Dawson. Further, attention is respectfully drawn to the fact that the submission by Counsel for the Crown, in his final address, that the deceased "must have been strangled" is in direct contradiction of the evidence of this witness. Pp. 16,17. P.43, L.8.

23. William Aron Morkel. Inspector of Police. This witness gave evidence of the finding of the body and that the Appellant's wife subsequently showed him a cycle, identified as that used by the deceased. apparently hidden about 200 yards from her house, and some ropes partly concealed under a hedge about three quarters of a mile from her house. This witness's evidence as to the cycle and the ropes was however contradicted by the evidence of Zelani, the Appellant's wife, who, being called as witness for the Crown, said that she had never seen the cycle referred to before and that the first time she had seen the ropes referred to was at the preliminary enquiry. No application was made nor permission given to treat her as a hostile witness. It is submitted that the evidence of these two witnesses did not in any way connect the Appellant with the deceased or implicate him in the death of the deceased or prove or tend to prove the Appellant guilty of murder or any other offence. P.28. L.17-39 P.29. L. 1-16. P.29. L.22-32.

24. Mutindi wife of Nyambu. This witness recounted of the coming of the stranger as set out in paragraph 4 above and that she left her hut because she was afraid and that she told the Appellant and his brothers these things when they arrived later. She said that the Appellant and his brothers and her son Grikoli said they would like to see the stranger and went off returning immediately with a cycle. (the evidence of Grikoli showed that it was the Appellant's brother Munyao who took the bicycle), and later went away again. Other than the above her evidence contained no evidence connecting the Appellant in any way with the stranger or with his death and it is submitted that her evidence contained no evidence proving or tending to prove the circumstances of the stranger's death or that the Appellant was guilty of murder Pp. 30,31. P.32, L.29.

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P.31, L.4,5. or any other offence. Further, questioned by the Assessors, this witness said there was no fight or quarrel and it is submitted that the said evidence ought not to have been admitted or alternatively was of no probative value by reason of the fact that it is manifest from this witness's evidence that she was not in a position at any material time to see whether or not there had been a fight or quarrel between the Appellant and the stranger.

P.31. L.20-31. 25. Finlay McNaughton. This witness was an assistant government chemist and gave evidence of the finding of blood stains on two pieces of rope. It is submitted that his evidence did not in any way implicate the Appellant in the alleged or any offence.

Pp. 32,33. P.46. L.26 and L.45,46. 26. Grikoli Muselbi son of Nyambu. This witness whom the Learned Judge appears to have regarded and relied upon as the most important witness for the Crown is the son of Mutindi referred to above.

P.32. L.1,2,3. The record recites that he appeared to be about 10 years old and that he said that he understood truth and the importance of telling the

P.32. L.4. truth. It also appears that he said he was a Christian and had been baptised and that he was thereupon sworn. No reference appears to have been made to the fact disclosed in exhibit 6, the record of the preliminary enquiry, that at that enquiry on the 24th day of November 1953 he was

P.12. L.5. described as a pagan and duly affirmed, nor were any steps taken to ascertain his true age notwithstanding the presence of his mother Mutindi. It is submitted that the evidence of this witness contains no evidence directly or indirectly touching the manner in which the stranger met his death or proving or tending to prove that the Appellant murdered him and on the contrary shows that the

P.32. L.38-42. Appellant and Grikoli left Mutindi's hut together and that at that time the stranger was alive and unharmed.

P.33. L.35-41. P.34. L.1-26. 27. George Huntley Knaggs. This witness who was the District Officer at Machakos gave evidence of the taking of a statement by him from the Appellant's brother Munyao and produced the said statement. It is submitted that this statement was not evidence against the Appellant but it does not appear that the Learned Trial Judge directed his mind to this consideration at any time and on

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the contrary in his judgment the Learned Trial Judge referred to this statement and the statement made by the Appellant together and without any reference to this consideration and whilst considering the evidence against the Appellant. P.46. L.15-49. P.47. L.1,2.

28. Julius Mbubi. This witness stated that he was present when the Appellant made a statement to Mr. Sagar on the 8th day of October 1953 and that he translated the said statement from Kikamba to English and English to Kikamba. In fact it would appear from the certificate endorsed on the said statement by Mr. Sagar that the same was translated by this witness from the Kikamba language into Kiswahili and that Mr.Sagar interpreted the same into English and it is respectfully submitted that this witness's evidence was unreliable and that in so far as there are inconsistencies between the statement translated by him and recorded by two-fold interpretation and the other statements made by the Appellant, such inconsistencies are to be treated with caution. P.38. L.34,35. P.39. L.1-11. P.63. L.41. P.64. L.1,2,3.

29. In the premises it is respectfully submitted that the only evidence connecting the Appellant directly with the death of the stranger or proving or tending to prove that the Appellant killed the stranger was the Appellant's statement to Mr. Sagar his evidence given on oath at the preliminary enquiry and his unsworn statement at the trial. Further it is respectfully submitted that upon that evidence, supported as it was by the evidence of Dr. Dawson and standing, as it did, uncontradicted by any evidence, direct or circumstantial, it was not open to the Learned Trial Judge or the Assessors to convict the Appellant of murder.

30. Further it is submitted that the Learned Trial Judge misunderstood and/or misinterpreted and/or confused the evidence or parts thereof; drew inferences of fact which could not properly be drawn in view of the whole of the evidence; attached weight to evidence which did not prove or tend to prove the Appellant's guilt of the offence alleged; and drew inferences from the statements and evidence of the Appellant which could not properly be drawn in the whole of the circumstances; in each of the aforesaid cases to the prejudice of the Appellant; and failed to take into account or give due weight to independent evidence

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which favoured the Appellant.

Pp. 44-49. 31. In support of the submission last above made reference is made to the whole of the written judgment given on the 10th day of May 1954 by the Learned Trial Judge but in particular and without prejudice to the generality of the foregoing it is contended that the Learned Judge erred in the instances which are set out by way of example in the next succeeding paragraphs numbered 32 to 40.

Commencing at P.44. L.25. P.29 32. In the fourth and fifth paragraphs of his judgment the Learned Judge said that it was proved that the Appellant's wife showed Inspector Morkel the spot where the cycle was found and the ropes, whereas in fact, having been called as a witness for the Crown, she denied this. Further it would appear that in dealing with the cycle and the ropes the Learned Judge considered the evidence relating to these to be evidence tending to prove the Appellant's guilt. It is submitted that he erred in both instances. 10 20

P.48. L.4,5,6. 7. 33. The Learned Judge said in his judgment, "in both unsworn statements (i.e. those of Accused 1 and 2) it is stated that the lamp got broken; this is inconsistent with Grikoli's evidence and appears to be an afterthought". It is submitted that this was not in any way inconsistent with Grikoli's evidence and that there was no justification for inferring from the evidence as recorded that this was an afterthought.

P.48. L.36,37, 38. 34. The Learned Judge said in his judgment "from all accounts the stranger was lying on the bed and was in a disadvantageous position". It is submitted that there was no evidence as to the position of the stranger immediately before he met his death, other than that of the Appellant, who said that the stranger was about to strike or had just struck the Appellant. 30

P.48. L.14,15, 16,17. P.48. L.39,40. Pp.32,33. 35. The Learned Judge said in his judgment "now if one believes the small boy's sworn evidence it is perfectly clear that Matalo's first action was to steal money from the dead man's pocket.", and "the first accused ..... has glossed over the theft of money from the deceased". It is submitted that there was no evidence to support those statements of fact. The evidence of the small boy was 40

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that the Appellant removed the stranger's note-book which contained the money and Munyao removed the cycle and the Appellant was later heard to say he was returning the cycle to the owner, this statement being accompanied by the noise of a cycle being pushed. This evidence did not therefore necessarily establish a motive for murder or indicate anything other than the removal of the above items for the purpose of identifying and/or of immobilising the stranger, followed by an intention to return them. Further it is submitted that it was contrary to the evidence as recorded to say that the Appellant glossed over the theft. It would appear that when the Appellant gave evidence on oath at the preliminary enquiry he was cross-examined but that his account of the events leading up to and resulting in the death of the stranger was not challenged on any material point, if indeed at all, and it was not put to him either that he had stolen the stranger's money or that there was any connection between the removal of the money and the death of the stranger. Further, neither in opening the case for the Crown nor in his final address to the Court, did Counsel for the Crown attach any significance to the removal of the money and it is submitted that in the circumstances the Appellant was entitled to assume at his trial that no importance was attached to the removal of the money such as to call for an explanation from him; and that accordingly it was not open to the Learned Judge to draw any inference from his silence.

P.17. L.21-27.

P.27. L.30-47.
P.43. L.3-9.

36. The Learned Judge said in his judgment "in my view the previous and subsequent conduct of the first accused is relevant in considering whether he is guilty of murder or manslaughter" and then went on to say "one would expect that, if he was incensed at finding a stranger in his hut, and there had been a genuine struggle, that he would not have stolen money and concealed the cycle; he would have reported all the events to the Police". It is respectfully submitted that this statement discloses confusion in the Learned Judge's mind as to the evidence for it is clear from the evidence as recorded that if the Appellant did steal money it was on a separate occasion and before the struggle, not after it, there was no evidence that the Appellant took or concealed the cycle; and it ignores the fact that he told his brother to report

P.48. L.45,46, 47.
P.49. L.1.

P.49. L.1-6.

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to the Chief and then returned to his work at Machakos and made no attempt at concealment or flight.

P.43. 37. It is respectfully submitted that a further indication of confusion as to the evidence is to be found in the opinions expressed by the Assessors.

P.48. L.38-45. 38 The Learned Judge appears to have drawn inferences prejudicial to the Appellant from the differences in the accounts given by the Appellant but does not appear to have made any allowance either for the circumstances in which those accounts were given, or for the fact that all were translated, (in one case from KIKAMBA to KISWAHILI and thence into ENGLISH), or for the fact that for the reasons given in paragraph 28 of this case there was doubt as to the reliability of the interpreter who interpreted the last mentioned statement from Kikamba, to KISWAHILI, or for the fact that the last account was given by the Appellant some 7 months after the first; and it is submitted that when such allowances are made such differences as there are between the Appellant's statements and evidence are not such as to cast any material degree of doubt upon the substance of those statements or that evidence.

P.49. L.6-14. 39. The Learned Judge concluded his judgment against the Appellant in the following words "the onus is on the Crown to prove murder and I think that all these facts prove that the first accused had a motive for concealing all that occurred and I think the only reasonable inference to draw is that after stealing the deceased's money, the first accused struck the deceased a severe blow on the head with a stick intending to kill him and cover up traces of his crime. I find the first accused guilty of murder". It is respectfully submitted that not only was this not the only reasonable inference to draw but that on the contrary it was an inference which could not properly be drawn, in that, inter alia, (i) there were no or no sufficient facts to prove that the Appellant had a motive for murder; (ii) the Learned Judge overlooked or disregarded the fact that motive however strong can never by itself supply the want of reliable evidence; (iii) there were no facts from which this inference could reasonably be drawn;

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(iv) it was inconsistent with the evidence of Grikoli and (v) whereas the Learned Judge was purporting to rely upon the Appellant's conduct after the death of the stranger as justifying the drawing of that inference, in fact not only was the Appellant's conduct after the death, (namely his request to his brother to report the death to their chief and his return to his work at Machakos where he was subsequently arrested), not such as to justify the drawing of such an inference, but was opposed thereto.

40. It is submitted that the Learned Judge's judgment indicates that he failed wholly to give any consideration to the fact that the Appellant's actions both before and after the death of the stranger were equally consistent with unintentional killing, in self defence or by accident, or provoked killing, and whereas after that part of his judgment last above quoted the Learned Judge, turning to the case of Accused 2, (Munyao) said "with regard to the second accused, there is no medical evidence that more than one blow was struck fracturing the deceased's skull", he failed wholly in considering the case against the Appellant to give any weight to the fact that this evidence supported the Appellant's statement and evidence as to the manner of the stranger's death.

41. It is submitted that had the Learned Judge not made the errors which it is respectfully submitted that he did make as set out in paragraph 30 to 40 above he could not reasonably have made the only findings of fact which he did make which were sufficient to support his decision, namely that the Appellant deliberately struck the stranger a severe blow intending to kill him, or any other findings of fact sufficient in law to justify the conviction of the Appellant for murder, and that accordingly neither the said findings of fact nor the conviction of the Appellant should stand

42. Further it is submitted that the Learned Trial Judge misdirected himself and the assessors in law and that but for the said misdirections as hereinafter set out, he could not reasonably have convicted the Appellant of murder or of any offence. In support of this submission reference is made to the judgment given by the Learned Judge and it is submitted that the said judgment is to be regarded as his summing up of the facts to the assessors

Pp.44 to 49.

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and his directions upon the law to himself and the assessors.

43. It is submitted that the evidence relied upon by the Crown as establishing that the Appellant unlawfully killed the stranger, namely the statement made by the Appellant to Mr. Sagar and his evidence on oath at the preliminary enquiry, which was the only evidence adduced for the prosecution proving that the Appellant caused the death of the stranger, and the Appellant's statement at his trial, disclosed two substantial defences, namely (i) that the killing was accidental and/or in self defence (in which case it is submitted that the Appellant was entitled to an acquittal) and/or (ii) provocation sufficient to reduce the killing to manslaughter; and it is submitted that the onus remained throughout on the prosecution to establish that the Appellant was guilty of the crime of murder.

44. Accordingly it is submitted that the Learned Judge should have directed himself and the assessors (i) that the only direct evidence of the death of the stranger disclosed a defence that the Appellant killed the stranger accidentally and/or in self defence; and (ii) that they should consider in relation to that defence (a) the circumstances in which the stranger, a member of another tribe, came to Mutindi's hut appearing to be somewhat drunk, (b) the conduct of the stranger which made Mutindi afraid and caused her to leave her hut taking her children with her, (c) the fact that the stranger was a trespasser in Mutindi's hut when the Appellant, her brother-in-law went to see who he was, (and it would seem was guilty of criminal trespass contrary to Section 304 of the Penal Code of Kenya), (d) that the stranger was armed with a knife according to the Appellant's
P.63. L.23. statement to Mr. Sagar, (e) the intrinsic probability that the stranger being woken up by the Appellant in the semi darkness might in those circumstances have seized his weapon, (f) the fact that if the stranger did as stated by the Appellant threaten to strike or strike the Appellant the Appellant would have been justified in law in taking reasonable steps for his own protection, (g) that there was no evidence of the striking of more than one blow and (h) that the medical evidence was to the effect that the stranger's death

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was caused either by a blow on the head or by his striking his head on the ground; and (iii) that they could not convict the Appellant of murder unless the evidence was such as to prove that the killing was not accidental or in self defence; and (iv) that if the evidence left them in doubt on these matters the Appellant was entitled to an acquittal. It is further submitted that the Learned Judge should have considered and directed himself and the assessors as to the provisions of Sections 10, 11 and 18 of the Penal Code of Kenya.

45. As appears from his judgment the Learned Judge failed to direct himself or the assessors upon any of the last mentioned matters and on the contrary it appears that he did not at any time ever consider or give any direction as to this particular defence but on the contrary assumed the Appellant's guilt and directed himself and the assessors that the sole issue was as to whether the Appellant was guilty of murder or manslaughter, and the only references in the judgment of the Learned Judge to a possible finding other than murder are "In my summing up to the assessors I directed them that they could find an opinion of manslaughter in the case of the first accused if they believed that there had been a fight between the stranger and (Accused 1) Matalo" and "In my view the previous and subsequent conduct of the first accused is relevant in deciding whether he is guilty of murder or manslaughter". P.48. L.8-12. P.48. L.45,46, 47. P.49, L.1.

46. It is further submitted that the Learned Judge should have further directed himself and the assessors that if they rejected the defences of accident and/or self defence they should then consider the defence of provocation in the light of the facts and circumstances referred to in paragraph 44 above set out and that he should have directed himself and the assessors as to the law relating to provocation and in particular as to the effect of Sections 203 and 204 of the Penal Code of Kenya.

47. It is submitted that the judgment of the Learned Judge shows that he did not give any proper directions as to the matters last mentioned; and that his only direction as to the possibility of an alternative finding of manslaughter, which was "In my summing up to the assessors I directed them

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that they could find an opinion of manslaughter in the case of the first accused if they believed that there had been a fight between the stranger and the (Accused 1) Matalo", was inadequate.

48. It is further submitted that the Learned Judge should have directed himself and his assessors as to the case of each accused separately and as to what was in law evidence against the Appellant only and what was evidence against his brothers and each of them only and that he failed so to do but on the contrary considered the statements made by the Appellant and his brother Munyao to Mr. Sagar and Mr.Knaggs respectively, together in one paragraph of his judgment, apparently comparing them and making no distinction as to which was evidence against whom, and then proceeded to consider in the same manner the evidence given by each at the preliminary enquiry and the unsworn statements made by each at the trial, and in such manner as to suggest that he was comparing the same rather than distinguishing between them, and further the Learned Judge admitted evidence against the Appellant which was inadmissible as being given in the absence of the Appellant by the Appellant's wife.

P.46. para.2.

P.47. paras.2 and 3.

P.29. L.9-16.

49. It is respectfully submitted that the misdirections and errors referred to in paragraphs 42 to 48 last above set out were such as to be likely to and have in fact led to the Appellant being deprived of the protection of the law and being the victim of a grave miscarriage of justice.

50. The Appellant respectfully submits that this appeal should be allowed and the judgment of the Court of Appeal for Eastern Africa set aside and his conviction and sentence quashed for the following amongst other

REASONS

1. Because there was no evidence upon which the Appellant could properly be convicted of murder contrary to Section 199 of the Penal Code of Kenya or alternatively his conviction was against the weight of the evidence.

2. Because the Learned Judge misdirected himself and the assessors as to the evidence

in such manner as to turn the scale against the Appellant.

3. Because the Learned Judge failed wholly to consider or direct himself or the assessors as to the defence of accident and/or self defence raised by the evidence.

4. Because the Learned Judge failed wholly to consider or direct himself or the assessors as to the defence of provocation reducing the killing to manslaughter as raised by the evidence.

5. Because the Learned Judge failed adequately to direct himself or the assessors as to the possible alternative finding of manslaughter.

6. Because the Learned Judge failed wholly to distinguish between or to direct himself or the assessors as to what was evidence against the Appellant and what was evidence against his brothers only or as to what evidence was admissible against the Appellant and what was not.

7. Because the Appellant has been deprived of the protection of the law and there has been a grave miscarriage of justice.

IAN PERCIVAL.

ANNEXE.

The Penal Code.

A N N E X E

THE PENAL CODE

(Laws of Kenya 1948 Revision
Volume 1 Cap.24)

Section 10.

Subject to the provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

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X X X X X

Section 11.

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Section 18.

Subject to any express provisions in this Code or any other law in operation in the Colony criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

Section 198.

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause

death or bodily harm.

Section 203.

When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

Section 204.

The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

Section 304.

Any person who -

ANNEXE.

(i) Enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person lawfully in possession of such property;

(ii) Having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit any offence,

is guilty of the misdemeanour termed criminal trespass and is liable to imprisonment for three months.

If the property upon which the offence is committed is any building, tent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody of property, the offender is liable to imprisonment for one year.

THE CRIMINAL PROCEDURE CODE.

THE CRIMINAL PROCEDURE CODE

(Laws of Kenya, 1948 Revision, Volume 1 Cap.27)

Section 168.

(i) The judgment in every trial in any Criminal Court in the exercise of its original jurisdiction shall be pronounced, or the substance of such judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates if any:

X	X	X	X	X
(ii)	X	X	X	X
(iii)	X	X	X	X
(iv)	X	X	X	X

Section 169.

(i) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the

	court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.				THE CRIMINAL PROCEDURE CODE.
(ii)	X	X	X	X	
(iii)	X	X	X	X	
(iv)	X	X	X	X	

No.48 of 1954

IN THE PRIVY COUNCIL

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI.

K I L O N Z O

- v -

THE QUEEN

C A S E

- for the -

APPELLANT

BLAKE & REDDEN,
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London, S.W.1.