E.T.D. 4

29 , 1960

IN THE PRIVY COUNCIL NO. 26 OF 1960

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

B E T W E E N:

PETER HAROLD RICHARD POOLE
(Accused) .. .. Appellant

- and -

THE QUEEN (Prosecutrix) .. Respondent

RECORD OF PROCEEDINGS

MERRIMAN, WHITE & CO.,
3, King's Bench Walk,
Inner Temple,
London, E.C.4.
Solicitors for the Appellant.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
London, W.C.2.
Solicitors for the Respondent.

IN THE PRIVY COUNCIL NO. 26 OF 1960

50919

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

LIST OF DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Description of Document	Date	
Statement of Accused	12th October 1959	
Caution and Charge by Superintendent Baker C.I.D. Nairobi	14th October 1959	
Statement of Accused	11th November 1959	
Record of Proceedings	7th December 1959	
Summing-up by Trial Judge (less that extracted - see 5 above)	10th December 1959	
Notes of Judges of Court of Appeal for Eastern Africa	1st March 1960	

IN THE PRIVY COUNCIL NO. 26 OF 1960

ON APPEAL
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AT NAIROBI

B E T W E E N:

PETER HAROLD RICHARD POOLE
(Accused) .. .. Appellant

- and -

THE QUEEN (Prosecutrix) .. Respondent

RECORD OF PROCEEDINGS

In the Resident Magistrate's Court at Nairobi

No. 1

Extract from Committal Proceedings. Criminal Case No.2357 of 1959, 11th November 1959.

No. 1

EXTRACT FROM COMMITTAL PROCEEDINGS
CRIMINAL CASE NO. 2357 OF 1959

IN THE RESIDENT MAGISTRATE'S COURT
AT NAIROBI

REGINA C.I.D. NAIROBI AREA Prosecutrix

- and -

PETER HAROLD RICHARD POOLE Accused

RULING:

Having addressed my mind to the points raised by Mr. Sirley and considered the evidence which has been recorded in the form of depositions, and without attempting to take the easy way out as it has been so succintly expressed I am satisfied that accused must be committed to the Court above to stand trial on a charge of murder contrary to Section 199 of the Penal Code.

Accordingly I now direct that a charge be framed accordingly and that the accused person, Peter Harold Richard Poole, be committed to the Supreme Court on a charge that he did on the 12th

In the Resident Magistrate's Court at Nairobi

day of October, 1959, in Nairobi, in the Nairobi Extra-Provincial District, murder Kamawe s/o Musunge the offence being contrary to Section 199 of the Penal Code.

R.H. Lownie.
11.11.59.

No. 1

Extract from Committal Proceedings. Criminal Case No.2357 of 1959,

11th November 1959 - continued.

Charge framed. Read to Court.
Provisions of Section 233 complied with.
Accused's reply recorded.

R.H. Lownie.

ORDER:

Accused to be remanded in custody to appear before Supreme Court. Depositions to be supplied to accused free of charge.

R.H. Lownie.

In the Supreme Court of Kenya at Nairobi

No. 2

Information and Notice of Trial. Criminal Case No.242 of 1959,

30th November 1959.

No. 2

INFORMATION AND NOTICE OF TRIAL
CRIMINAL CASE NO. 242 OF 1959

COLONY AND PROTECTORATE OF KENYA

I N F O R M A T I O N

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

THE 7TH DAY OF DECEMBER, 1959

At the Sessions holden at Nairobi on the 7th day of December, 1959, the Court is informed by the Attorney-General on behalf of Our Lady the Queen that PETER HAROLD RICHARD POOLE is charged with the following offence :-

STATEMENT OF OFFENCE

MURDER contrary to section 199 of the Penal Code.

PARTICULARS OF OFFENCE

PETER HAROLD RICHARD POOLE on or about 12th day of October, 1959, at Nairobi, in the Nairobi

Extra Provincial District MURDERED KAMAWE S/O MUSUNGE.

DATED at Nairobi this 30th day of November, 1959.

K.C.BROOKS.
Ag. Senior Crown Counsel,
for Attorney-General.

In the Supreme Court of Kenya at Nairobi

No. 2

Information and Notice of Trial, Criminal Case No.242 of 1959, 30th November 1959 - continued.

CRIMINAL CASE NO. 242 OF 1959.

R.M. Nairobi Cr.C.2357/59
KILIMANI CDA 487/59-CA340/59

To PETER HAROLD RICHARD POOLE.

TAKE NOTICE that you will be tried on the above information at the Sessions of the Supreme Court to be holden at Nairobi on the 7th day of December, 1959, at 10 o'clock in the forenoon.

NAIROBI.

P. HEIM.
REPUTY REGISTRAR,
SUPREME COURT OF KENYA.

This 30th day of November, 1959.

No. 3

No. 3

Judge's Notes of Proceedings. Criminal Case No.242 of 1959, 7th December 1959.

JUDGE'S NOTES OF PROCEEDINGS
CRIMINAL CASE NO.242 OF 1959

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

(From Original Criminal Case No.2357 of 1959 of the Resident Magistrate's Court at Nairobi).

REGINA .. .. .. PROSECUTRIX

- versus -

PETER HAROLD RICHARD POOLE ACCUSED

7.12.59 at 10 a.m.

Brookes for Crown.
Sirley for accused.
Accused arraigned.

In the Supreme Court of Kenya at Nairobi

No. 3

Judge's Notes of Proceedings. Criminal Case No.242 of 1959,

7th December 1959 - continued.

Sirley: Submitting a plea in bar. S.82 C.P.C. Section must be strictly interpreted. It bars the same charge, but not another charge.
R. v Noormohamed Kanji, 4 E.A.C.A. 34.
By inference that case is against me.
This point has never been decided in so far as Kenya is concerned. Effect of s.79(1) of Uganda C.P.C. is same as Kenya section.

Brookes: Have not had time to consider authorities. But base my argument on words "any subsequent proceedings". 10
Could not be wider. Cover same charge.
R. v Jamal-ud-Din, 1 E.A.C.A. 68.

Sirley: Nothing to add.

Ruling.

In my view the wording of section 82(1) is quite clear and the entry of a nolle prosequi does not constitute a bar to the filing of a fresh information in respect of the same charge.

R.O. Sinclair,
C.J. 20

Plea: Not Guilty.

Brookes: Understand defence challenging admissibility of accused's statement to police. For that reason do not intend to refer to it in my opening.

Sirley: Am objecting to any reference to the statement until it has been proved.

Brookes: If Court feels it would be better not to refer to statement I shall not do so. 30

Court: In the circumstances I think it would be better not to refer to the statement in opening to the jury.

R.O. Sinclair,
C.J.

Jury panel enter and roll called. G.W. Tinney struck off roll as his age 74. Jurors chosen, subject to challenge:-

1. G.D. Taylor.
2. R.W. Pizzey. 40
3. T.E. Osborne.
4. E.O.A. Baumann.
5. D.N. Nuttall.
6. E.G.S. Blanckhart.

7. T.G. Considine.
8. H.M. Huck.
9. G.J. Barber.
10. E.G. Spall.
11. J.M. Porter.
12. E.V. Benn.

Accused warned as to challenge.

Challenges :-

T.E. Osborne by Crown - stood down and W.B. Michie chosen in his place.

E.G. Spall by Crown - stood down and D.M. Wood chosen in his place.

E.G.S. Blanckhart by defence - stood down and A. Snowball chosen in his place.

E.V. Benn by Crown - stood down and L.J. Crook chosen in his place.

Jurors sworn.

Foreman:- L.J. Crook.

Accused given in charge.

R.O. Sinclair,
C.J.

No. 4

EVIDENCE OF TITORO S/O SABAI

P.W.5 - TITORO s/o SABAI, Male, African, Christian, Tiriki, sworn, states in Lululyu :-

Examined Brookes. Work for Mr. Battersea in Gordon Road as a houseboy. Was working for him on 12th October this year. That day finished work at 2 p.m. Went to Colonial Stores in Adam's Arcade, which is in Ngong Road. Bought some articles there. Left the Arcade. Went along Ngong Road into Kilimani Road. There I saw Kamawe Masunge. I knew him. I was standing at the side of the road when I saw him talking to the Accused. The first time I saw him was when he passed me when I was near the shops. That was in Gordon Road. He was going towards Kilimani Road. He was on a bicycle. The dogs stopped him - Alsatian dogs. They were from the accused's home. Kamawe

In the Supreme Court of Kenya at Nairobi

No. 4

Prosecution Evidence.

Titoro s/o Sabai,

Examination - continued.

was on Kilimani Road when he was stopped by the dogs. He picked up some soil which he threw at the dogs. After the dogs retreated the accused came from his house calling the dogs to follow. The accused came up to the hedge of the next house where he got hold of deceased's bicycle. It was at the junction of Ngong Road and Gordon Road. The deceased got from Kilimani Road to the junction by running backwards. Accused was following him. Kamawe was going to Colonial Stores. After Kamawe had thrown the soil he went back to the main road - Ngong Road. He was just walking pushing his bicycle and holding a bicycle pump in his hand. He was proceeding towards the shops and facing that direction. When accused caught up with Kamawe, he caught hold of the bicycle and pulled out a pistol from his pocket. He pulled the trigger and the first shot did not hit the deceased. Then he shot another one which hit the deceased who left his bicycle and ran to the corner of the hedge, bending over and holding his stomach.

At the time accused shot Kamawe, the dogs were with the accused. They ran away after the first shot.

After Kamawe was shot, I went past the accused, back to the shops and telephoned '999'. Then I went and stood on the side of the road waiting for the police so that I could show them where the incident took place. Accused was standing next to the deceased.

The police car came on the scene. I showed them where the body of Kamawe was. It was lying against a hedge at the side of the road.

On 13th October I identified the body of Kamawe to Dr. Rogoff.

Accused was still on the scene when the police car arrived.

Cross-Examination.

CROSS-EXAMINED

Cross-examined Sirley: I remember giving evidence in the Lower Court. I pointed out to the Lower Court where both shots hit deceased's body. In the Lower Court I said that the deceased did not show signs of having been hit by the first bullet.

I said in the Lower Court "He shot deceased in the centre of his body, then a second time to the right and a little higher up" (demonstrates). I said I saw them hit the body. To-day I said only one bullet hit the body. To-day is the true statement. The other one was wrong. The shots were fired one after the other like this. (Demonstrates about one second between shots). Both shots were fired at the same place. If a person says shots fired in different places he would be lying.

I saw deceased from the first time the European came until deceased was shot. During none of that time did deceased have a stone in his hand. If a person said he had stones in his hand, she would be lying. I did not hear any conversation between accused and deceased. I heard only screaming after deceased was shot. I was about 20 yards (indicated) away from them. I saw a European woman in a car. She was near me. I was a little nearer them than the European woman. The accused and deceased might have said something but I did not hear it. I said in the Lower Court "I heard the bwana speak, but not Kamawe". I did not hear the accused speak. I only heard the accused talk, but did not hear the exact words. I heard only screaming by deceased after he was shot. I did not hear him speak.

I said in the Lower Court "Kamawe was telling the bwana 'let me go' ". I was standing at the corner of Kilimani Road and Gordon Road. I went into Kilimani Road. I followed accused and deceased to Ngong Road - further away than the width of the Court (about 35 ft). I stood there because I saw accused coming from his house. I followed them because I wanted to know the outcome. The European lady was in her car. She stopped her car. I passed her car. It came from Ngong Road. It did not turn round in my presence. It did not move while I was there. When I left to telephone, her car was still in the same place.

RE-EXAMINATION

Re-examined Brookes: No questions.

By Court. I was just going across Kilimani Road - did not go into it. I first saw deceased when he was attacked by the dogs. He did not pass me. I

In the Supreme Court of Kenya at Nairobi

No. 4

Prosecution Evidence.

Titoro s/o Sabai, ..

Re-Examination - continued.

did not see him riding his bicycle. He was in Kilimani Road when I first saw him.

Court. Court with accused, counsel and jury adjourns outside Court for witness to indicate distances.

R.O. Sinclair, C.J.

Court resumes after a few minutes.

Witness continues evidence.

By Court: I have indicated outside the Court certain distances and positions. I indicated that when I first saw the deceased he was some distance down Kilimani Road. I indicated the distance (Approx. 40 yards from the junction). I indicated the place where I was standing when I first saw the deceased. (At a spot about 8 yards from the corner of accused's plot at the junction). I indicated where I was when the deceased was shot. (At a spot about 8 yards from the N.W. corner of Milne's plot on the west side of Gordon Road). I indicated where the European lady's car was. (In the junction of Kilimani and Gordon Roads). I indicated where the deceased was when he was shot. (A spot about 40 yards from junction of Kilimani and Gordon Roads). The dogs came from the small gate in Kilimani Road. The deceased was standing near the gate in Kilimani Road when I first saw him.

Cross-Examination (Continued by leave).

CROSS-EXAMINED (CONTINUED)

Cross-examined Sirley (with leave as a result of material elicited by the Court): I did see deceased riding his bicycle. He passed me. I was then in Gordon Road. I saw him turn into Kilimani Road. When I got to the junction the deceased had already been stopped. I saw him get off his bike. I did not actually see him get off his bike. I did not say in the Lower Court that I saw deceased get off the bike. At the moment when the shots were fired the European lady was inside the car. The car did not move back before the shots were fired.

Re-Examination (With leave)

RE-EXAMINATION

Re-examined Brookes (with leave): No further questions.

R.O. Sinclair, C.J.

Court. Adjourned to 9.30 a.m. on 8.12.59.

R.O. Sinclair, C.J.

No. 5

In the Supreme Court of Kenya at Nairobi

No. 5

Extract of Summing-up by Trial Judge - Conviction, Allocatus and Sentence,

10th December 1959.

EXTRACT OF SUMMING-UP BY TRIAL JUDGE CONVICTION, ALLOCATUS AND SENTENCE

Gentlemen, will you now consider your verdict? You may retire if you wish and you may have any of the exhibits including the accused's statement.

Deputy Registrar, Mr. Heim; sworn:

Jury Retire at 10.45 a.m.

Jury Return at 12.50 p.m.

REGISTRAR: Gentlemen of the Jury, are you agreed upon your verdict?

FOREMAN OF THE JURY: We are My Lord.

REGISTRAR: Do you find the accused, Peter Harold Richard Poole, Guilty or Not Guilty of Murder, contrary to Section 199 of the Penal Code?

FOREMAN OF THE JURY: Guilty My Lord.

REGISTRAR: You say he is Guilty, is that the verdict of you all?

FOREMAN OF THE JURY: It is My Lord.

THE CHIEF JUSTICE: The accused is accordingly convicted of Murder, Contrary to Section 199 of the Penal Code.

REGISTRAR: Prisoner at the Bar. You stand convicted of Murder, contrary to Section 199 of the Penal Code. Have you anything to say why sentence should not be passed upon you according to law.

THE ACCUSED: No My Lord.

THE CHIEF JUSTICE: PETER HAROLD RICHARD POOLE, you have been convicted of Murder and the law provides only one penalty for Murder. The sentence of the Court is that you be hanged by the neck until you are dead.

You have seven days in which to file a Notice of Appeal and ten days after the record is filed for filing a memorandum of Appeal.

Thank you Gentlemen for your help in this very long and difficult case. You are excused Jury Service for two years.

Foreman of the Jury: Thank you My Lord.

In the Court of Appeal for Eastern Africa at Nairobi.

No. 6

Report of Chief Justice (Trial Judge) to Court of Appeal,

26th February 1960.

No. 6

REPORT OF CHIEF JUSTICE SINCLAIR (TRIAL JUDGE) TO COURT OF APPEAL

REPORT BY TRIAL JUDGE UNDER RULE 42(4) OF THE EAST AFRICAN COURT OF APPEAL RULES, 1954

CRIMINAL APPEAL NO. 217 OF 1959
REGINA v. PETER HAROLD RICHARD POOLE

The 5th prosecution witness, Titoro, was called during the afternoon of the 7th December, 1959. I do not remember the time when he was called, but the 3rd and 4th witness for the prosecution had previously given evidence that afternoon and it must have been after 3 p.m.

2. I did not take over the examination of the witness during Mr. Sirley's cross-examination. After Mr. Sirley had completed his cross-examination and Mr. Brookes had intimated that he had no questions to ask in re-examination, I proceeded to ask the witness some questions in order to clarify some points in his evidence which I thought to be obscure. I wished the witness to indicate certain distances and positions, but this could not be done in the court room as it was too small for the purpose. I accordingly adjourned the Court outside to the steps at the Judges' entrance. My recollection of the time is that it was about 4.30 p.m. The Judges' car park was then empty, save for my own car, and from my knowledge of the habits of the Judges, the time must have been after 4.15 p.m. My recollection of the time is confirmed by Mr. Nduati, the Court Clerk, who was present throughout.

3. Outside, some time was spent explaining to the witness what parts of the terrain he was to imagine represented the accused's house and plot, Kilimani Road, Gordon Road, Ngong Road etcetera. After that had been done I asked the witness to indicate on the ground certain places, positions and distances which he had referred to in his evidence. To that extent I asked questions of the witness. The type of question asked was "Will you please show where you were standing when the deceased was shot?" There was only one possible exception when I asked him to indicate where the gate was through which the dogs ran out. The distances indicated were all agreed with counsel, sometimes after being paced out.

4. I asked both counsel if they wished the witness to demonstrate any further positions or distances. Mr. Sirley then asked the witness to indicate at least one position or distance. I regret that I am unable to remember now what he did ask the witness to indicate. This demonstration lasted about 15 minutes; certainly not more than 20 minutes in my recollection. The Court Clerk again confirms my recollection of the time.

5. We then returned to the court room. Immediately I had taken my seat on the Bench Mr. Brookes stated that he did not know whether the accused had been present at the demonstration. It was established that the accused had not been present. I then adjourned the court to the same place to repeat the demonstration in the presence of the accused. There I asked the witness to indicate the same places, positions and distances and he did so with no material variation from his previous demonstration. I am sure that he demonstrated all the places, positions or distances which he had demonstrated previously. Substantially the same questions were put to him by me whether they had previously been asked by Mr. Sirley or myself. On this occasion the demonstration took about half the time occupied by the previous demonstration - about 7 or 8 minutes in my estimation. The Court Clerk's estimate is more than five minutes and less than 10 minutes. The shorter time is explained by the fact that on the second occasion the witness understood what was required of him much quicker.

6. The hearing was then resumed in the court room and the witness returned to the witness box. I asked him questions so as to place on record what he had demonstrated outside. I believe that the record shows accurately, without any material omissions, what the witness had demonstrated. I then gave Mr. Sirley the opportunity of cross-examining the witness further, which he did.

7. I made a note of the circumstances of the two adjournments and this should have appeared in the original record after page 28 and before page 29. I did not appreciate it was not in the record until asked for this report.

R. O. SINCLAIR
CHIEF JUSTICE

NAIROBI

26th February, 1960

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960.

No. 7

JUDGMENT

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

CRIMINAL APPEAL NO. 217 OF 1959

BETWEEN

PETER HAROLD RICHARD POOLE .. APPELLANT

- and -

THE QUEEN .. .. RESPONDENT

(Appeal from a conviction and sentence of the Supreme Court of Kenya at Nairobi (Sinclair, C.J.) dated 10th December 1959 in

Criminal Case No. 242 of 1959

Between

The Queen .. .. Prosecutrix

- and -

Peter Harold Richard Poole .. Accused).

FORBES V-P.

The appellant was, on 10th December, 1959, convicted by the Supreme Court of Kenya sitting at Nairobi of the murder of one Kamawe s/o Musunge, and was sentenced to death. He has appealed to this Court against his conviction and sentence.

The appellant is a European, and his trial accordingly took place before a Judge and jury in accordance with the provisions of section 222 of the Criminal Procedure Code (Cap.27).

Prior to the hearing of the appeal counsel for the appellant intimated that he intended to ask the Court to depart from one of its own previous decisions and, in accordance with the dictum of the Court in Joseph Kabui v. R. (1954) 21 E.A. C.A. 260, applied that a bench of five judges should be assembled to hear the appeal. This Court adheres to the principle of stare decisis, unless

it is of opinion that to follow its earlier decision which is considered to be erroneous involves supporting an improper conviction (Joseph Kabui v. R. supra; Kiriri Cotton Co. v. R.K. Dewani (1958) E.A. 239 at p.245). A full Court of Appeal has no greater powers than a division of the Court (Commissioner for Lands v. Sheikh Mohamed Bashir (1958) E.A. 45 at p.50; Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All E.R. 293); but if it is to be contended that there are grounds, upon which the Court can act, for departing from a previous decision of the Court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five Judges. In the instant case it proved possible to make the necessary arrangements, and, accordingly the appeal came before a full Bench.

Fifteen grounds of appeal are set out in the memorandum of appeal, and two further grounds were added by a supplementary memorandum. Counsel for the appellant expressly abandoned grounds 2, 3 and 4 of the memorandum of appeal, and intimated that he would argue the appeal on three broad heads which would cover such of the remaining grounds of appeal as he relied on. We will deal with the appeal on the basis of the heads of appeal argued by counsel.

The three heads of appeal that were argued by counsel for the appellant were (1) that the trial was a nullity; (2) that the verdict of the jury was, in all the circumstances, unreasonable; and (3) that the summing up was defective in certain respects. It will be convenient to deal with the first head, which reletes to matters of procedure, before referring to the facts of the case.

The contention that the trial was a nullity is based on two entirely separate matters of procedure. The first referred to an abortive trial of the appellant for the murder of the deceased which was concluded by the entry of a nolle prosequi. The relevant facts as to the abortive trial are as follows: The appellant was on 14th October, 1959 arrested without warrant upon a charge of murder of the deceased. In due course a preliminary inquiry was held in accordance with the provisions of Part VIII of the Criminal Procedure Code (hereinafter referred to as the Code), and the appellant was committed for trial before the Supreme Court

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

upon the charge, framed by the committing magistrate under section 233 of the Code, "that he did on the 12th day of October, 1959, in Nairobi in the Nairobi Extra-Provincial District, murder Kamawe s/o Musunge the offence being contrary to section 199 of the Penal Code." The appellant was remanded in custody to appear before the Supreme Court under section 236 of the Code. An authenticated copy of the depositions and statement of the appellant was duly transmitted to the Attorney General under section 246 of the Code, and the Attorney General, on 18th November, 1959, under section 250 of the Code filed an information charging the appellant with the offence of murder contrary to section 199 of the Penal Code, the particulars given of the offence being that the appellant "on or about the 12th day of October, 1959, at Nairobi in the Nairobi Extra-Provincial District, murdered Kamawe s/o Musunge." The information was signed on behalf of the Attorney General by the Deputy Public Prosecutor in pursuance of powers conferred on him under section 83 of the Code. Section 250 of the Code reads:

> "250(1). If, after the receipt of the authenticated copy of the depositions as aforesaid, the Attorney General shall be of the opinion that the case is one which should be tried upon information before the Supreme Court, an information shall be drawn up in accordance with the provisions of this Code, and when signed by the Attorney General shall be filed in the registry of the Supreme Court.
>
> (2) In any such information the Attorney General may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial."

The trial of the appellant on the information filed on 18th November, 1959, was fixed for 30th November, 1959. On that date the appellant was arraigned before the learned Chief Justice and pleaded not guilty to the information. A jury was chosen and sworn, and the appellant was given in charge in accordance with the provisions of section 280 to 288 inclusive of the Code. Crown

Counsel thereupon opened for the Crown and was about to call the first prosecution witness when one of the jurors intimated that he had "a conscientious objection to giving a verdict of guilty in this case on a religious objection". After a short adjournment counsel for the appellant addressed the court, submitting that the juror in question was not incapacitated, or, if he was, that the trial should proceed with eleven jurors. A further adjournment ensued to enable Crown Counsel to consider the position. Upon resumption Crown Counsel is recorded as saying:

> "Submit no power to discharge Juror as he is not incapable. Court may have inherent power to discharge jury. Think it is safer to enter a nolle prosequi and do so now."

Counsel for the appellant submitted that there was no inherent power to discharge the jury in the circumstances, and that this was not one of the cases in which a nolle prosequi could be entered. The learned Chief Justice then ruled:

> "In view of the entry of a nolle prosequi the accused is discharged in respect of the charge for which the nolle prosequi is entered."

We were informed by the learned Solicitor General who appeared for the Crown that Crown Counsel, as he informed the Court that he did not intend to proceed, handed a fresh information, duly signed, to the Deputy Registrar; that the Deputy Registrar, upon the adjournment of the Court, after the discharge of the appellant and after he had left the dock, said to him "would you come with me" or words to that effect; that the appellant then accompanied the Deputy Registrar to the anteroom of the Court, where the Deputy Registrar served the new information upon him; and that the Deputy Registrar then executed a warrant as authority for the Prisons Officers to detain the appellant in custody pending his trial upon the new information. The terms of the new information were identical with those of the original information except that the new information was dated 30th November, 1959, and was signed for the Attorney General by the Acting Senior Crown Counsel who was appearing for the Crown. It was not contested that the Acting

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

Senior Crown Counsel was duly authorised under section 83 of the Code to enter a nolle prosequi and sign an information. It was upon the new information of 30th November that the appellant was subsequently tried, before the learned Chief Justice and a new jury, and was convicted.

It may be remarked in passing that it appears to this Court that, upon the juror in question announcing that he had a conscientious objection to giving a verdict of guilty, the learned Chief Justice might properly in the exercise of his discretion have discharged the jury and ordered the re-trial of the appellant before another jury. The matter was, however, taken out of the learned Chief Justice's hands by the entry of the nolle prosequi, and it is necessary to consider the position created by the course which was adopted.

Counsel for the appellant argued that the effect of the nolle prosequi entered on 30th November was to bring the prosecution to an end altogether, and that if the Crown wished to proceed against the appellant again upon the same facts it was necessary for the prosecution to start again ab initio, that it to say, that the appellant must be re-arrested and that a new preliminary inquiry and committal for trial must take place. He referred to the decision of this Court in R. v. Noormahomed Kanji (1937) 4 E.A.C.A. 34 (in which the Court held that, under the section of the Criminal Procedure Code of Uganda which corresponds with section 82 of the Code, upon a nolle prosequi being entered in respect of any charge in an information, a fresh information in respect of the same charge might be filed without a fresh preliminary inquiry being held) and contended that that decision put too narrow a construction on section 82 read in the context of other sections of the Code and should not be followed; that upon a proper construction of section 82 of the Code, upon the entry of nolle prosequi, an accused must be discharged from custody forthwith and that the recognizances of any witnesses bound over to give evidence at his trial are discharged; that the Code provides no method for the subsequent arrest of an accused except arrest without warrant under section 28; that upon such arrest the accused must be taken before a magistrate under section 32; and that the ensuing procedure provided for in the Code, culminating with a committal for trial by a subordinate

court, must be followed before the accused can again be brought before the Supreme Court. Counsel also contended that the use, in section 82, of the term "nolle prosequi" which is an expression of the English common law, connoted common law ideas; that the section should, therefore, be construed by reference to the meaning of the term at common law; and that at common law upon the entry of a nolle prosequi the prosecution must be started again in all its aspects; and he referred to English authorities including R. v. Allen 121 E.R. 929; R. v. Mitchel 3 Cox C.C.93; R. v. Ridpath 88 E.R. 670; Goddard v. Smith 91 E.R. 803; R. v. Stratton 99 E.R. 156; and R. v. Wylie, Howe and McGuire (1919) 83 J.P. 295; and to the Australian case of Gilchrist v. Gardner (1891) 12 N.S.W. Rep. 186.

We do not propose to refer to the English and Australian authorities except to say that it is by no means clear to us that they establish the proposition for which counsel for the appellant contended. Most of the English authorities refer to ex officio informations of the Attorney General and so must be of doubtful application in the case of an information upon a committal for trial by a magistrate. It is not suggested that the information in this case is an ex officio information under section 84 of the Code. So far as R. v. Ridpath (supra) is concerned, the reports (the case is also reported in 92 E.R. at p.890) do not support learned counsel's contention that a nolle prosequi at common law operates as a discharge of the accused from custody and of recognizances entered into by him. That case, however, is one of those relating to ex officio informations.

In the instant case we think that the matter falls to be decided upon the provisions of the Code. It is true that under paragraph (2) of Article 4 of the Kenya Colony Order in Council, 1921, as extended by Article 74 of the Kenya (Constitution) Order in Council, 1958, the common law is in force in Kenya, but it is in force only in so far as it may not be modified, amended or replaced by, inter alia, any Ordinance for the time being in force. It is also true that sub-section (3) of section 3 of the Code provides that:

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 1st 25th March 1960 - continued.

"The Supreme Court may ... in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before His Majesty's High Court of Justice in England at the date of the coming into operation of this Code."

The Code does, however, make provision for the entry of a nolle prosequi, and the consequences which are to follow thereon; and, incidentally, in subsection (2) of section 82 of the Code it confers upon the Attorney General power to enter a nolle prosequi before an information has been filed, whereas in England a nolle prosequi may not be presented until an indictment has been found (R. v. Wylie, Howe and McGuire, supra). The relevant provisions of the Code are comprehensive and in our view displace the common law.

Section 82, which is the relevant section of the Code, reads as follows:

"82 (1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

(2) If the accused shall not be before the court when such nolle prosequi is entered, the registrar or clerk of such court shall forthwith cause notice in writing of the entry of such nolle prosequi to be given to the keeper of the prison in which such accused may be detained, and also, if the accused person has been committed for trial, to the subordinate court by which he was so

committed, and such subordinate court shall forthwith cause a similar notice in writing to be given to any witnesses bound over to prosecute and give evidence and to their sureties in case he shall have been admitted to bail."

In R. v. Noormahomed Kanji (supra), the case which counsel for the appellant submits ought not to be followed, this Court, in considering a similar situation in relation to section 79 of the Uganda Criminal Procedure Code (which is in the same terms as section 82 of the Code) said:

"Various English authorities were cited both by Mr. Shaylor and Mr. Mathew, for the Crown, but none of these authorities bear directly on the point in issue.

It is convenient to state here that it is within the knowledge of the members of this Court that the practice adopted by the Crown in this case has been, in the past, the practice in the East African Dependencies and, further, it is within the knowledge of one member of the Court that a similar practice was observed in West Africa on a section similarly worded.

On a close reading of the section in question, it will be observed that the accused person is to be discharged in respect of the charge for which the nolle prosequi is entered. It seems clear that these words refer to the charge in the information as the information is 'the charge' on the trial before the High Court, and the nolle prosequi is entered in the High Court in respect of that information. The Attorney General states that the 'proceedings' should not continue. If, then the information is the charge, the proceedings are the High Court proceedings, and the nolle prosequi puts an end to these proceedings.

Crown Counsel has conceded that, in view of the wording of the section, a nolle prosequi may be entered in respect of the proceedings in Subordinate Courts as well as the High Court. This may be so, but we do not consider that this fact in any way interferes

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 21st March 1960 - continued.

with the reasoning set forth supra. We are of opinion, therefore, that after a nolle prosequi has been entered in respect of any given charge contained in an information, there is no necessity for a fresh preliminary inquiry to be held before a further information is filed."

The charge preferred in an information signed and filed by the Attorney General under section 250 of the Code is clearly distinct from both the charge on which an accused is arrested and that which is framed by the magistrate under section 233 of the Code. It is expressly stated in section 250 that in the information the Attorney General may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial. Section 82 provides that the accused "shall be at once discharged in respect of the charge for which the nolle prosequi is entered." Prima facie, we should be disposed to agree with the decision in Noormahomed Kanji supra, that where a nolle prosequi relates to a charge in an information, it is the proceedings in respect of that charge only which are discontinued. Counsel for the appellant in fact conceded that if two informations had been filed against an accused, e.g. in the case of a multiple murder, the entry of a nolle prosequi in the course of the trial upon one information, in respect of charge contained in that information, would not preclude proceedings continuing against the accused on the second information. He argued, however, that in the instant case a second information had not been filed when the nolle prosequi was entered; that the entry of the nolle prosequi immediately effected the release of the appellant from custody; and that, as has been said previously, the only way of getting the appellant back into custody was by arrest under section 28 of the Code, which involved following the procedure prescribed by the Code upon the making of an arrest under that section.

We do not agree that the entry of a nolle prosequi under section 82 of the Code immediately effects release of an accused from custody. The section, as we read it, requires that the accused

be discharged by the court "in respect of the charge for which the nolle prosequi is entered", and thereupon, if he has been committed to prison in respect of the offence charged, he is to be released: that is to say, if the accused is in court, his release follows upon his discharge by the court.

Learned counsel's principal argument, however, concerned the alleged procedural difficulty of bringing the appellant before the Supreme Court again once he had been released upon the entry of a nolle prosequi. With respect, we think that learned counsel's argument ignores the provisions of section 66 of the Code. That section reads as follows:

> "66. Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within the Colony, or which according to law may be dealt with as if it had been committed within the Colony, and to deal with the accused person according to its jurisdiction."

The section was not cited to us by either counsel, possibly because it appears under the heading "Place of Inquiry or Trial". The words of the heading, however, cannot restrict the plain words of the section, and, it is further clear from the provisions of section 69, that the sections under that heading have a wider application than the mere matter of the place where an inquiry or trial is to be held. Section 69, which is also relevant to the question under consideration, reads:

> "69. The Supreme Court may inquire into and try any offence subject to its jurisdiction at any place where it has power to hold sittings:
>
> Provided that, except under section 84 no criminal case shall be brought under the cognizance of the Supreme Court unless the same shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the Supreme Court."

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

As we read it, the proviso to section 69 does not of itself require that in circumstances such as those which occurred in the instant case a fresh preliminary inquiry must be held. The condition that the case "shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the Supreme Court is satisfied by the holding of the original preliminary inquiry unless under the other provisions of the Code the effect of a nolle prosequi is to discharge the proceedings on the preliminary inquiry as well as those in the Supreme Court.

Reverting to section 66, we think that that section authorises the Supreme Court to issue process to cause to be brought before it a person charged with an offence which it has jurisdiction to try. We see no reason why the Supreme Court should not act under this section to compel the attendance before it of a person properly charged upon information, including ordering the arrest of such person if he should happen to be at liberty. In the case of a multiple murder, which has already been instanced, it would seem patently absurd to suggest that, if after a preliminary inquiry into all the murders, an information had been signed and filed in respect of one murder only and it proved necessary to enter a nolle prosequi on the charge in that information, involving under section 82 the release of the accused, a further information filed subsequently in respect of the second murder must of necessity be abortive because there is no means of bringing the accused before the court. We are of opinion that, on the assumption that the Supreme Court had jurisdiction to try the appellant on the second information filed, it had power under section 66 of the Code to do what it purported to do, that is, to order the arrest of the appellant and his detention pending the trial upon that information. We are of opinion that the arguments of counsel for the appellant that there is no machinery provided in the Code whereby an accused can be brought before the court again once he has been "discharged" under section 82 are based on a false assumption and must fail.

So far as section 82 of the Code is concerned, we are unable to find anything in the wording of the section to indicate that a nolle prosequi

entered in respect of a charge in an information operates as a discharge of the proceedings on the preliminary inquiry. It is true that, as remarked in Noormahomed Kanji's case, the Attorney General has the power, which does not exist in England, of entering a nolle prosequi at any stage before the filing of an information. In such a case the nolle prosequi would clearly be in respect of the charge in the subordinate court and would effectively terminate those proceedings. In our view, however, the proceedings on a charge in an information, though necessarily based on the proceedings in the subordinate court, are distinct from the latter. That is not to say that proceedings against an offender do not commence with his arrest; but proceedings against an offender are in distinct stages, and, in section 82 of the Code the reference to "proceedings" must, in the context, be the proceedings "in respect of the charge for which the nolle prosequi is entered": that is to say the proceedings in respect of the charge in the information, which are the proceedings in the Supreme Court. Equally, the words in the section "if he has been committed to prison shall be released" cannot be a general direction for the release from custody of the prisoner whatever other charges may be pending against him, but must be read in the context as a direction for the release of the prisoner "in respect of the charge for which the nolle prosequi is entered."

Counsel for the appellant argued, as has been mentioned, that under subsection (2) of section 82 of the Code, upon the entry of a nolle prosequi, the recognizances of witnesses bound over to give evidence at the trial are discharged. This, however, is not what the subsection says. It merely provides that notice of the entry of the nolle prosequi is to be given to the witnesses, and does not provide that the effect of such notice is to discharge their recognizances. It would appear that the witnesses' recognizances "to appear at the trial to give evidence" remain valid in respect of any trial on an information founded upon the particular preliminary inquiry.

In our view, therefore, the entry of a nolle prosequi in respect of a charge on an information filed by the Attorney General under section 250 of the Code, does not discharge the proceedings at the preliminary inquiry upon which such charge is based

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

so as to preclude the filing of any other charge upon information based on the facts disclosed at that preliminary inquiry; and we have not found any other provision of the Code which appears inconsistent with this construction of the provisions of section 82. We do not think that the fact that the terms of the charge in the second information may be identical with the terms of the charge in the first information affects the position.

In any event it appears that at the moment of the appellant's discharge under section 82 there was in existence a valid information charging him with an offence. In his reply counsel for the appellant to some extent challenged the information which the learned Solicitor General had given us as to events immediately after the entry of the nolle prosequi, saying that there was no note on the record as to what had happened, that he was informed that the learned Chief Justice had refused to look at the new information, and that the new information was not properly before the court when the nolle prosequi was entered. Since the proceedings before the Court at that stage were not concerned with the second information it was to be expected that the record would contain no note of what happened and that the learned Chief Justice would not look at the second information. The second information at that stage concerned the Registrar and not the learned Chief Justice. We see no reason why we should not accept the learned Solicitor General's statement of the facts, since it appears to be the effect of those facts rather than the facts themselves which are challenged.

As to the effect of the handing of the new information to the Deputy Registrar, its acceptance by the Deputy Registrar would appear to constitute a sufficient "filing" for the purposes of section 250 of the Code. The information had not been handed to the Deputy Registrar at the moment that Crown Counsel entered the nolle prosequi, but, as we have indicated, we are of opinion that it is the Court's order of discharge which effects the release of the appellant, and not the entry of the nolle prosequi. We are informed and accept that the second information had been handed to the Deputy Registrar before the order of discharge was made. It follows that at the moment of discharge on the first information, there was already

in existence and filed a second information. The situation then obtaining appears indistinguishable from that in which different informations have been filed in respect of different offences arising out of facts found at one preliminary inquiry, and a nolle prosequi has been entered in respect of one such information. As already mentioned, counsel for the appellant conceded that in such case the proceedings on the second information were competent and could continue.

Apart from the question whether or not the second information had been filed at the moment when the appellant was released in respect of the first information, it is to be noted that under section 255 of the Code the critical moment when an information becomes effective would seem to be the moment of signing of the information and not that of filing. That section provides, inter alia, that an information when signed by the Attorney General "shall be as valid and effectual in all respects as an indictment in England which has been signed by the proper officer of the court in accordance with the Administration of Justice (Miscellaneous Provisions) Act, 1933." Under section 2 of that Act "where a bill of indictment has been so preferred the proper officer of the court shall ..... sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly." There is no doubt that in the instant case the second information had been signed before the nolle prosequi was entered on the first information, and that therefore there was in existence a valid information when the nolle prosequi was entered. We are unable to see why the appellant should not be held in custody pending the disposal of the charge on this information, whatever may be the power of the Supreme Court to cause him to be re-arrested. But, as indicated, we consider that the Supreme Court had the necessary power to cause the appellant to be re-arrested, even if he had been released and allowed to go free for a period of time.

For the reasons given we respectfully agree with the conclusion of the court in Noormahomed Kanji's case and hold that this ground of appeal must fail. It may be noted that in E.B.K. Sey v. The King (1950) 13 W.A.C.A. 128 the West African Court of Appeal reached a similar conclusion upon the corresponding provisions of the Criminal Procedure Code of the Gold Coast, as it then was.

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 1st 25th March 1960 - continued.

The second matter on which counsel for the appellant relied for his contention that the trial was a nullity was what he described as "an unfortunate accident" which occurred in the course of the trial. The incident in question occurred when Titoro s/o Sabai, an African eye-witness of the alleged murder of the deceased, was giving evidence. His evidence involved specification of the distances between various points at the scene and between the witness and the appellant and deceased at various stages in the episode which terminated in the death of the deceased. It is common practice in East Africa, where the majority of African witnesses are incapable of expressing distances in terms of the ordinary units of measure, for a witness to be asked to give a visual demonstration of any particular distance which may be material. In the instant case, after completion of the examination-in-chief, cross-examination and re-examination of the witness, the learned Chief Justice desired the witness to give a visual demonstration of certain distances which were mentioned in his evidence. The court room was too small for the purpose, and the learned Chief Justice accordingly adjourned outside the court building where a visual demonstration of the distances was given by the witness. On resumption in the court room, it was found that the appellant had not been present at the demonstration. The learned Chief Justice then caused the demonstration to be repeated in the presence of the appellant. No objection was taken at the time to the procedure adopted by the learned Chief Justice.

The details of the incident were at one stage in dispute, and accordingly a report from the trial court was called for under rule 42(4) of the Eastern African Court of Appeal Rules, 1954. The report of the learned Chief Justice submitted under that rule fully sets out the details of the incident, and was accepted as correct by counsel for the appellant. Counsel for the appellant conceded that the appellant had suffered no actual prejudice as a result of the incident, and that the point was purely a technical one, and accordingly it is not necessary to set out the learned Chief Justice's report in detail in this judgment. The essential facts are that a demonstration which lasted between 15 and 20 minutes and which constituted part of the trial took place in the

absence of the appellant, though in the presence of his advocate; that the demonstration was repeated in the presence of the appellant, on this occasion occupying about half the time taken on the previous demonstration; that it is not suggested that any matter was demonstrated on the first occasion which was not repeated on the second occasion, though, owing to the witness having already been through the demonstration once, the second demonstration took a much shorter time; that after the demonstration the advocate for the appellant was given an opportunity to cross-examine the witness; and that it is conceded (rightly, in our view) that no actual prejudice was suffered by the appellant.

Counsel for the appellant argued, however, that the trial of the appellant was a trial on a charge of felony; that on a charge of felony the prisoner must be tried at the bar; that unless there is good cause the whole trial must take place in the presence of the prisoner; that the fact that by accident, part of the trial took place in the absence of the prisoner was such an irregularity as must vitiate the trial; and that no action taken by the trial judge could cure the irregularity which had occurred, as the irregularity was one which went to the root of criminal procedure. Counsel referred, inter alia, to sections 193 and 290 of the Code and to R. v. St. George 173 E.R. 921; R. v. George Smellie (1919) 14 Cr. App. R.128; R. v. Hales (1924) 1 K.B. 602; Wachira s/o Marange and ors. v. R. (1956) 23 E.A. C.A. 562; Karamat v. R. (1956) A.C. 256 and Tameshwar & anor. v. R. (1957) A.C. 476.

There is no doubt that the absence of the appellant from the first demonstration was an irregularity, and the only question is whether it is an irregularity curable under section 381 of the Code, or whether it is so fundamental that it cannot be cured under that section notwithstanding that it has occasioned no failure of justice. The distinction between irregularities which are curable and those which are not is made clear in the following passage from the judgment of the Privy Council in Polkuri Kotayya v. King Emperor (1947) 74 I.A. 65 at p.75. Section 537 of the Indian Code of Criminal Procedure, to which that passage relates, is in similar terms to section 381 of the Code. The passage reads:

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

"Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the note-book in question amounted merely to an irregularity in the proceedings which can be cured under the provisions of s.537 of the Code of Criminal Procedure if the court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr.Pritt's contention, and reference may be made to Tirkha v. Nanak ((1927) I.L.R.49 A.475), in which the court expressed the view that s.537 of the Code of Criminal Procedure applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code and to In re Madura Muthu Vannian ((1922) I.L.R.45 M.820), in which the view was expressed that any failure to examine the accused under s.342 of the Code of Criminal Procedure was fatal to the validity of the trial, and could not be cured under s.537. In their Lordships' opinion, this argument is based on too narrow a view of the operation of s.537. When a trial is conducted in a manner different from that prescribed by the Code (as in N.A. Subramania Iyer's case ((1901) L.R.28 I.A.257), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in Abdul Rahman v. The King Emperor ((1926) L.R.54 I.A.96), where failure to comply with s.360 of the Code of Criminal Procedure was held to be cured by ss.535 and 537. The present case

falls under s.537, and their Lordships hold the trial valid notwithstanding the breach of s.162."

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

While the Penal Code preserves the distinction between felonies and misdemeanours, the Criminal Procedure Code in fact makes little distinction between them so far as procedure is concerned. Section 193 of the Code applies to offences of all kinds and provides:

"193. Except as otherwise expressly provided all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any)."

We think that the English cases relating to the necessity for trial at the bar in cases of felony have little application in Kenya, and that the provision which has to be considered is section 193 of the Code. Under that section this Court has held that it is competent for a trial court to dispense with the presence of an accused person if he persists in making such an uproar that the trial cannot properly proceed in his presence - Wachira s/o Murage & 2 ors. v. R. (supra). The English decisions disclose a similar practice in English courts. It is stressed, however, that in the instant case the presence of the appellant was not dispensed with, and that there was no good reason to dispense with his presence. Counsel for the appellant relied on the decision of the Privy Council in Tameshwar v. R. (supra). That was a case where the jury viewed the scene of the offence in the absence of the trial Judge and during the view certain witnesses indicated various positions relevant to the case. In the course of their judgment their Lordships said:

"There remains the question whether the absence of the judge at this view vitiates the trial. Their Lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their Lordships are to interfere, yet if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 1st 25th March 1960 - continued.

their Lordships may well think it necessary to advise Her Majesty to allow an appeal - see Attorney for New South Wales v. Bertrand ((1867) L.R. I.P.C.520, 530), Ibrahim v. The King ((1914) A.C.599, 615) per Lord Sumner. Their Lordships think it plain that if a judge retired to his private room while a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the judge had been present he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked; and his summing-up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Mr. Le Quesne argued that the conviction should not be set aside unless the absence of the judge was shown to have affected the result of the trial; but their Lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass."

Counsel contended that the same principle should be applied to the absence of an accused person during the course of a trial, and that it should be held to be "too disturbing a precedent to allow it to pass". It must be noted, however, that, while there is no provision in the Code, or for that matter, in any other system of law of which we are aware, which enables a trial to proceed in the absence of the trial judge, section 193 of the Code expressly contemplates that there may be circumstances in which a trial can proceed in the absence of an accused. No doubt such a procedure is only to be adopted in exceptional circumstances, as is indicated by section 290 of the Code, which provides for the discharge of the jury and adjournment of the case if an accused through sickness or other sufficient cause becomes incapable of

remaining at the bar. But the fact that circumstances can exist in which evidence may be taken in the absence of an accused indicates that the accused's presence throughout the trial is not so fundamental a requirement as is the presence of the trial judge. This view is supported by the decision of the Privy Council in Karamat v. R. (supra). In that case a view was directed, but the accused declined to attend the scene. Their Lordships held that the view, in which the witnesses who had already given evidence attended and placed themselves in the positions in which they had been at the material times or indicated the positions of others, was unobjectionable so long as the witnesses taking part were recalled to be cross-examined if desired. They continued:

> "It was, however, strenuously argued before this Board that as the accused was not present this is a fatal objection. A short answer to this point was made by Mr. Le Quesne, for the Crown, who pointed out that under the Criminal Procedure Ordinance it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. But, in addition to this, their Lordships desire to say that if an accused person declines to attend a view which the court thinks desirable in the interests of justice he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction, if one follows, though he could, of course, object if any evidence were given outside the scope of the view as ordered. The appellant had the opportunity of attending and declined it."

We think it follows that the presence of an accused person throughout a trial is not an absolute requirement that necessarily goes to the root of a conviction. We consider that in the instant case the trial was conducted substantially in accordance with the provisions of the Code. It is true an irregularity occurred in that a witness gave a demonstration of distances in the absence of the

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

appellant. The demonstration was in no sense a view and was merely supplemental to evidence he had already given in court in the presence of the appellant. The demonstration was in the presence of the appellant's advocate. The demonstration was immediately repeated in the presence of the appellant. The appellant's advocate had the opportunity of cross-examining the witness after the demonstrations. No objection was taken at the trial to the procedure which had been followed. And no suggestion is made that the appellant suffered any actual prejudice as a result of the irregularity. In these circumstances we are of opinion that the appellant's absence from the demonstration, notwithstanding that his presence had not been dispensed with under section 193 of the Code, amounts to no more than an irregularity curable under section 381 of the Code. We think this ground of appeal must fail.

For the reasons given we hold that the trial was not a nullity, and we now consider the grounds of appeal which relate to the facts and to the summing-up.

It has never been contested that on 12th October, 1959, at about 3 p.m. the appellant shot the deceased in the chest with a pistol, killing him almost immediately. The version of the affair most favourable to the appellant appears in a statement made by the appellant to Senior Superintendent Baker of the Kenya Police shortly after the incident. This statement was put in evidence at the trial without objection; and the appellant, who declined to give evidence on oath, in a brief unsworn statement to the trial court said that there was nothing he could add to it. The statement, omitting a passage which relates to events after the shooting, reads as follows:

> "About 10 minutes before I made the '999' call, I can't be more specific than that, I was in the lounge of my house; at corner of Gordon Road and Kilimani Road, when my wife called out to me. I think she was in the kitchen, I'm not sure - I think she might have been going through to the kitchen - that an African was throwing stones over the fence at the dogs. I looked out of the window and saw that there was an African, the one who was subsequently shot. He was throwing stones

over the fence from Kilimani Road. I called to my wife to get the pistol out of the safe, a home armoury safe which is fixed to the wall. I was in the midst of constructing a radiogram. She brought the pistol to me. I put it in my pocket and went outside into the garden towards the Kilimani side where the boy was. I was yelling at him to stop, as I went towards him. He threw one more stone as I got outside, directed at me, which did not hit me. He then mounted his bicycle and went along Kilimani Road in the direction of Gordon Road. I raced up the drive after him, calling out to the dogs to get him and at the top of the Kilimani Road he turned on the dirt track running alongside Gordon Road. As I got out of my gate I followed him along the dirt path towards the Ngong Road. Somewhere about Milne Drive, which is about 30 to 35 yards from my gate I caught up with him, the dogs having gone ahead and having forced him off his bicycle. I called the dogs back and he threatened the dogs with stones. I think he had 2 stones in his left hand, they were about the size of your hand. Each time the dogs moved forward, as dogs will, he threatened them by drawing his arm back, as though he was going to throw them. I moved forward and he threatened me as well, again by gesture, not by words. I pointed the pistol at him and said '<u>Kama unatupa mawe nibapigu we</u>'. I pointed the pistol at him as I spoke. I meant that if he threw the stones at me I would shoot, and there is no doubt in my mind that he understood because he then dropped the bicycle and stood there with the stones in his hand. He then stood there and said '<u>Piga mimi</u>' repeating this several times in an attempt to call my bluff, indicating that he didn't think I would shoot him whatever he did. I told him that I wanted to take him back to my house to ring the police - this was in Swahili. I'm sure he understood this. He then reached down and picked up his bicycle. He dragged his bicycle backwards and so I told the dogs to get him again, because he was clearing off. The dogs moved towards him and made him drop his bicycle again. This happened on 3 or 4 occasions each time we both moved closer to the Ngong Road, until I should say we were 8 to 10 yards from the hedge at the

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

corner of Ngong Road and Gordon Road. All this time he was dropping the bike when the dogs went towards him and then picking the bike up when they moved away from him. He kept on saying '<u>Piga mimi, piga mimi</u>', drawing his hand across his throat and his chest. His right hand this would be, he still had the stones in his left hand. On the 3rd or 4th occasion that this happened, that would be on the last occasion, I managed to dart forward enough to grab hold of the carrier of his bicycle and he dragged me some 3 or 4 feet across the Ngong Road. He let go of the bicycle, partly threw it down with a discarding gesture of his right hand, and drew back his left arm, he must have been left-handed. This was a far more threatening gesture than before, and there is no doubt in my mind that he had come to the stage when he was going to throw the stone to hit me. We were at that stage 6 or 7 feet apart. I fired one shot, intending to strike his legs. I'm not sure where the shot hit. This stopped his arm which was in the process of throwing. By throwing I mean that his arm was travelling forward, but the stone wasn't released. He let out a yelp and I should say that both the yells and the sudden stopping of the throw were due solely to the shock by being hit, if he was hit, or by the sound of the shot. There was a momentary pause and he drew back his arm again in a further attempt to throw the stone. It was his left arm again, as I said he must have been left-handed as far as I can see. As he went to throw again, that is as his body moved forward for the actual throw, I fired again - at him. I meant to stop him. He dropped his arm, made some noises, unintelligible to me, I didn't distinguish what he said. He turned and ran around the corner. I followed to the corner and he was lying on the ground with his shoulders up to the bushes of the hedge.....

There is no doubt in my mind that I fired in self-defence; the African was going to throw the stone, I'm quite sure. It wouldn't have done me much good had he hit me. He still had another stone and I should have been unable to defend myself had I been knocked

unconscious at this stage. Had one of these stones hit me it was highly likely that I would have been knocked unconscious at least."

Two eye-witnesses; Titoro s/o Sabai, who has already been mentioned, and Mrs. Hook, a European nursing sister, gave evidence. Counsel for the appellant stated that he had no criticism to make of the learned Chief Justice's summing-up of the facts, and it is convenient to refer to the relevant passages of the summing-up for the versions of the affair given by these two witnesses. The gist of Titoro's evidence as summarised by the learned Chief Justice is as follows:

"On the 12th October he (i.e. Titoro) finished work at about 2 p.m. and went to Adam's Arcade, which is in Ngong Road, where he bought some articles. He was on foot. After leaving the Arcade he went along Ngong Road and turned into Gordon Road where he was passed by the deceased on a bicycle. The deceased turned into Kilimani Road. When he, that is Titoro, reached Kilimani Road he saw the deceased some 40 yards along Kilimani Road. He said the deceased was near the accused's gate leading on to Kilimani Road. You will notice from the plan that this gate is over 70 yards from the junction where the witness says he was standing. The deceased had dismounted and was being attacked by some Alsatian dogs. The deceased picked up some soil and threw it at the dogs. The dogs retreated. The deceased then commenced to wheel his bicycle back to Gordon Road, turned into Gordon Road and continued towards Ngong Road. He was holding a bicycle pump in his hand. In the meantime the accused came out from his house, called his dogs and followed the deceased. The accused caught up with him, that is the deceased, near the corner of Ngong Road, caught hold of the deceased's bicycle and pulled a pistol out of his pocket. He then shot at the deceased twice, there being about a second between each shot. Both shots, he said, were fired at the same spot. The first shot missed the deceased, but the second shot hit him. After the first shot, the dogs which were with the accused, ran away and on the second shot the deceased left his bicycle and ran round the corner of the hedge into Ngong Road, bending over and holding his stomach."

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 1st 25th March 1960 - continued.

There were discrepancies and contradictions in Titoro's evidence which were duly pointed out to the jury.

Mrs. Hook's evidence, as given in the summing-up, is as follows:

"Mrs. Hook, the nursing sister, appears to have been the next witness on the scene. She said that on the 12th October she turned into Gordon Road from Ngong Road at about five minutes to three. On the right hand side of the road and a short distance down the road, she saw an African, the deceased, with a bicycle being attacked by two large dogs. He was pushing at the dogs with his bicycle as if he was trying to push the dogs away. She stopped her car just short of Kilimani Road on the opposite side of Gordon Road wondering what to do. The deceased was on the other side of the road almost level with the car.

Shortly after, a European, who she said was the accused, came from Kilimani Road. The dogs seemed to run towards him and the deceased bent down and picked up what appeared to her to be two large red stones. They were round and about the size of large oranges. He held one in each hand raised above his shoulders as you saw her demonstrate. The way he was holding the stones in his hands did not impress her as threatening. His bicycle was supported against his body.

The accused called out in Swahili, "If you hit my dogs, I'll hit you." As he said that he took a gun out of his pocket and pointed it at the deceased. He moved nearer to the deceased. The dogs had then returned and were attacking the deceased. The accused told them to go away; they started to go away but came back again. Then the deceased said, 'Yes, hit me. I am not bad. We will go to the Court and the police will know.' As he said this he beat his chest with his hand. There was a heated argument between them and a lot of shouting. During this time the deceased was backing towards Ngong Road and in a few seconds they were behind her.

The accused and deceased were both pulling the bicycle. When they were nearly at Ngong Road she reversed her car and stopped it almost at the corner of Ngong Road. At about the time she stopped the car, she heard a shot. That made her look up and she saw the gun in the accused's hand. The deceased was near the corner and the accused was three or four yards away. They were more or less level with where she stopped the car. The accused was then facing towards her and the deceased was, she thought, also facing towards her. The deceased had his hands raised, but she could not say whether he had stones in them or not. The deceased then went round the corner into Ngong Road and the accused followed him. Seconds later, she heard another shot. She then got out of her car and went round the corner."

The discrepancies between the three versions of the affair were brought to the attention of the jury and, as has already been indicated, counsel for the appellant accepted that the facts had been correctly and adequately dealt with by the learned Chief Justice in the summing-up.

Nevertheless counsel submitted that the verdict of the jury in all the circumstances was unreasonable, and that they should have brought in a verdict of manslaughter. He conceded that he could not argue that self-defence had been established; and further conceded that if Titoro's evidence was accepted, it was a case of murder. But he submitted that it was clear from the learned Judge's summing-up that he thought little of Titoro's evidence, and that he seemed to have had doubts as to the accuracy of Mrs. Hook's evidence. He submitted that the only reliable basis for the prosecution case was the appellant's own story; that on that story the case amounted to no more than a sudden quarrel between two men, one armed with stones and the other with a pistol, which culminated in one using the pistol; and that this constituted a classic case of manslaughter. He also stressed the publicity which the affair had attracted and suggested that the jury might have been influenced by political considerations notwithstanding the learned Chief Justice's warning to put out of their minds all they had read about the case.

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

We do not consider that the publicity attracted by the affair and its political aspect are any ground for interfering with the verdict of the jury if that verdict is otherwise reasonable on the evidence. The learned Chief Justice carefully directed the jury to return a verdict according to the evidence heard in Court and that evidence alone, and to put out of their minds anything heard or read about the case outside the Court. We cannot assume that the jury did not heed that injunction merely because the case did attract publicity. To do so would involve the setting aside of a verdict of guilty in every case in which there had been publicity. Such publicity is, no doubt, unfortunate, but in present circumstances the jury system has to work with such publicity, and the best that can be done is for the trial judge to instruct the jury to ignore the publicity.

As to the alleged unreasonableness of the verdict, we are satisfied that there was ample evidence on which the jury could reach the conclusion which they did reach. As was conceded by counsel for the appellant, if they accepted Titoro's evidence the case was clearly one of murder. There were discrepancies between Titoro's evidence and the evidence given by Mrs. Hook and between Titoro's evidence at the trial and his evidence at the preliminary inquiry. These discrepancies were duly brought to the attention of the jury by the learned Chief Justice, but the jury may nevertheless have reached the conclusion from his evidence that the appellant's dogs had attacked the deceased in the road and that the deceased had been merely defending himself against them. Mrs. Hook's evidence, if accepted by the jury, indicated that the appellant was the aggressor throughout the time she was present. Even if the jury discounted Titoro's evidence, upon the appellant's own account it is clear that he armed himself with a loaded pistol before there was any question of provocation which could justify such action. The jury heard all the witnesses and had the effect of their evidence and the whole of the defence case clearly put before them in the summing up. It is not for this Court to speculate as to the view of the evidence which they took in arriving at their verdict. This Court will not substitute its own verdict for that of the jury, and will only intervene if satisfied that the

verdict cannot stand on the evidence or that the jury has been misled by a material misdirection. We see no reason whatever to interfere with the verdict of the jury in this case.

The last head of appeal concerns alleged misdirections in the summing up, and to some extent overlaps the last ground of appeal considered, in that it is alleged that, on the evidence, if the misdirections had not occurred, the jury might well have brought in a verdict of manslaughter; and that therefore the conviction of murder should be set aside and one of manslaughter substituted.

Two misdirections were alleged, first, that the learned Chief Justice, while commenting on the appellant's absence from the witness box, omitted to point out to the jury that the appellant was not bound to give evidence; and secondly, that the learned Chief Justice had not adequately "married" his directions on law to the facts of the case.

As regards the first alleged misdirection, the relevant passage in the summing-up reads as follows:

> "Turn now to the accused's story. He has not given evidence on oath and subjected himself to cross-examination, but from the dock he stated that he had made a statement which had been read in this Court and there was nothing he could add to it. I think it necessary to read that statement to you again in full and you may have it when you retire to consider your verdict."

The learned Chief Justice then proceeded to read the appellant's statement to the jury in full, and pointed out where support for the appellant's version was to be found in other evidence given in the course of the trial. The contention that the passage set out above amounts to a misdirection is based on the judgment of the Privy Council in Waugh v. The King (1950) A.C.203. In that case the learned trial judge had referred nine times in the course of the summing-up to the failure of the accused to give evidence, and in one passage, which is set out in their Lordships' judgment, said:

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 25th March 1960 - continued.

"But as I have said before, the prisoner has not told you how it happened. You have not been able to ask him one question; the one person who is alive today to tell us what happened, does not see fit to go there (pointing to the witness-box) and tell you what happened."

The passage in their Lordships' judgment on which counsel for the appellant relies reads as follows:

"The law of Jamaica is the same as the law of England both as to the right of a judge to comment on a prisoner's not giving evidence and as to dying declarations. Whilst much of the summing-up is unexceptionable, there are certain parts of it which, in their Lordships' view, do constitute a grave departure from the rules that justice requires, and they are therefore of opinion that the conviction must be quashed. It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence, but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment. Here the appellant had told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover, his story was corroborated by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place. In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course. The question whether a prisoner is to be called as a witness in such circumstances and on a murder charge is always one of the greatest anxiety for the prisoner's legal advisers, but in the present case their Lordships think that the prisoner's counsel was fully justified in not calling the prisoner, and that the judge, if he made any comment on the matter at all, ought at least to have pointed out to the jury that the prisoner was

not bound to give evidence and that it was for the prosecution to make out the case beyond reasonable doubt."

We are unable to see any resemblance between the situation in Waugh's case and that in the instant case. In Waugh's case the trial judge repeatedly commented, and commented most adversely, on the accused's failure to give evidence. In the instant case the learned Chief Justice's single reference to the appellant's failure to give evidence amounts to no more than a statement of the fact, which in any case was self-evident. No adverse comment on the fact was made, and the learned Chief Justice gave the fullest weight to the defence story as set out in the appellant's statement to the police, stressing where support for that story was to be found in other evidence. He had already directed the jury that:

"The fourth principle which must guide you and which above all you must bear in mind, is that the burden of proof is upon the Prosecution to satisfy you that the accused is guilty. It is not for him to satisfy you that he is innocent. It is the duty of the Prosecution to prove beyond reasonable doubt the guilt of the accused."

In these circumstances we do not think that any misdirection occurred on the point.

As to the second alleged misdirection, counsel for the appellant conceded that the summing up contained a clear and accurate review of the facts, and an accurate statement of the law, but complained that the learned Chief Justice dealt with the law in vacuo, and did not relate it to the facts; he submitted that the jury were entitled to more guidance than was given, and that, had they been more fully directed, they might well have brought in a verdict of manslaughter.

We can only say that, reading the summing-up as a whole, we can see no substance in this submission. The learned Chief Justice, it is true, adopted the course of directing the jury as to the law, and then proceeded to review the facts. His direction as to the law, however, so far as we can see, and as was conceded by counsel, was clear and

In the Court of Appeal for Eastern Africa at Nairobi

No. 7

Judgment, 1st 25th March 1960 - continued.

accurate. The law was concisely stated, but was none the less clear on that account. We see no reason to suppose that the jury had any difficulty in applying the law as it had been explained to them to the facts of the case, or that any further direction would have had any effect on their verdict. If we may say so, with respect, we think that the summing-up as a whole was admirably clear and accurate both as to law and fact.

For the reasons given we think this appeal must fail and it is accordingly dismissed.

Dated at Nairobi this 21st day of March, 1960.

K.K. O'CONNOR, P.
A.G. FORBES, V-P.
T.J. GOULD, J.A.
R. WINDHAM, J.A.
A.D. FARRELL, J.

Delivered by Forbes, V-P.

In the Privy Council

No. 8

Order granting Special leave to appeal to Her Majesty in Council, 11th May 1960.

No. 8

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 11th day of May, 1960

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
EARL OF PERTH
MR. ORMSBY-GORE
MR. HEATH
SIR ROLAND WELENSKY

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 2nd day of May 1960 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the

In the Privy Council

No. 8

Order granting Special leave to appeal to Her Majesty in Council,

11th May 1960 - continued.

18th day of October 1909 there was referred unto this Committee a humble Petition of Peter Harold Richard Poole in the matter of an Appeal from the Court of Appeal for Eastern Africa at Nairobi between the Petitioner and Your Majesty Respondent setting forth (amongst other matters) that on the 11th November 1959 after a preliminary inquiry by the Resident Magistrate in Nairobi the Petitioner was committed for trial to the Supreme Court of Kenya on a charge of murdering Kamawe s/o Musunge: that on the 30th November 1959 a nolle prosequi was entered in the said Supreme Court and the Petitioner discharged: that on the same day a new information was signed and on the 10th December 1959 the Petitioner was convicted of murder and sentenced to death by the said Supreme Court: that the Petitioner appealed to the Court of Appeal for Eastern Africa and that Court on the 21st March 1960 dismissed the Appeal: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Order of the Court of Appeal for Eastern Africa dated the 21st March 1960 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Order of the Court of Appeal for Eastern Africa dated the 21st day of March 1960:

"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty at the hearing of the Appeal."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order

In the Privy Council

No. 8

Order granting Special leave to appeal to Her Majesty in Council, 11th May 1960 - continued.

as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

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

W. G. AGNEW.