Case Number:	Criminal Appeal 276, 277, 278, 279, 280 & 281 of 1953
Date Delivered:	15 Jan 1954
Case Class:	Criminal
Court:	Supreme Court of Kenya
Case Action:	Judgment
Judge:	Geoffrey Burkitt Whitecomb Rudd
Citation:	Jomo Kenyatta & 5 others v Regina [1954] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN HER MAJESTY'S IN THE SUPREME COURT OF KENYA

AT KITALE APPELATE SIDE

CRIMINAL APPEAL 276, 277, 278, 279, 280 & 281 OF 1953

(From Original Convictions and Sentences in Criminal Case No: 1 of 1952, of the Acting Resident Magistrate\'s Court at Kapenguria)

(1) JOMO KENYATTA…….(Original Accused No: 1)

(2) FRED KUBAI……...…….Original Accused No: 2)

(3) RICHARD ACHIENG……...….……Original Accused No: 3)

(4) BILDAD M. KAGGIA…….....Original Accused No: 4)

(5) PAUL NGEI…….…...……...Original Accused No: 5)

(6) KUNGU KARUMBA…....……...Original Accused No: 6)...APPELLANTS

Versus

REGINA……....…….....RESPONDENT

JUDGMENT

These six Appeals have been consolidated. The Appellants appeal from convictions under Section 71 of the Penal Code of being members of an unlawful Society, namely the Mau Mau Society and of convictions under Section 70 of the Penal Code of managing or assisting in the management of the same unlawful Society. Under Section 72 of the Penal Code, a prosecution for either of these offences shall not be instituted without the consent of the Governor. The subsequent amendment to this section rendering such consent unnecessary in the case of the Mau Mau Society did not apply to these prosecutions, as it was enacted subsequently.

The first point taken by the Appellants is that there was no consent to the prosecutions by the Governor. It is admitted, however, that prosecutions of the Appellants for offences under these sections were consented to by the Member for Law and Order acting for the Governor under a purported delegation to the Member by the Governor of his power to give such consent. Section 26 of the Interpretation and General Clauses Ordinance provides as follows:-.

"Where by any Ordinance the Governor is empowered to exercise any powers or perform any duties he may, unless by law expressly prohibited from so doing, depute any person by name or a person for the time being holding any office designated by him, to exercise such powers or perform such duties on his behalf, subject to such conditions exceptions and qualifications as the Governor may prescribe and thereupon or from the date specified by the Governor the persons so deputed shall have and exercise such powers and perform such duties as aforesaid. Provided that subject to the provisions of any letters patent or royal instructions relating to the appointment of a Governor\'s Deputy, nothing herein contained shall authorise the Governor to depute any person -

a. Other than a member to make rules

b. To issue Warrants or Proclamations or to hear any Appeal

Under the power in that behalf conferred upon him by any Ordinance."

If this Section is capable of applying to the function of the Governor of consenting to prosecutions under Section 70 and/or 71 of the

Penal Code, then the Member for Law and Order had power to give the Governor\'s consent to the prosecutions in question in this Appeal. But it was contended that Section 26 of the Interpretation and General Clauses Ordinance could not apply to Section 72 of the Penal Code on the ground that Section 72 was a special provision and the maxim generalia specialibus non derogant applied so as to prevent the Governor from invoking Section 26 of the Interpretation and General Clauses Ordinance and delegating his power of consent. If this contention is correct, it is difficult to envisage any case in which Section 26 would have any effect, in as much as it is only Statutory Powers that the Governor is authorised to delegate and Statutory Powers to do any act would normally be found in a special Statute dealing with the subject matter in relation to which the power is required to be exercised.

We have no doubt that the consent of the Governor referred to in Section 72 of the Penal Code is an exercise of a power by the Governor. There is nothing in that Section which expressly prohibits the Governor from deputing that power to any person designated by him for the purpose. We have carefully considered all the authorities which have been submitted to us by Mr. Pritt and we do not see anything in them to prevent Section 26 of the Interpretation and General Clauses Ordinance from having effect so as to enable the Governor to depute his power of consent to the Member for Law and Order. It was submitted that as Section 26 of the Interpretation and General Clauses Ordinance was enacted in 1948, and therefore, subsequent to the Penal Code, it should not have the effect of altering Section 72 of the Penal Code. We do not think that this fact necessarily affects the matter or that even if Section 26 of the Interpretation and General Clauses Ordinance had been a completely new section, it would necessarily be restricted in its application to Ordinances enacted subsequently to it. But in point of fact, this section is to all intents and purposes relevant to the matter before us, a re-enactment of Section 13 of the old Interpretation and General Clauses Ordinance Chapter 1 of the 1926 edition of the Laws of Kenya which was in force when the Penal Code was enacted and which was repealed and re-enacted by the present Interpretation and General Clauses Ordinance in 1948. Mr. Pritt placed much reliance on the case of Seward v. Vera Cruz 10 AC 59 but we do not find this case to be at all in point. The point at issue in that case was whether Section 7 of the Admiralty Court Act 1861 which gave the Court of Admiralty "jurisdiction over any claim for damage done by any ship" gave that Court jurisdiction over claims for damages for loss of life under Lord Campbell\'s Act. It was held that it did not. An action under Lord Campbell\'s Act is an action in personam against the persons liable by law to pay damages for negligence causing death, and this was held to be not an action in rem against the ship. The dictum of Lord Selborne at page 68 "Now if anything be certain it is this, that where there are general words in a later Act, which can be of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not bound to hold that earlier and special legislation indirectly repealed, altered or derogated from, merely by force of such general words without any indication of a particular intention to do so" could not apply in this case in view of the fact that Section 26 of the Interpretation and General Clauses Ordinance is a re-enactment of Section 13 of the previous Interpretation and General Clauses Ordinance which was in force when the Penal Code was enacted. There is no substance in this point.

The next point taken by the Appellants was that the consent was not in its terms a proper consent to these prosecutions. The consents referred to prosecutions under Section 71 of the Penal Code of being a member of an unlawful Society and prosecutions under Section 70 of the Penal Code of managing or assisting in the management of an unlawful Society, but did not specify the particular unlawful Society or give particulars and the point amounts to this, that the consents were bad for uncertainty. Although consent was certainly necessary, the Section does not specify that it should be given in any particular form. It is a question of fact whether the particular prosecution under Section 70 or 71 has been consented to or not. There is no indication that any other prosecution under these sections was intended or envisaged against any of these Appellants in respect of any Society other than the Mau Mau. The intention to prosecute the Appellants on these charges must have been brought to the notice of the Member for Law and Order and the Governor himself. The Magistrate was specially appointed by the Governor to try these prosecutions only and for that purpose assigned by the Governor to exercise jurisdiction and try them at Kapenguria. We have no doubt that the consents related to these prosecutions and to no other and we find no substance in this point.

Then it was argued that there was no jurisdiction to try the Appellants at Kapenguria which is in the Rift Valley Province. That is to say, that no act giving jurisdiction as to venue occurred in the Rift Valley Province. There can be no substance in this point as regards the Appellants Kenyatta, Kubai and Achieng, in view of Section 74 of the Criminal Procedure Code. There is evidence that they were present at a private meeting at 0L Kalou which is in the Rift Valley Province, when Kenyatta advised the people at the meeting not to use force to make people take the Oath and it was part of the Crown case that these three Appellants had acted as members of the Mau Mau Society and as managers of it at 0L Kalou in the Rift Valley Province, and on that basis they were clearly triable at Kapenguria. Before the prosecutions were instituted all the Appellants were arrested and taken to Kapenguria and there detained under the Emergency Regulations. They were then released and re-arrested in Kapenguria in the Rift Valley Province on the charges on which they were tried and convicted. After that arrest, they were kept in custody at Kapenguria until trial.

Section 71 of the Criminal Procedure Code provides as follows:-. "Subject to the provisions of Section 69 and the powers of transfer conferred by Sections 79 and 81 (none of these Sections apply) every offence shall ordinarily be enquired into or tried by a Court

within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the Accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a Summons lawfully issued charging the offence." In as much as all the Appellants were formally released and then arrested at Kapenguria on the charges on which they were tried, we think it is clear that they were apprehended at Kapenguria and after that arrest they were certainly in custody on charges for these offences in Kapenguria. So that if Section 71 of the Criminal Procedure Code means what it says, they were triable at Kapenguria. But Mr. Pritt has submitted on the basis of Sections 78 (1) and (2) that the provisions of Section 71 relating to apprehension and custody are meaningless and can be given no effect.

Section 78 (1):-. "If, upon the hearing of any complaint, it appears that the cause of complaint arose outside the limits of the jurisdiction of the Court before which some complaint has been brought, the Court may, on being satisfied that it has no jurisdiction, direct the case to be transferred to the Court having jurisdiction where the cause of complaint arose."

Section 78 (2):-. "If the accused person is in custody and the Court directing such transfer thinks it expedient that such custody should be continued, or, if he is not in custody, that he should be placed in such custody, the Court shall direct the offender to be taken by a police officer before the Court having jurisdiction where the cause of complaint arose, and shall give a warrant for that purpose to such officer, and shall deliver to him the complaint and recognizances, if any, taken by such Court, to be delivered to the Court before whom the accused person is to be taken; and such complaint and recognizances, if any, shall be treated to all intents and purposes as if they had been taken by such last-mentioned Court."

The argument was that the power of transfer under Section 78 is dependent upon the Court before whom the complainant was brought being satisfied that it has no jurisdiction and as sub-section (2) refers to the case where the Accused is in custody it follows, according to the argument, that the place of custody cannot give jurisdiction as to venue.

At first sight it is difficult to construe Section 71 with the first two sub-sections of Section 78, so as to give meaning to all the words which they contain. Section 78 refers to a complaint and Section 71 to apprehension or custody on a charge, there is a difference between the hearing of a complaint and the hearing of a charge.

Where there is a charge there is no necessity for a complaint, but when a complaint has been made it is a step precedent to a charge and on the hearing of the complaint, the Magistrate has to decide whether or not a charge should be framed. Sections 71 and 78 deal with different matters. It is Section 71 which describes the conditions which can apply to give jurisdiction and in this case, the proceedings commenced when the Police presented charges against the Appellants at Kapenguria. Two of the conditions prescribed by Section 71 apply in the case of all the Appellants, since they were apprehended at Kapenguria on the charges on which they were tried and they were also in custody in Kapenguria on those charges. As regards Kenyatta, Kubai and Achieng the third condition prescribed by Section 71 applies as well as the other two. We have, therefore, no doubt but that there was jurisdiction to try the Appellants at Kapenguria.

The next point that arises is as to the admissibility of what has been called pre proscription evidence. Section 69 of the Penal Code defines an unlawful Society and by sub section (2) (ii) a Society is an unlawful Society if declared by an Order of the Governor in Council to be a Society dangerous to the good government of the Colony. The Mau Mau Society was so declared on the 12th August, 1950, and this declaration has been referred to as the proscription and the period prior to the 12th August, 1950, has been referred to as the pre proscription period. Paragraph (i) of Section 69 (2) of course enacts seven other matters, any one of which, if proved in relation to a Society, would make that Society unlawful irrespective of any declaration by the Governor in Council. In the present cases the charges against the Appellants are on the basis that the Mau Mau Society was unlawful by reason of the proscription and the Appellants were charged with being members of the Society and managing or assisting in its management between the 12th August, 1950 (the date of the proscription) and the 21st October, 1952. It was submitted that no evidence could be adduced by the Crown relating to any acts of any of the Appellants in the pre proscription period, on the grounds that such evidence was irrelevant and prejudicial to the Appellants. In support of the admissibility of this evidence the Crown relied on Section 11(2) of the Indian Evidence Act. Section 11 provides: “Facts not otherwise relevant, are relevant - (i) If they are inconsistent with any fact in issue or relevant fact (ii) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.” It is well settled of course, that this Section does not render evidence admissible under the Act which would be inadmissible under the English Law of Evidence. It does not render evidence of bad character or evidence of similar unconnected acts or evidence of a propensity to commit a particular type of crime admissible. The pre proscription evidence in this case was all directed to showing that the Appellants affected by it were connected with Mau Mau in the pre proscription period and it was, therefore, not evidence of facts unconnected with the facts at issue. The presumption of continuance would apply with more or less force, according to the nature of the pre proscription evidence and the effect of the other evidence in the case. The Appellants contended that any presumption of continuance arising from the pre proscription evidence

would necessarily be more than offset by the presumptions of innocence and of legality, but this is not necessarily the case. If the pre proscription evidence was relevant, it is immaterial whether it tended to show that the Mau Mau Society was an illegal Society prior to the proscription.

We consider that the Magistrate's ruling that evidence concerning the connection of any of the Accused with the Mau Mau Society both before it was proscribed as an unlawful Society and after it was proscribed as an unlawful Society was relevant to the charges, was entirely correct. This evidence was submitted in the first place on the basis that the Society was lawful before it was proscribed, but when the evidence of the Crown Witness Rawson Macharia had been given it became clear that he was alleging that he was present when the Appellant Kenyatta administered in the pre proscription period, an Oath in the name of the Mau Mau Society which was an illegal Oath and that any Society sponsoring such an Oath was necessarily an unlawful Society. Mr. Pritt contended that this evidence should have been struck out, in as much as it conflicted with the basis of the Crown\'s original argument as to admissibility on the grounds that the Society was lawful before it was proscribed. This contention must fail. The evidence was relevant and so it was immaterial whether it disclosed a criminal act on the part of Kenyatta or not. Once evidence was properly admitted, the Court had to consider the weight to be attached to it and was in no way bound by what was said for the purposes of the argument as to admissibility before the evidence was given in Court. The pre proscription evidence was related to five incidents of which the first can be called the incident of the K.C.A. letter. When Kenyatta was arrested in October, 1952, his house was searched and the Police found there a letter signed by Kenyatta dated the 24th July, 1948, and in the following terms : -.

To all the Leaders of K.C.A.,

KIAMBU.

I want that you should come here together on 20.8.48, together with four Elders from each village and we shall sleep here. All Members and those who call themselves K.C.A. will come here on 21.8.48 at 8.0\'clock in the morning without fail.

Your Leader,

Jomo Kenyatta

At all material times the K.C.A. was an illegal Society and it was contended that this letter was inadmissible in evidence as tending to show a connection with the K.C.A. and not the Mau Mau Society. There was, however, evidence that the Mau Mau Society was either an offshoot or a reincarnation of the K.C.A. There was evidence that both Societies were referred to as the Society of the Country and that they were regarded as one and the same Society. We think that this rendered the letter admissible. In any case, Kenyatta gave Evidence in Chief as to this letter and that certainly made it evidence in the case. We do not, however, attach a great deal of importance to this letter, because there is no proof that it was ever sent to anyone. Kenyatta says that at about the time of the date of the letter he was negotiating with Government for the revival of the K.C.A. as a lawful Society and endeavoring to induce Government to cancel the declaration of it as an unlawful Society, and that in that connection he intended to get in touch with the Leaders and that he signed the letter without reading it carefully and that when he did read it, he found that it was not in the terms that he had intended and so he never sent it to anybody. This explanation was not accepted by the learned Magistrate.

Apart altogether from this letter, the evidence as to two other pre proscription incidents, the Gichungwa incident and the Rawson Macharia incident if accepted, as it was, disclosed beyond any doubt that in the pre proscription period Jomo Kenyatta stated that the Mau Mau Society was his Society and that he had administered an Oath as an Oath of the Mau Mau Society. The acceptance of this evidence, together with the post proscription evidence which we will deal with later, necessarily had the effect that even if the K.C.A. letter had been excluded, the ultimate decision of the case against Kenyatta must in reason, have been the same as it was.

The next incident is the Gichungwa incident which occurred in 1949 when Kenyatta invited Gichungwa to join a Society which he called "My Society" and when asked which Society that was, Kenyatta said "The Mau Mau Society". This evidence was clearly admissible as showing that Kenyatta was at least a member of the Mau Mau Society in 1949 and as showing that he was not telling the truth when he said that he did not know the Mau Mau Society and had never had anything to do with it. The Magistrate accepted Gichungwa\'s evidence as true and we have no reason to doubt but that he was correct in doing so.

The next three pre proscription incidents all occurred in March, 1950. We shall first deal with the Rawson Macharia incident which occurred on the 16th March, 1950. Rawson Macharia gave evidence that on that date he was present when Kenyatta administered an

Oath to one Thiongo Waithaka which was an undertaking that he would agree to drive out the Europeans from Kenya and that a similar Oath was administered to one Solomon Memia by Kenyatta who used these words: "If you see an African killing anyone you must help him. You must pay Shs: 62/50 to this Society and this is Mau Mau. You must not ask how this money is used and if you shall be asked whether you are a member of this Society you must say you are a member of K.A.U." The ritual of the Oath was consistent with what was proved by other witnesses to be part of a Mau Mau ceremony or ritual. This evidence was clearly admissible as showing Kenyatta\'s connection with Mau Mau.

In cross-examination Rawson Macharia was clearly shown to have given evidence which was not correct by saying that Kenyatta gave evidence in 1932, in Kenya, before the Carter Land Commission, whereas in fact, Kenyatta was not in Kenya in 1932, and his evidence to the Carter Commission was given in England. Rawson Macharia however, persisted in saying that Kenyatta gave evidence in Kenya before the Carter Commission and in this he was certainly wrong. This particular allegation is, however, irrelevant to the facts at issue. Its only importance was as to the credit that could be given to Rawson Macharia\'s other evidence. The learned Magistrate considered this and was satisfied that Rawson. Macharia\'s other evidence was true. The learned Magistrate was certainly entitled to come to this conclusion and we do not doubt its correctness.

The next pre proscription incident is the Muthondu incident. Muthondu was a Kikuyu and an Elder of the Native Tribunal at Gatundu where he lives. In March, 1950, he attended a meeting of age groups at Gitundu Market, at which Kenyatta and Kubai were present. He said that when the meeting was over the congregation were invited to go to Kenyatta\'s place and that he, Muthondu went there and found three female goats in the process of being slaughtered outside the house. Kubai and Kenyatta were there with about four hundred others. Muthondu did not stay there after dark, but returned to his eating house and went to bed. He heard a great deal of noise and singing coming from Kenyatta\'s house during the night. At dawn he got up and opened his shop and about forty men and women arrived there whom he had last seen when he left them at Kenyatta\'s house the night before. These people came along a path leading from Kenyatta\'s house and were looking at each other’s hands. Muthondu went to see what they were looking at and saw that they had seven cuts on the right hand. He saw this on the hands of more than five people. After drinking tea these forty people went away and the women were singing. Up to that time he had never seen people with such cuts on that part of the hand. The songs that were sung were new to him and he heard the words of one of the songs which were to the effect that the people should unite to get self government and their lands back. Kenyatta\'s house was about seven furlongs, as the crow flies, from Muthondu\'s shop and there was a hill and two valleys in between. It was suggested that Muthondu could not have heard singing or recognised the words of any hymns that were sung at Kenyatta\'s house. The defence admitted that there had been a meeting of age groups at Gitundu, but denied that there had been any meeting at Kenyatta\'s house or that Kubai had been present either at the meeting of the age groups or at Kenyatta\'s house. The Magistrate accepted the evidence of Muthondu and we think he was entitled to do so. Seven furlongs is certainly a very considerable distance at which to hear the words alleged to have been sung; but sound would probably be easier to hear and distinguish at night than in the day time and there were valleys between Kenyatta\'s house and Muthondu\'s shop. There was no evidence as to wind conditions. We do not think that it would necessarily have been impossible for Muthondu to have heard singing at Kenyatta\'s house. Of this evidence the Magistrate held that there had been a Mau Mau initiation ceremony at Kenyatta\'s house that night. The words of the song which Muthondu said he heard, are such as might very well be sung at a Mau Mau Meeting. They might also however, be sung at a meeting of K.A.U. or even possibly at an age group meeting and no strong presumption would arise, in our opinion, merely from the words of the song, that the meeting was connected with Mau Mau. Such a large meeting at night is, however, in our opinion, unusual and there was evidence that the making of seven cuts on the arm was very suggestive of Mau Mau. Mr. Henderson who gave this evidence did not suggest that such seven cuts were suggestive of anything else. We do not think that the fact that, according to the evidence, Muthondu saw the cuts on the hands, as distinct from the arms, affects this matter. It is very well known, that among Africans the same word is usually used for the hand and for the arm. We are unable to say that the Magistrate was wrong in accepting Muthondu\'s evidence, or in concluding from it that a Mau Mau initiation ceremony had been held that night at Kenyatta\'s house.

The last of the pre proscription incidents was the Njui incident. Njui said that in March, 1950, some people tried to make him undergo Mau Mau initiation; that he protested loudly and that Kenyatta, who was in a room close by, came out when he heard the disturbance caused by Njui\'s protest and that he told Njui that Mau Mau was not a bad thing and that he took Njui by the hand and led him through the initiation. Njui had reported the matter to the Police, but did not implicate Kenyatta in that report. He said that the reason he did not at once implicate Kenyatta was that he was afraid of the consequences to himself if he had done so. This evidence was clearly admissible as, if it were true, it showed that Kenyatta was associated with Mau Mau.

The learned Magistrate thought that Njui\'s evidence might well have been the truth. He was certainly not satisfied that it was false, but in view of the fact that Njui had not implicated Kenyatta in his original report to the Police, the Magistrate decided not to accept his evidence as it was uncorroborated and so he held that this incident had not been proved and he did not take it into account in convicting Kenyatta. We can find nothing wrong or improper in this view. Had the Magistrate decided to accept Njui\'s evidence,

we would not have been disposed to say that he was wrong, but as the Magistrate decided that Njui\'s evidence was not sufficiently satisfactory to be accepted as true, we do not take this incident into account in any way against any of the Appellants in this Appeal.

Before considering the other incidents in detail, we will deal at this stage with the contention that the learned Magistrate did not try the case judicially. Mr. Pritt, for the Appellants made a general attack on the learned Magistrate and submitted that he was biased in favour of the Prosecution and against the Appellants and that he did not try the case fairly with an open mind. Indeed, Mr. Pritt went so far as to say that the learned Magistrate was incapable of trying this case judicially. This is, of course, a vital matter to which we have given serious attention. We have no hesitation in saying that we consider these imputations on the learned Magistrate to be completely unfounded. It is true that the learned Magistrate was not favourably impressed by the Defence Witnesses and that, on the whole, he preferred the evidence of the Witnesses for the Crown: but if the Crown case was true, that would necessarily be so. It was not fair to suggest that the learned Magistrate accepted the submissions of the Prosecution without question and without regard to the counter submissions made by the Defence. The Njui incident is a case in point in which the Magistrate was not prepared to accept the evidence submitted by the Crown as reliable. Yet had he done so, we would not have been disposed to differ from him. Similarly as regards Munyi incident, which we shall deal with later. The learned Magistrate refused to place as much importance on the nyimbos as the Crown invited him to do. He had had very great judicial experience in the Colony. It is doubtful if anyone has greater and it would indeed be surprising if he dealt with the case in the way Mr. Pritt submitted he did. The Judgment clearly shows that the Magistrate was at very considerable pains to direct himself fairly and to exclude from consideration matter which he thought would be improperly prejudicial to the Appellants.

We have been invited to set aside the convictions on the ground that the Magistrate\'s view of most of the evidence was incorrect in fact. The position of an Appellate Court as regards findings of fact is quite clear. It will not reject a finding of fact if there is evidence to support it unless it is satisfied that the finding was wrong. In a criminal case of course, the burden of proof upon the Crown is higher than in a civil suit, so that in a Criminal Appeal the Court will set aside a finding of fact if it is satisfied that either the finding was wrong or that there must necessarily be a reasonable doubt that it is not correct. As regards the incidents we have already dealt with, we see no reason to disturb the learned Magistrate\'s findings of fact which we consider were justifiable on the evidence.

We now turn to the post proscription incidents, the first of which in time, is the initiation of Waweru into Mau Mau by the Appellant Karumba in June, 1951. There was some question as to the date of this alleged incident. According to the record Waweru said at first that it happened in June, 1952, and if that were so, his evidence could not be accepted as it would not be consistent. But it appears that Waweru was led when he gave the date as 1952. He subsequently corrected it to 1951. We do not attach any importance to this alleged discrepancy in the date as we are completely satisfied that Waweru never intended to suggest that the incident occurred in 1952 or at any time other than 1951. He said that he was called from his house in the evening and brought to the house of one Nganga, whore he was seized by three people and put into a circle of people with knives in their hands. Karumba was there and said: "It is I who have ordered your being seized, because we want you to take the Oath." Waweru asked: "Oath, what for"" And Karumba replied: "It is for the Kiama Kiabuburi (Association of the Country) which has been organised with a view to driving out the Europeans and it is secret. That is why we have seized you, because you are a very bad man. You belong to the Government and you go about and about. I do not in future want you to reveal our Association because you are a Government man." Waweru replied: "Well that is so. I will not disclose it because I am afraid of being killed." Karumba then said: "You will have to pay SHS: 62/50 in order to become a member and pay a ram." Waweru said: "I have not got those things now." He was then asked if he could bring them and he said: "I might bring them the day after tomorrow." Karumba then said: "SHS: 62/50 must be paid here and now" and turning to Nganga said: "That is, for you to deal with, because you brought him here." The Oath was administered to him not to disclose the Society. These allegations were denied by Karumba and another Witness was called by the Defendants to prove that a man called Kimani Kihio had died in 1950 and could not have been present as Waweru said he was when Waweru went to be cleansed from the Oath by a Witch Doctor. The Magistrate did not accept the evidence of Karumba or of the other Defence Lightness. He was satisfied that Waweru\'s evidence was true. The ritual of the Oath included the passing of blood in a gourd seven times round the head and seven times round the legs. Then small bits of meat were put to his mouth and blood was put in the form of a cross on the Witness’s forehead and across his lips. The Magistrate found that the ceremony was a Mau Mau initiation ceremony and we think he was entitled to do so for there was the evidence of Ephraim Gichereri at page81M of the typescript that Kiama Kiabururi was used as an alternative for Mau Mau and the K.C.A. which the Witness said was the same thing and there was evidence that the passing of blood round the head and the putting of it on the lips is characteristic of Mau Mau. The object of the Kiama Kia Burbururi as stated by Karumba according to Waweru is certainly one of the objects of Mau Mau. The ritual of the Oath was not as full as the ritual of other Mau Mau Oaths, but we think that this may have been due to the nature of the obligation imposed by the Oath in this case, which was merely not to inform on Mau Mau activities. Much of the ritual of the Oaths has obviously been carefully arranged on the basis of recognised tribal ritual so that it would not be unnatural to find that the ritual of various Mau Mau Oaths varied according to the obligation imposed by the Oath. It is significant that the sum demanded was the

same as that which was demanded of the initiates in the avowedly Mau Mau initiations testified by Rawson Macharia.

This incident shows that Karumba was acting in a managing capacity in his local area. The other incident in which he is involved, the meeting at Headquarters, which we shall deal with later, points in the same direction and shows that he was furthering the policy of Mau Mau.

We shall next deal with Ngei\'s admission to Mr. Pedraza on the 8th October, 1952, while he was in custody immediately after he had been arrested for an alleged offence unconnected with Mau Mau. It is quite clear that Ngei then admitted that he was a member of Mau Mau and the only Question is as to whether this evidence was admissible under Sections 25 and 26 of the Indian Evidence Act, as amended in this Colony. Mr. Pedraza was an Administrative Officer and a Magistrate entitled to hold a Subordinate Court of the first class. He went with the Police to superintend the arrest of Ngei. He said that he did so as a Magistrate, but we think that on the reported decisions in East Africa and in India on these sections of the Evidence Act that Mr. Pedraza was sufficiently connected with the actions of the Police in making the arrest, to be considered as being a Police Officer for the purposes of these sections and that if the sections had not been amended, this evidence would probably not have been admissible. The sections were, however, amended, before the trial and now read as follows:-. "Section 25 No confession made to a Police Officer shall be proved as against a person accused of any offence, unless:-.

(a) Such Police Officer is of, or above the rank of, or a rank equivalent to Assistant Superintendent, or

(b) Such Police Officer be an Administrative Officer holding first or second class Magisterial powers and acting in the capacity of a Police Officer.

"Section 26 No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, an Administrative Officer holding first or second class Magisterial powers or a Police Officer of, or above the rank of, or a rank equivalent to Assistant Superintendent, shall be proved as against such person.

The words in italics constitute the amendments.

Mr. Pritt admitted that Section 25 could not help him, since if Mr. Pedraza was acting as a Magistrate the section did not apply, and if he was acting as a Police Officer within the meaning of the section, the evidence was not excluded since Mr. Pedraza was an Administrative Officer holding first class Magisterial powers, but Mr. Pritt submitted that the evidence should have been excluded under Section 26. This submission was put on the basis that any confession made by a person in Police custody is inadmissible unless made in the immediate presence of a Magistrate or other person mentioned in the section as amended and that such person must be a person who was not connected with the arrest and ensuing custody. In other words, according to Mr. Pritt the confession must be made to what he called a neutral third party, capable of acting as an Umpire.

We think that that is not the effect of the amendment and that the amendment to Section 26 applies in exactly the same way as the admitted effect of the amendment to Section 25 and there is authority for our view in the supplement to Woodroffe\'s Law of Evidence 9th Edition at page 27 "If a confession is made to a Magistrate himself, then it is obviously made in the immediate presence of a Magistrate and the requirements of Section 26 are satisfied Sidheswar v. E. A.I.R. 1934 A 351." In Kenya by virtue of the amendment, an Administrative Officer holding first class Magisterial powers is in the same position as a Magistrate and a confession made to him is, therefore, a confession made in the immediate presence of such an Administrative Officer.

It was suggested that as the Judge\'s Rules had not been complied with and no caution had been given to Ngei, the confession should not have been admitted, but we do not think that that should be so in this case. The confession did not refer to a charge upon which Ngei had been arrested. It was completely voluntary and in fact, blurted out by Ngei himself. The evidence was clearly admissible. This confession was not repudiated; it was denied.

Corroboration was, therefore, not strictly necessary, but corroboration can be found in Ngei\'s conduct at the Headquarters Meeting and in the incident we consider next, namely, Ngei\'s letter from prison dated the 21st October, 1952, in which he said: "I had slapped the D.O. at Kangundo (Pedraza) and threw a pail at him with several other abuses. The D.O. there had a shock and drove to Machakos saying that there was an element of Mau Mau at Kangundo. He was not far from the truth. Do you know what I sing daily in my small cell" Here is the tune: "Bless Mau Mau, Bless Mau Mau, Bless all the adherents of Mau. Mau, Bless all the Oath takers of Man Mau and cheer up my lads of an Mau." Sing it Hennie and remember me in the cell. Yesterday, 21.10.52, all the leading

K.A.U. officials have been arrested. Government has pro-claimed a State of Emergency, just like Malaya. White massacre planned is coming up. Nairobi is steaming up now."

There is no doubt that Ngei wrote such a letter and had it posted to an address in Tanganyika, but it was intercepted in the post. Ngei tried to explain away the apparent meaning of this letter, but the Magistrate did not accept his explanation. We think it would have been surprising if he had, and we have no doubt that the Magistrate was correct in saying that the letter suggested that Ngei knew there was an element of Mau Mau at Kangundo; that the letter appeared to display sympathy with the Mau Mau movement, its adherents and Oath takers and showed that Ngei thought, or heard, or knew, that a white massacre was to take place.

We now pass to the consideration of what may for convenience be termed the incident of the nyimbos or hymn books and that of the black exercise book which can conveniently be considered together.

The nyimbos are three books respectively grey, blue and yellow in colour, each of which contains hymns adulatory of K.A.U. and its Leaders, including some of these Appellants, and in particular of Kenyatta. One of the hymns refers to Mau Mau by name, and others refer, although not in express terms, to the formation, objects and alleged Leaders of Mau Mau. There was also evidence that hymns from one or other of these books were sung at K.A.U. meetings, but not as to which of the hymns were so sung. The fact that someone is praised in a book is not, in itself, evidence that that person is a member or a manager of an organisation which is also praised or referred to in the book; nor indeed is it, in itself, evidence that the person so praised had any knowledge of the association or of the sentiments of the author of the book. There is nothing at all upon the record from which the inference could possibly be drawn that any of the Appellants other than Kaggia, Kenyatta and Kubai had any personal knowledge of these books. We therefore, think that the Magistrate ought to have directed himself that these books were not admissible in evidence against any of the Appellants other than Kaggia, Kenyatta and Kubai.

To determine, however, whether or not the books were admissible in evidence against Kaggia, Kenyatta, or Kubai, it is necessary briefly to analyse certain circumstances relating to the manner in which they came into the possession of the Police and as to their connection with the black book already referred to. The first hymn in the blue nyimbo is in the following terms:-.

"One day the Leaders of the K.A.U. met together at Kaloleni and decided to have a secret understanding, with a view to getting back their land."

CHORUS: "Come Kikuyu people and call Mumbi and let us have this secret understanding. We are sorrowful owing to our land going without our consent."

AGAIN: "Rejoice for the present you white people, for the time is coming when you will wail because of the evil you have done. May you go and wail in the sea."

Hymns numbers 5 and 9 refer to one Dedan Mugo who was convicted some years ago for an Oath taking offence in connection with the K.C.A. The rest of the book is mainly in praise of the K.A.U. and urging people to join.

This hymn book was, according to the evidence which the Magistrate accepted, purchased from Kaggia himself by a European Police Officer, who, in September, 1952, saw Kaggia travelling with other Africans in a motor car in which there were fifty or sixty copies of this book and asked Kaggia if he could buy one, to which Kaggia replied in the affirmative, handing him the book. Kaggia, while admitting that he was present in the car in which the books were being conveyed, denied that he had in fact sold this book to the Police Officer, maintaining that the sale had been effected by the author, who was also a passenger in the car. The Magistrate, however, rejected this denial, and we cannot but observe that there was ample evidence to support his finding of fact, that Kaggia was the vendor of this book. Quite apart from the evidence of the Police Officer as to Kaggia\'s having sold him the book, the surrounding circumstances point strongly to Kaggia\'s having knowledge of the book, in as much as it was advertised in Kaggia\'s newspaper, and according to the advertisement, obtainable from Kaggia\'s private post office box number. We therefore, are satisfied that this book was admissible in evidence against Kaggia. While the Magistrate does not appear to have attached any great importance to this book in relation to Kenyatta, as he has not expressly ruled that it did not establish anything against him, it may be desirable to consider that question. The book was advertised in Sauti Mwafrica, the official organ of the K.A.U. and application for the book could, according to the advertisement, be made through the box number of the Nairobi branch of K.A.U. These facts might be construed as implicating Kenyatta in the distribution of the book, having regard to the Magistrate\'s observation that at the material time Kenyatta was President of the K. A. U. and that the Head Office of the K.A.U. was situate in the same building as that from which the book could be obtained. The latter observation appears to us to have been erroneous, in as much as the evidence in

fact established that although the Nairobi branch of the K.A.U. was situate at Kiburi House, which is in Racecourse Road, the Head Office was situate at the material time in Whitehouse Road. It would appear impossible to impute to the Leader of a Colony-wide organisation responsibility for all publications distributed through any of the branches of that organisation. Nor would it appear proper to treat the fact that the book was advertised in Sauti Mwafrica, as any evidence that the President of the K.A.U. necessarily had, as such, any knowledge of the contents of the book. We, therefore, consider that this book establishes nothing against Kenyatta and should have been disregarded as against him.

In as much as Kubai, not Kenyatta, was the Chairman of the Nairobi branch of the K.A.U., had an office at Kiburi House at which he constantly attended and used Kaggia\'s post office box number, the learned Magistrate\'s remarks as to Kenyatta\'s alleged connection with this book might have had greater force in relation to Kubai but the learned magistrate does not refer to the nyimbos in connection with Kubai.

The grey nyimbo was bought in August, 1952, by a policeman from an itinerant vendor. There is nothing in the book itself or in the circumstances in which it came into the possession of the Crown which would, in our view, render it admissible in evidence as against any of the Accused, other than Kenyatta. It contains, however, some hymns, manuscript versions of which were found in the black book (to which reference is made hereafter) which was found in Kenyatta\'s house. Its admissibility in evidence as against Kenyatta can, therefore, only be determined if regard is had to the circumstances relating to the black book. If the black book is not evidence against Kenyatta, then the fact that manuscript versions of hymns in the grey book were found in that black book, cannot render the grey book admissible against him.

The yellow book, which is the nyimbo containing a specific reference to Mau Mau, was found in Kenyatta\'s house, and also contained hymns, the manuscript versions of which appear in the black book. There is nothing to suggest that the yellow book was admissible in evidence against any of the Accused other than Kenyatta.

The black book was an exercise book which contained, in addition to the manuscript versions of hymns already referred to, certain accounts and passages which were suggestive of having been notes for one of Kenyatta\'s speeches. It bore also, the name of one Mwangi who professed to be a son of Kenyatta. In cross-examination, Kenyatta denied all knowledge of it and explained that persons call themselves son of anyone whom they admire. He also denied all knowledge of the accounts in the book. It may be significant that those accounts relate to the payment of wages to his employees and a loose piece of paper found in the book contains an entry in which the author alleges that Kenyatta owed him a specific sum. This might, on the face of it, suggest that the book was not Kenyatta\'s book, but rather a book kept by one of his employees who was entrusted with the payment of wages to the other employees.

It was contended for the Crown that the mere fact that the book was found in Kenyatta\'s house rendered it admissible in evidence against him by reason of the definition of "possession" in Section 5 of the Penal Code, which is in the following terms:-.

"Be in possession" or "have in possession" includes not only having in one\'s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.

It seems to us that that definition is of no assistance in the instant case, as the issue to be determined is whether or not the article was in the possession of Kenyatta, whether that possession was personal or was through the intermediary of someone else. We do not, however, think that in view of the Magistrate\'s express rejection of Kenyatta\'s disclaimer of all knowledge of this book that he was unjustified in drawing the inference from the fact that it was found upon his premises and contained entries relating to his accounts, that it was in his possession. We are, therefore, satisfied that the book was evidence against him, and the fact that it contained hymns copied from one or other of the nyimbos is, in our view, sufficient to establish that he knew and approved of those hymns, but not of any other hymns in those nyimbos.

Although, as has already been observed, the Magistrate aid not administer to himself what we consider to have been the proper direction in relation to the admissibility of the nyimbos as against the Appellants, this failure does not appear to us to be a matter of any importance as, in his summary of his findings against each of the Appellants, he makes no reference to the nyimbos, except in relation to the case against Kaggia and Kenyatta. Furthermore, he observes in relation to the grey book that there was no evidence which connected any of the Accused with it and, therefore, that he did not see that it could help the Prosecution to any great extent; and in relation to the yellow book, that he did not attach much importance to it, and in relation to the black book that it was only important as demonstrating that Kenyatta was not a person to be believed and that its contents were not, in his opinion, very harmful

to Kenyatta\'s case.

We are quite satisfied, therefore, that his decision in relation to any of the Appellants, was not improperly influenced by the reception in evidence of these books and even had he placed as high a degree of reliance upon them as the Prosecution appears to have done, nevertheless, in view of the provisions of Section 167 of the Indian Evidence Act, we do not consider that this Appeal could have been allowed on behalf of any of these Appellants upon the ground that evidence as to these nyimbos had been wrongfully admitted in relation to that Appellant.

The next incident we deal with can be disposed of very shortly. It concerns only the Appellant Kaggia and the Magistrate found that in August, 1952, he unsuccessfully attempted to induce one Otto Mongoti to join Mau Mau. There can be no doubt that there was evidence to support this finding.

The next incident concerns only the Appellant Kubai. One Munyi stated that in September, 1952, he was initiated into Mau Mau at Kubai\'s instigation and that Kubai had been holding a Study Circle in which members of Mau Mau were instructed in Mau Mau doctrine and practice. The only evidence as to this was that of the Witness Munyi himself and as it was clear that he had to some extent been actively engaged in Mau Mau activities for some time after his initiation, the learned Magistrate quite correctly held that Munyi was an accomplice and in the absence of corroboration the Magistrate refused to accept this incident as proved and did not take it into account in convicting the Appellant Kubai. In our opinion, Munyi\'s evidence was clearly admissible against Kubai, but its force was, of course, weakened by the absence of corroboration and as the Magistrate decided not to act on it, we have left it out of account.

We come now to two most important incidents. The meeting at Kamirithu and the meeting at K.A.U. Headquarters which resulted from it. The magistrate accepted the evidence of the three Witnesses who gave evidence for the Crown and did not accept the evidence of the Defence where it conflicted with the evidence of those Witnesses. We are satisfied that the learned magistrate was entitled to do this and indeed, we consider that the reasons put forward by Pritt as showing that the Crown witnesses should have been disbelieved, were very unconvincing. The main facts of these incidents are as follow:-

The three Crown Witnesses were some of the Leaders of a small K.A.U. branch at Limuru which was disturbed at the progress Mau Mau was making in the district. They got permission to hold three meetings for the purpose of denouncing and dissociating themselves and the K.A.U. from Mau Mau. The third of these meetings took place at Kamirithu on the 23rd March, 1952, and Kenyatta, Kubai and one Mworia came there together to see what was going on in that branch. The Vice Chairman of the branch and the Treasurer and two other people spoke before Kenyatta and told him that very many people were saying that he was the Leader of Mau Mau. They asked him to deny this allegation publicly before the meeting and to denounce Mau Mau and dissociate himself and the K.A.U. from it. They mentioned the evils which resulted from Mau Mau and that it was dividing the Kikuyu to no good purpose and that they were frightened of it. Then Kenyatta got up to speak he said that at a time when ...."we are fighting against the Europeans, you are fighting against your own people and because of that, this question.you are asking me about Mau Mau I am not going to answer it for you." He said that the people of that branch were like Detectives for the C. I.D., that they were unworthy of K.A.U. and knew nothing really about the K.A.U. He ordered the Leaders of the branch to attend at the K.A.U. Headquarters. The Crown Witnesses said that Kenyatta did not reply directly to any of their questions, but answered in a roundabout way which made people at the meeting angry. Kenyatta also said that he did not know Mau Mau and that perhaps the people at the meeting could tell him. He said that it was the business of the C.I.D. to make such investigations and referred to Mau Mau as an animal and suggested that if it were found preventing people from joining the K.A.U. it should be hit with the handle of an axe. We agree with the learned Magistrate that this was not an effective denunciation of Mau Mau. a result of this meeting three Crown Witnesses on the 24th April, 1952, attended a meeting of the Executive Council of the K.A.U. at the K.A.U. Headquarters which consisted of the first five Appellants and one Otiendi, who was the Secretary of the K. A. U. and another man called Wallace. The Appellant Karumba was present with the members of the Executive Council, although he was not himself a member of it. He was the Chairman of a large branch of the K. A.U. at Chura.

In the meantime, Mworia had published in his newspaper Munenyereri a report of the Kamirithu meeting which ridiculed the Limuru branch and its Leaders. It is clear that at some stage of the Headquarters meeting, the Crown Witnesses complained of this report and desired action to be taken against Mworia, but that was not the sole matter which was discussed at Head-quarters. Kenyatta asked the Crown witnesses "Are you all enemies of Mau Mau" and when they answered "Yes" he said " Well, I see you have been given permission(to hold meetings) because you are the enemies of the people and want to fight the black people instead of the Europeans." He said that they ought not to fight against Mau Mau, because Mau Mau was a religion. The Crown witnesses were told that their branch would be closed down and that it should be amalgamated with the Chura branch under Karumba. The Crown Witnesses refused to join the Chura branch because they said that all the members of that branch.were forced, whether they

liked it or not, to take the Mau Mau Oath and they were not going to have the Mau Mau Oath administered to them. They said that each of the Appellants, one after the other, stressed that they were not to worry about Mau Mau, because it was a religion. That Kubai also said that the Limuru branch was preventing people from joining the Association of the Country and that they should not go on fighting other people because everyone knew that the Mau Mau was a religion and that their branch was to be closed. That Otiendi was the only member of the Executive Council who said that he did not see the necessity for closing down the Limuru branch. That Achieng stressed that Mau Mau was a religion and became angry with the Limuru Witnesses, saying that it was a meeting of the Executive Council, that the Witnesses had been allowed to state their views and that they had taken up too much time. Ngei appears to have been in agreement with the others that Mau M au was a religion and also deprecated action being taken against Mworia in respect of the report of the Kamirithu meeting, at a time when he said they were fighting for the liberty of the press.

It is clear that all the Appellants showed themselves to be sympathetic to Mau Mau and tried to induce the Crown Witnesses to join the Chura branch, even if it meant joining Mau Mau and desired the Limuru branch to be incorporated with the Chura branch because the Limuru branch had denounced Thu Mau.

The next incident involves Kenyatta, Kubai and Achieng who held a meeting at Ol Kalou on the 26th June, 1952, when Kenyatta made an inflammatory speech, but the real incident occurred later that evening when Kenyatta had a private interview with some of the local people and was overheard saying to them, in the presence of Kubai and Achieng "I do not want to hear anybody repeating what I am going to tell you now, because I have heard the people saying that K.A.U. and Mau Mau is one and the same thing. Those of you who have been using force to make people take the Oath, I do not want you in future to use so much force, because if you take them by force, they will go and report to the Police and it will be dangerous. I am remembering that many of our people are now in jail and we cannot waste our strength in that way because if all our people are arrested in that way, there will not be anyone left to take charge of administering the Oath and in that way, we will not be given self-government." This was said in Kikuyu and there was no evidence that Achieng, who is a Jaluo, understood Kikuyu. There was the usual conflict of testimony, but the learned Magistrate carefully considered the matter in his Judgment and in our opinion, he was justified in believing this evidence.

The remaining incidents which are of importance relate to speeches made by Kenyatta at public meetings. We do not attach importance to what has been called the Kennaway conversation which occurred in April or May, 1952, when Kenyatta refused to put, or made excuses for not putting, on the Agenda for public meetings, the denunciation of Mau Mau. He gave reasons for this refusal which are not, in themselves, very convincing, but in our opinion, nothing definite turns on this and it is much more important to consider what Kenyatta said or did not say at his various meetings.

In June, 1952, Kenyatta snake at a large meeting at Thika and said that he had heard people saying there was something called Mau Mau, but he did not know what Mau Mau was and then he said in Kikuyu .... "let the people take a little snuff." This is not a known Kikuyu idiom and in its literal sense, it would seem to have no application to the subject matter of Kenyatta\'s speech, but the remark was received with loud applause and one hearer understood Kenyatta to mean by it that people could go on taking the Mau Mau Oath. Although this phrase is not a recognised Kikuyu idiom, we think that in its context the remark must have had an inner meaning, probably that his previous statement was not to be taken seriously, that was recognised by the audience and occasioned applause. The statement that Kenyatta did not know what Man Mau was, cannot be accepted, in view of the evidence of the incidents testified to by Rawson Macharia, Gichungwa, and the Crown Witnesses who gave evidence of the meeting at Headquarters, all of which give the lie to it.

On the 20th July, 1952, Kenyatta, Achieng and Kaggia were present at a public meeting at Nyeri when Kenyatta was asked what he was going, to do in the way of stopping Mau Mau in the Nyeri district, but he answered vaguely that he did not know what Mau Mau was and decried those who accused the Kikuyu generally of being Mau Mau and those who he said were accusing persons who committed trivial offences, of being Mau Mau. He said that European liquor was harmful and those who drank it and under its influence committed offences, might be the so called Mau Mau. Whenever his remarks were vague as to what Mau Mau was, he was applauded. Here again, we have Kenyatta suggesting that he did not know what Mau Mau was and making unreal suggestions as to what it might be. It was suggested that what he really meant, was that he had nothing to do with Mau Mau and refused to recognise it, but the evidence of those who heard his speech and understood Kikuyu was otherwise. As we have already said, the suggestion that he did not know what Mau Mau was, and never had anything to do with it, cannot be accepted, in view of the other evidence which showed him to have actually been an Administrator of the Mau Mau Oath,

The last incident was brought out by the Defence to show that Kenyatta could not have been a member of Mau Mau, because he denounced it at a public meeting convened for that purpose at Kiambu on the 24th August, 1952. Its importance depends upon whether the alleged denunciation was a real and genuine and sincere denunciation. At this meeting, Kenyatta read out the aims of

the K.A.U. and said they were not the same as those of Mau Mau. He then called on those "who agree that we should get rid of Mau Mau\' to hold up their hands and repeat after him in Kikuyu "let Mau Mau disappear down to the roots of Mokongoe". Mokongoe appears to mean some sort of mythical tree. Kenyatta said in evidence that this was a well-known and powerful Kikuyu curse, but there was no other satisfactory evidence to that. The learned Magistrate who heard the evidence was left with the impression that if there was any denunciation of Mau Mau in Kenyatta\'s speech, it was extremely vague and weak and that it was not a sincere exhortation to put down Mau Mau and have nothing to do with it. We are unable to say that the Magistrate could not properly have come to that conclusion. In cross-examination. Kenyatta said that he might have said: \'What we want is, if you are all agreed on this, we should look for Mau Mau and when it is found, we should take hold of its horns and throw it off and kill it outright." If Kenyatta did say this, we think it is equivocal. Mau Mau is not an animal and has not got horns and the alleged recommendation was dependent on all agreeing. The metaphor is equivocal and could, in our opinion, easily be explained away as being unreal by the supporters of Mau Mau.

Furthermore, the circumstances in which the Kiambu meeting came to be held were such as, in our opinion, to render the fact that Kenyatta uttered some denunciation of Mau Man at that meeting of little significance. Those circumstances, as testified to by Kenyatta in his Examination in Chief, were that David Waruhiu had a discussion with him as to the situation in the country. Thereafter they discussed the matter with David Waruhiu\'s father, the late Senior Chief Waruhiu, and subsequently, there was a meeting between Kenyatta, the two Waruhiu\'s and Mr. Mathu. The object of the meeting being to determine what was the best method of denouncing Mau Mau to people in the Kiambu district. Subsequently, the District Commissioner was approached and on his advice a large committee was formed and the meeting was held. Assuming for the moment that Kenyatta was a Leader of the Mau Mau and that Mau Mau\'s illegal activities were sought to be concealed under the cloak of the legitimate activities of K.A.U. it would not be surprising that Kenyatta in his capacity as President of K.A.U. consented to take part in a denunciation of Mau Mau in as much as to have refused to do so would have at once excited the suspicions of other Kikuyu Leaders, such as Senior Chief Waruhiu and Mr. Mathu and therefore, the value to be attached to any denunciation by Kenyatta must, to some extent, be determined in the light of the findings as to antecedent activities indicative of Kenyatta\'s membership of Mau Mau. Mr. Pritt further contended that evidence confirmatory of Kenyatta\'s version of his denunciation of Mau Mau at the Kiambu meeting had been wrongly excluded, the evidence in question being a sound track and a recording of portions of his speech at that meeting which were subsequently used by the Government for the purposes of anti-Mau Mau propaganda. It is desirable to consider in some detail the circumstances in which this evidence was excluded. Kenyatta having testified that his speech at the Kiambu meeting had been recorded, Mr. Pritt on the 5th February, applied for "either a witness summons or a subpoena duces tecum whichever is the most reasonable," to issue to the Director of African Information Service (hereinafter referred to as Mr. Reiss) directing him to bring or send all films, sound films or sound recordings of the meeting held at Kiambu on the 24th August, 1952, and all records or recordings of the said meeting used for the purpose of broadcasting or other public display. Pursuant to this application the Court expressed its intention of issuing a witness summons in the terms "made out in Mr. Pritt\'s memorandum" (vide page 1231 of the record). On the 13th February, Mr. Pritt informed the Court that he had ascertained that Mr. Reiss had in his possession a written transcript of every thing on the record and suggested that it would be convenient if, instead of the recordings being played over in court, this transcript could be used in evidence, apparently without formal proof. The Magistrate having expressed his reluctance to adopt the proposed course - an attitude which, in our view, was not only justified, but the only proper attitude to be adopted - Mr. Pritt suggested that Mr. Reiss should be called. Mr. Somerhough then interposed that Mr. Reiss\' position was obscure as from the record he appeared as a Defence Witness, to which Mr. Pritt replied that whatever might appear upon the record he had applied for a subpoena duces tecum. The Court then observed that if Mr. Reiss was "a Witness duces tecum" he was not subject to cross-examination and Mr. Pritt said that he proposed to ask Mr. Reiss to come into Court and to produce all the documents mentioned in the subpoena. Mr. Somerhough then enquired how the documents were to be identified, to which Mr. Pritt replied he supposed "it would speak for itself." Mr. Somerhough then contended that a person producing documents under a subpoena duces tecum was only entitled not to be sworn if the documents proved themselves or if they were to be identified by someone else. At this point Mr. Pritt said that he would be quite content if the documents were produced by the Witness and subsequently the Crown objected to their being played over because their identity had not been proved. This observation suggests that the Defence may have been quite as willing to have a cause for complaint as to the exclusion of the proposed testimony, as to have that testimony admitted. The Court then asked if the articles were documents, to which Mr. Pritt replied in the affirmative. Mr. Somerhough next said that he had no objection to Mr. Reiss producing the documents unsworn if they could be properly identified, or if somebody was going to identify them, but that it was improper for there to be no sworn evidence, that it was either the sound recording of the Kiambu meeting or some sound recording used for public exhibition afterwards, and that someone must say on Oath which. Then after the Court had enquired whether Mr. Reiss might be sworn as there did not seem to be much controversy, a remark which, on the face of it, was directed rather to the nature of the testimony which Mr. Reiss was expected to give than to the question as to how that testimony should be given, Mr. Pritt replied that it was a matter of principle as the Indian Evidence Act gave the litigant a right to the production of documents without the person producing them being sworn. The Court then enquired whether if Mr. Reiss produced documents in obedience to the subpoena the matter ended there, or was proof required of what they were. In reply Mr. Pritt maintained that if a Witness served with a subpoena to produce a contract produced something which purported to be a contract, that

was sufficient and therefore, if Mr. Reiss said "This is the recording of the Kiambu meeting at which Kenyatta spoke" it was sufficient, but that if the Prosecution persuaded the Court that that was not sufficient he (Mr. Pritt) would then do his best to prove it. Mr. Somerhough next raised the Question whether these objects were documents within the meaning of Section 3 of the Indian Evidence Act to which the Court replied that it could not decide that until the Court saw the objects. Mr. Somerhough then went on to say: "My point is this. This document requires proof; it has got to be proved that it is what it is; that it was the original record, untampered with, of the original speech, or that it has been tampered with in some way for reproduction, so it must have some sort of proof. This Witness can certainly produce it without this proof and without being cross-examined, as long as another Witness identifies it, but at some stage it has got to be proved before it can be of any value at all, it has got to be proved before the Court precisely what it is. That is the only point the Crown makes; by all means produce it, but it must be properly proved or be subject to identification, but the Court must know what it is and the only way they can do that is on sworn evidence, if it is a document; if it is not a document, then it will have to be produced by a. Witness." Mr. Pritt then reiterated that they were documents and that to the best of his knowledge, information and belief, he would be able to get a Witness to identify them and of course, if he failed in that, then he would only have gone half way which was not enough.

Therefore, he asked the Court to say Mr. Reiss could come in as a Witness on subpoena duces tecum and say that he is producing is what he was asked to produce. The Court then pointed out that the first thing was to determine whether it was or was not a document and that unless he knew whether it was a document, he would be at sea. Mr. Pritt then asked whether it was possible to get as far as the Witness handing the things in for the Court to see. The Court replied that there seemed to be no objection to that course as it need not form part of the record and the Witness might merely deposit the things upon the Magistrate\'s desk and point out what it was. Mr. Somerhough replied, that if the Witness did that he would be giving evidence, a view to which the Court did not accede on the grounds that what the Witness said would not be recorded. Mr. Somerhough then invited Mr. Pritt to support the submission that the objects were documents and an opportunity was afforded for consultation with Mr. Reiss. Mr. Pritt then stated "The things we want to produce are two in number, or two in variety. One, I will take the simplest first, is a sound film track has got marks on it; you can see the marks, which reproduce the sound. On the other hand, the actual tape recording of the speech is recorded on tape or some kind of metal which does not receive any physical marks. The coating on it is of some kind of magnetic nature, or two the electrically induced impulses caused by the microphone vibrating to the sound, when it comes into contact with that magnetic surface on the tape it changes its nature, so that when you reverse the process the magnetic surface of this tape, having had its nature changed, will reproduce the sound, but no microscope would ever show you the change. Therefore, it may be there is no mark. There are no physical marks. I suppose we could claim there are marks in the sense that the physical nature of the thing has been changed in some particular form or way and shape as a result of receiving a sound so it can then give that sound back when it is given some more electricity to feed on." The Court then intimated that it doubted whether these objects were documents within the meaning of the Evidence Act and further discussion ensued as to what was the appropriate course to be adopted during which Mr. Pritt enquired whether Mr. Somerhough would undertake not to cross-examine Mr. Reiss and Somerhough declined to give the undertaking sought and Mr. Pritt declined to put Mr. Reiss into the box. From perusal of the record of this discussion, it is quite manifest that the Magistrate was, at all times, most anxious to allow these objects to be tendered in evidence in a proper manner, although he intimated his uncertainty in the absence of authority as to whether the objects were documents. Mr. Pritt then said: "Subject to Your Honour\'s ruling and without prejudice, may I ask to have Mr. Reiss called into Court on his subpoena duces tecum"" to which the Court replied: "All that I can allow is that he comes in and lays these things on the table." Mr. Somerhough then argued that that course would serve no useful purpose as it was detrimental to anticipate the Court\'s ruling as the Witness could not produce anything on a subpoena duces tecum except a document. Whereupon the Court intimated that its ruling would be reserved.

On the 17th February, the Magistrate delivered the considered ruling which appears at page 1499 of the record. After reciting the respective contentions of Mr. Pritt and Mr. Somerhough, the learned Magistrate says: "Now if Mr. Reiss comes into Court and is not a Witness and merely says: \'These are the things which you have asked me to produce\', this is about all that the Defence can do in these circumstances. I shall not be wise as to what these two things are, or may do. It seems to me that there must be evidence given by Mr. Reiss to explain what these things are and if there is evidence, it must be on Oath and will be evidence liable to cross-examination. It seems for all practical purposes to be rather useless for Mr. Reiss merely to produce unsworn the two sound tracks or mechanical devices without the Court being able to understand that they are. In other words, if I am to understand what they do or can produce, it seems there must be explanations and that this can be done only by the witness giving evidence and that if there is evidence, I cannot rule out cross-examination of the Witness." So too, at Page 1500 in the course of his ruling, he says: "Furthermore, as I have tried to explain, it does not seem that mere production of them, if I were to hold that they are documents, would be of any practical use to me or, to the Defence. I should merely be looking at articles the nature of and the purpose of which I should not understand. It seems to me therefore, that if Mr. Pritt wishes to produce these articles through Mr. Reiss, Mr. Reiss ought to be a witness sworn in the usual way giving evidence and proof in the ordinary way with the consequent liability of being cross-examined by the Prosecution." In the ruling the Magistrate, however, in another passage, held that the objects were not documents. In effect, therefore, the Ruling deals with two distinct questions. First, were the articles documents. As Section 139 of

the Indian Evidence Act which enables persons attending under a subpoena duces tecum not to be sworn, relates only to persons summoned to produce a document, if the answer to the first question is in the negative, it is unnecessary for present purposes to deal with the second question, which is whether, assuming these objects to be documents, the learned magistrate in fact prevented their being tendered in the manner in which the Defence was entitled to have them tendered.

The definition of document in Section 3 of the Indian Evidence Act is as follows:- Any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter." While we know of no authority in point, it appears to us on principle that where it is sought to tender in evidence an object which is alleged to be a document if objection is taken on the ground that it is not a document and the Court is not satisfied upon inspection that it is a document, the Court ought not to allow it to be tendered unless evidence is first given which satisfies the Court that it is a document. Thus although it has been held that a paper bearing "secret writing" is a document, if those marks have been developed, we think that if it were sought to tender in evidence a sheet of paper which appeared to be blank, the Court would be justified in refusing to allow it to be tendered as a document until such time as evidence were given that the paper in fact bore secret writing. As it is documents and documents alone which can be produced pursuant to a subpoena duces tecum, it would seem to us that the appropriate time for giving evidence directed to establishing that a particular object to the production of which on subpoena duces tecum objection has been taken, is a document, is before that object is produced by the person to whom the subpoena duces tecum was directed. This ground alone would, in our view, have justified the Magistrate in refusing to allow Mr. Reiss to produce these objects pursuant to the subpoena duces tecum without previously having had technical evidence establishing their nature as documents. In this connection it should be observed that Mr. Pritt\'s statement from the bar as to the nature of the objects, while no doubt made in the utmost good faith and as full as his information rendered possible, was not as satisfactory as would have been technical evidence. Thus, in relation to the tape recording, having stated originally that it did not bear physical marks he went on to say that it might be contended that it bore marks by reason of the nature of the substance with which the metal tape was coated having been changed by an electrical impulse. While this may be so, it would appear to us in the absence of any technical knowledge that it is at least equally possible that the effect of an electrical impulse upon the magnetic tape is not to change the nature of the tape but rather to vary in some manner its properties and we are by no means certain that a variation in the properties of a substance necessarily entails a variation in the substance or any marks upon the substance. In our view, the term \'marks\' in the definition of \'document\' clearly connotes a physical mark upon the substance on which the document is recorded. In view of Mr. Pritt\'s admission, we therefore, have no doubt that the tape recording at least was not a document within the meaning of this definition and therefore, was not capable of being produced pursuant to a subpoena duces tecum.

It remains to consider the somewhat more difficult question of the sound track. Here, according to Mr. Pritt, and we have no reason to doubt the accuracy of his statement, there were visible marks which could have been seen by the Court upon inspection. It must, therefore, be determined whether the existence of marks, as such, renders a sound track a document. In the definition the term \'mark\' is used in conjunction with the terms \'letters and figures\' and we therefore, think that it must be read ejusdem generis with those words as meaning marks which show the characteristics common to letters and figures and those characteristics appear to us to be dual. First, that they convey, or in combination with each other are capable of conveying, information of some description and secondly, that that information is conveyed or capable of being conveyed through the visual sense. In this connection it should be observed that every illustration to the definition of document in Section 3 of the Indian Evidence Act is an illustration of something which conveys information to that sense. We gather that the marks upon the sound track are not capable of being understood by anyone until such time as the sound track is passed through a machine which emits sound. In one sense, therefore, those marks do not convey any information at all or express or describe anything, although their use in the proper manner causes sound to be produced by a machine and therefore, the marks by themselves may be regarded as meaningless. Hence, we do not consider that a sound track is a document within the meaning of the Indian Evidence Act. In this connection, we desire to add that it may be that the connotation of the term document at common law is wider than that applicable in this jurisdiction in as much as in the absence of a statutory definition the Courts are entitled to have regard to the etymological significance of the term document, but that significance, whatever it may be, cannot override the express provisions of the Indian Evidence Act. This observation is of some importance in view of an admission by Mr. Somerhough, during the course of the argument, that a gramophone record was a document, as if a gramophone record is a document for the purposes of the Indian Evidence Act it would be difficult to hold that, a sound track was not, in as much as in neither case do the marks convey information to the visual sense or themselves convey any information at all. Mr. Somerhough\'s admission. arose in the following circumstances; the Court having intimated that there must be some decision on the point, Mr. Pritt said that all that he could find was that the Courts had ruled that are phone records were documents, whereupon Mr. Somerhough said: \'That is a mark of course" and Mr. Pritt replied that there had been controversy as to whether it was libel or slander as it could not be read but only be played, whereupon Mr. Somerehough again said: "It is a document because it is a nark, but it is not a writing." Mr. Pritt, did not cite the authority to which he referred and not having had the advantage of perusing that authority, we incline to the view that he was under a misapprehension and that what that authority really decided was whether or not a defamatory statement upon a gramophone record was libel or slander and that the ratio decidendi rested not upon the decision that the record was a document, but rested upon the fact that the defamatory statement was made in a

permanent form.

While as we are satisfied that neither the tape recording nor the sound track was a document within the meaning of Section 5 of the Indian Evidence act, we consider that the Magistrate was correct in refusing to permit them to be produced by Mr. Reiss without his being sworn, it is desirable, in case our view as to the nature of these objects should be wrong, also to deal with the contention that by declining to allow Mr. Reiss to produce these objects (hereinafter referred to as documents) without being sworn, the magistrate precluded the Defence from tendering evidence in a manner in which they were lawfully entitled to tender it. In our view, the true position is that where a Witness attends pursuant to a subpoena duces tecum he, without being sworn, can under Section 159 of the Indian Evidence Act, produce the documents referred to in the subpoena. That production, while it renders the documents available to the Defence, does not render them evidence, except in the case of documents which prove themselves e.g. public records. When therefore, they are produced pursuant to a subpoena duces tecum they should be marked for identity but do not become exhibits until such time as they are proved by someone who, giving evidence in the ordinary way, testifies as to their nature. To illustrate this by a simple example. If in the course of litigation between A and B, A desires to tender in evidence a contract in Arabic which happens to be in the possession of C, a person with no knowledge of Arabic, a subpoena duces tecum would secure the attendance in Court of C bringing with him the document. C upon being called, can be asked without being sworn, if he produces the documents referred to in the subpoena duces tecum. He then hands in the sheet of paper bearing Arabic script upon it. At that stage that sheet of paper has not been proved to be a Contract between A and B or anything more than a sheet of paper with marks upon it, as to the meaning of which the Court is in complete ignorance. Some subsequent Witness would, however, testify that the document in question bore the signature in Arabic of A or B or both and as to its nature, but it is not until such subsequent testimony is given that the document becomes evidence. Clearly, therefore, the issue to be determined is whether or no the Defence was precluded from taking a first step which they desired to take and could lawfully take towards the proving of this document. The Court in determining whether someone should be allowed to produce a document pursuant to a subpoena duces tecum is, if satisfied that the object sought to be produced is, in fact, a document - a matter which has previously been considered - in our view in no way concerned with the question as to whether or no the person producing it is capable of proving its nature; or as to whether the party seeking its production is likely subsequently to be able to prove that nature by other evidence. Nor do we consider that the Court is entitled to dictate to parties the manner in which they should prove their case. In the course of argument Mr. Pritt suggested that if the Court permitted Mr. Reiss to produce these documents, but held, contrary to Mr. Pritt\'s submission, that it was necessary for them to be identified by sworn testimony, he would endeavour to tender such testimony and that that testimony might be given by recalling Kenyatta to give evidence that the sound which was produced when the sound track was played over was, in fact, what he had said at the Kiambu meeting. We do not think that that evidence would have established the identity of the sound track and the tape recording in as much as in our view, what was necessary was for the evidence to prove that the sound track and the recording produced were, in fact, the sound track and recording which were made at the Kiambu meeting, not merely that the words recorded on the sound track and the recording were the same as the words used at that meeting. To put it slightly differently: in our view, the only admissible evidence as to this sound track and recording would have been the evidence of someone who was in a position to say on Oath "I was present at the Kiambu meeting and it is within my personal knowledge that this particular sound track and this particular tape recording were made during the course of Kenyatta\'s speech and are respectively a sound recording and a tape recording of that speech." Unless Mr. Reiss was, in fact, concerned with the taking of these recordings at the meeting, a matter as to which we express no opinion because there is no material before us dealing with this question, he, like Kenyatta, would not be the proper person to prove the recording and the sound track, although by virtue of his official position he might be the only person or one of the persons entitled to produce those documents with a view to their being proved by someone who could give evidence of the nature already indicated. In his ruling, however, the magistrate appears to have considered that Mr. Reiss was a witness who could prove these documents and does not appear to have had regard to the fact that even if Mr. Reiss were able to prove them, the Defence was, under no obligation to prove them through Mr. Reiss\' evidence if they were in a position to prove them in the manner already suggested by some other Witness. We therefore, think that had the Magistrate been satisfied, as he was not, that these objects were documents, he would have been wrong in declining to permit Mr. Reiss to produce them unsworn; although, had Mr. Reiss so produced them, the magistrate would have been entitled or rather, would have been obliged subsequently, unless evidence establishing identity of the documents had been given, to refuse to admit them in evidence. We do not, however, think that refusal to permit Mr. Reiss to produce these documents unsworn is, in the circumstances of the present case, of any materiality. In fact, had they been produced and duly proved, they could at the most have provided verbatim confirmation of Kenyatta’s evidence as to what he said at the Kiambu meeting. The Magistrate\'s finding, in this respect was not that Kenyatta did not use the words which he alleged that he had used at that meeting, but that the terms in which Kenyatta denounced Mau Mau were not such as to constitute a genuine and sincere denunciation. That conclusion could in no way have been effected by the tendering of evidence which merely repeated in Kikuyu, what Kenyatta had himself said were the words used by him.

Considerable criticism was directed to the latitude allowed to the Prosecution in cross-examination, it being contended that the number of inadmissible questions asked was so great that their cumulative effect must inevitably have been to prejudice the mind of the magistrate, more especially as, according to the Defence, that mind was susceptible to be prejudiced. In this connection, Mr.

Pritt referred, inter alia, to an observation by the magistrate in the following terms "I did not know there was no difference between the latitude in cross-examination against a person - that is, I did not think there was any difference between Accused persons and any other," which was subsequently modified by the addition of the phrase "within of course, limits" and to certain observations made by the Magistrate during the course of the final address of the Deputy Public Prosecutor. The limitations upon cross-examination of Accused persons are clearly established and need not now be recapitulated and all that can be said as to the Magistrate\'s observation above quoted is, that it is only explicable upon the assumption that he had momentarily forgotten the provisions of Section 159 of the Criminal Procedure Code. We however, by virtue of the provisions of Section 167 of the Indian Evidence Act are not concerned with the abstract question as to whether or not the Magistrate\'s decision that certain questions might be asked in cross-examination was correct, but rather with the question whether or not the fact that those questions were permitted to be asked and were answered, resulted in prejudice to the Accused or any of them, and therefore, it is necessary to analyse in some detail the admissibility or otherwise of individual questions to which exception was taken.

The first question objected to was whether Kenyatta practiced polygamy. The Crown sought to support the question on the ground that Kenyatta had given Evidence in Chief that he was a Christian and the question was allowed. We do not consider that this question caused any embarrassment or prejudice to the Defence, nor do we consider that the fact as to whether or no Kenyatta practiced polygamy, had any bearing on the case at all, as it is a well known fact that many Africans who profess Christianity have more than one wife under native custom and this fact is not ordinarily regarded as constituting any reflection upon their character.

Objection was also taken to a series of questions as to whether he had at any time stirred up racial animosity and as to the accuracy or otherwise, of reference in newspaper reports of a speech which he made at Mombasa suggesting that the English were in the past responsible for slave trading from Mombasa under the cloak of Christianity and he was also cross examined as to his knowledge of the part played by the English in the abolition of the slave trade.

It was contended that these questions could only have been designed to prejudice the mind of the Court and were irrelevant to the charge upon which he was being tried, although they might have been relevant to other charges preferred against him then upon the Court file. In the course of his Examination in Chief, in answer to the question "Does the K.A.U believe in violence" Kenyatta said inter alia (vide pages 891 and 892 of the record) \'\'We feel that the racial barrier is one of the most diabolical things that we have in this Colony, because we see no reason why all races in this country cannot work harmoniously together, without any discontent’’ and subsequently, “We feel that we can live together in this country without anybody saying \'I do not like you because you belong to this colour or that colour because, in my mind, colour has, nothing to do with it.\'" By the avowal of sentiments of this nature, Kenyatta, in our view, clearly laid himself open to cross-examination directed to establishing that he did not in fact sincerely hold such views and we, therefore, think that the questions objected to in this connection were clearly admissible.

Objections were also taken to cross-examination directed to establish the truth of the Crown allegations in relation to the Rawson Macharia incident, and as to the nyimbos, the black book and certain entries in the black book, upon the ground that that incident and those documents were not admissible in evidence against him. As we have already held that evidence as to the Rawson Macharia incident and as to the black book was so admissible (although the latter was, in our view, as in that of the Magistrate, of little probative value), it follows that this branch of the cross-examination was also admissible. As however, in our view, the blue and grey nyimbos were not admissible against him, it follows that the cross-examination as to these nyimbos was strictly inadmissible. Here again, however, we are satisfied that no prejudice resulted to the Accused from this cross-examination, which, from the Judgment, does not appear to have had any influence at all upon the Magistrate.

Kenyatta was also cross-examined in considerable detail as to the absence from newspaper reports of meetings at which he claimed to have denounced Mau Mau, of any reference to such denouncement and it was in relation to this line of cross-examination Mr.Pritt contended that the interjections of the Magistrate during Mr. Somerhough’s final address, showed that the Magistrate was biased by these questions. Quite clearly, the contents of newspaper reports of his speeches, except in so far as they might have been adopted by Kenyatta in his evidence, were not evidence against him, but in our view, it is permissible to ask a Witness whether he has been reported as having said something on a particular occasion and we therefore, do not consider that these questions were inadmissible. Furthermore, it seems to us that even if they were inadmissible, they did not materially influence the decision of the Magistrate in as much as in his Judgment he expressly says that he is not regarding the contents of these newspapers as evidence, although he considered it remarkable that so many of the reports should be, according to Kenyatta, consistently incorrect.

In our opinion, in as much as the Mau Mau is a Society which above all else feeds and breeds on racial hatred and the Appellants were charged with membership and management of that Society, cross-examination directed to show that any of the Appellants incited racial hatred is relevant and admissible. If evidence is required of the fact that Mau Mau’s object is racial strife it is to be found in the evidence of the Oaths administered by Kenyatta in Rawson Macharia\'s evidence and in what Kenyatta told the Limuru

witnesses.

The objections to the cross-examination of Kubai fall to be considered under two heads. First, the cross-examination as to reports in the newspaper Sauti Mwafrica, of meetings addressed by Kenyatta and/or himself and as to the part which he had played in organising a transport strike. We do not consider it necessary to deal with the former category in any detail, in as much as our views in relation to this line of cross-examination have already been expressed in relation to the newspaper reports which were put to Kenyatta. Kubai in his Evidence in Chief maintained that the Union of which he was an Officer, was highly thought of by the Labour Department. The Prosecution contention would appear to be that evidence of this nature rendered him liable to cross-examination as to his part in organising a strike not, with a view to suggesting that in so doing he had acted in any way improperly, but simply and solely with the view to testing the truth of his answers as to the high repute with which he was regarded by the Labour Department. The fact that a Trade Union Official has at some time taken part in the organisation of a strike is, in itself, no reason why he ought not to be regarded amicably by the Labour Department, as one of the functions of Trade Union Officials is, in proper circumstances, to take part in the organisation of strikes and there does not appear to have been any suggestion that Kubai was responsible for any illegal action which may have been committed in the course of this strike. Here again, however, this line of cross-examination does not appear to us to have been regarded as of any importance by the Magistrate. In considering the sum total effect of so much of the cross-examination as was the subject of the complaint, it must be borne in mind that this trial was one before a retired Judge of many years\' experience, not before a Jury. There are many questions which, although strictly admissible, a Judge, when presiding over a trial before a Jury, will refuse to allow to be asked because the prejudice which may result to the case for the Defence is out of all proportion to the weight which ought properly to be attached to those questions. Where however, the trial is before a Judge alone, the danger of prejudice of this nature is greatly minimised and therefore, a greater latitude in so far as questions which are strictly admissible, might properly be admitted in cross-examination, even were it not for the provisions of Section 167 of the Indian Evidence Act.

We must now consider the total effect in relation to the charges of the evidence as against each of the Accused.

As far as Kenyatta is concerned, both the charges have, in our opinion, been clearly established against him. In 1949 he tried to get Gichungwa to join Mau Mau and referred to it as his Society.

In 1950 he administered unlawful Oaths to two people in the name of Mau Mau and was present at the initiations which were found, on Muthondu\'s evidence, to have taken place at his house. On the 26th June, 1952, at Ol Kalou he gave instructions that less force was to be used in the administration of the Oaths and in 1952, he tried to close down the Limuru Branch of the K.A.U. because it was anti-Mau Mau. At various meetings in 1952, when challenged to denounce Mau Mau and dissociate himself from the Leadership of it, he failed to do so in any convincing manner. His appeal fails.

Karumba, was proved by the evidence of Waweru and the Headquarters meeting, to be a member of Mau Mau and to have acted as a local Leader in his district. He may have in 1950, helped to convene anti-Mau Mau meetings; Waweru said he was a good man then, but the evidence as to his conduct in 1951 and 1952, shows him to have been then a member and to have acted as a local Manager. His Appeal fails.

Ngei admitted to Pedraza that he was Mau Mau. In evidence he claimed to be an African Leader. His letter from Prison suggests that he thought he was in a position to know what had been planned by Mau Mau. He was a member of the Executive Council K.A.U. and was present and took part in the discussions at the Headquarters meeting.

This brings us to the relationship between K. A. U. and Mau Mau. The Magistrate was fully entitled to come to the conclusion that Mau Mau for the furtherance of its policy, got control of the Executive Council of K.A.U. and then used K.A.U. as a cloak or cover for Mau Mau and operated and directed the policy of K.A.U. in the interests of Mau Mau. We do not think that the evidence necessarily shows that the Appellants formed the Executive Committee of Mau Mau, but it is not necessary for the Crown to prove as much as that in order to justify convictions for management of Mau Mau. In our opinion, members of Mau Mau who became members of the Executive Council of K.A.U. and used their position as such to further the interests of Mau Mau and to direct the policy of K.A.U. so as to enable it to act effectively as a cover for Mau Mau, are persons who assisted in the management of Mau Mau and helped to direct and control the Mau Mau policy in K.A.U. Ngei\'s Appeal therefore, fails.

Kaggia tried to induce Otto Mongoti to become a member of Mau Mau. He was actively engaged in the spread of Mau Mau propaganda. We think these facts show that he was a member. His membership of the Executive Council of K.A.U. and his attitude at the Headquarters meeting, place him in the same position as regards management as Ngei.

Kubai was present at Kenyatta’s house on the evening that a Mau Mau initiation took place, as was found on Muthondu\'s evidence. He was at the Kamirithu Meeting and told the Crown Witnesses that they should not oppose the Association of the Country, in other words Mau Mau. He understands Kikuyu and was present at the Ol Kalou incident. We have no doubt but that he was a member of Mau Mau and that he assisted in its management.

Achieng is a Jaluo, not a Kikuyu, but the case of Ngei, who is a Mkamba, shows that membership of Mau Mau was not confined to Wakikuyu, There is no direct evidence that Achieng understands Kikuyu but he was present at the incident at Ol Kalou and at the meeting at Nyeri which is in the heart of Kikuyuland. The main evidence against him is that of the Headquarters meeting when he took the same line as the other Appellants, namely that the Crown Witnesses should not object to Mau Mau as it was a religion and he also said that they were taking, up too much time. He put his character in issue by calling a Witness who deposed to his good character and according to a letter written by him in the Colonial Times he succeeded Otiende, the only member of the Executive Committee of K.A.U. who objected to the closing down of the Limuru Branch, as Secretary of the K.A.U.

The learned Magistrate in convicting Achieng did so largely because he considered that the Head-quarters meeting showed that the appellants were members of the Executive Committee of Mau Mau as well as of K.A.IJ. We think that that finding was not sufficiently supported by the evidence. We have grave doubts that the evidence establishes with sufficient certitude that Achieng was a member of Mau Mau, although we are satisfied, notwithstanding the letter in the Colonial Times, that he was sympathetic to Mau Mau.

In view of those doubts and the fact that we think the learned Magistrate went too far in holding that all the Apellants were proved to be not merely members and managers of Mau Mau, but the Executive Committee of Mau Mau, we think that Achieng should be acquitted and we allow his Appeal accordingly.

DATED, READ AND DELIVERED THIS 15TH DAY OF JANUARY 1954

RUDD J

JUDGE