DER - 4
Kenyatta et al.
Court of Appeal for Eastern Africa

c/o Barclays Bank
Queensway
Nairobi, Kenya
August 30, 1953

Mr. Walter S. Rogers
Institute of Current World Affairs
522 Fifth Avenue
New York 36, New York

Dear Mr. Rogers:

A large detachment of European and African policemen guarded the entrance to Nairobi's Law Courts Building the morning of Monday, August 17th. Africans entering the building were searched carefully for weapons. Several Europeans and Africans whom I recognized as policemen patrolled the corridors in plain clothes and mingled with the crowd waiting for the doors of Law Court No. 1 to open. The Crown's appeal in the case of Jomo Kenyatta et. al. was about to begin before the three judges of the Court of Appeal for Eastern Africa, British East Africa's highest court.

The doors were opened at last and press credentials were checked carefully by high-ranking policemen. In addition to reporters from the East African Standard, Nairobi's daily, there were reporters for London and Indian papers and a Reuter's correspondent. A few Africans, representing local African papers, attended irregularly throughout the trial.

The courtroom, panelled in dark wood, was about 40 feet square, with a high domed ceiling. The bench to be occupied by the judges rose about 10 feet from the floor. Directly in front of it and slightly lower, was a small bench to be occupied by the Court Registrar, a European, and his two Asian assistants. Two African messengers dressed in khaki shorts and short-sleeved shirts, had been posted on either side of the Registrar's bench, ready to carry law books and documents from counsel to judges.

The press section---two rows of high pews---was at the judges' right. Across from it were similar pews, rapidly filling with Asian, and a few European, spectators. Facing the judges was a long table for counsel, who now were arriving. They were Mr. John Whyatt, Q. C.*, Kenya's Attorney-General; Mr. E. N. Griffith-Jones, Solicitor-General, and Mr. A. G. Somerhough, Deputy Public Prosecutor. These three would represent the Crown. For the respondents there was Mr. D. N. Pritt, Q. C., who had flown out from England. Mr. A. R. Kapila, an Indian who is a lawyer in Nairobi, was to assist Mr. Pritt. Counsel all wore the traditional black robes and white wigs.

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* Queen's Counsellor

Directly behind counsel were two rows of pews occupied by spectators and some of the plain clothes policemen. Behind that was the dock, filled with spectators. Kenyatta and the others would not be in court as this was a Crown appeal.

There were two galleries, one filled chiefly with Asians, including a few bearded Sikhs wearing turbans, and the other almost entirely filled with Africans, all of them young men. Of the total of about 125 spectators, there were about 75 Asians, 25 Europeans and 25 Africans. Roughly that balance continued throughout the hearing. Askaris with rifles guarded the galleries.

The Registrar rapped for order, everyone rose and the three judges, Sir Barclay Nihill, president of the court, Sir Newnham Worley, vice-president, and Sir Enoch Jenkins, entered from a door behind the bench. The judges wore white wigs and gray and scarlet robes. They bowed. Counsel and some of the spectators returned the bow. The Registrar called out:

"In Her Majesty's Court of Appeal for Eastern Africa at Nairobi. Criminal Appeal No. 228 of 1953. Regina versus Jomo Kenyatta, Fred Kubai, Richard Achieng Oneko, Bildad M. Kaggia, Paul Ngei and Kungu Karumba."

The hearing began.

Mr. Whyatt rose to present his arguments. First he recounted the background of the case.

On November 17, 1952, the Governor, Sir Evelyn Baring, appointed Mr. Ransley Samuel Thacker, Q. C., "to execute the duties of the office of resident magistrate in and for the colony." The appointment was made under the provisions of Article XVII of the Letters Patent of the Colony of Kenya.

In the Gazette, where the government publishes official notices, the following appeared on November 19:

"Government Notice No. 1228
The Courts Ordinance
(Cap. 3)
Appointment

In exercise of the powers conferred by Section 7 of the Courts Ordinance, I, Evelyn Baring, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Royal Victorian Order, Governor and Commander-in-Chief of the Colony and Protectorate of Kenya, do hereby assign
Ransley Samuel Thacker, Esq., Q. C.
Acting Resident Magistrate
to the Northern Province to exercise jurisdiction in such Province.
Given under my hand at Nairobi this 17th day of November, 1952

E. Baring
Governor."

There were two other events on the 17th. Warrants were issued for the arrest of Jomo Kenyatta, president of the Kenya African Union, and five other officers of the KAU by Mr. F. Wilson, then District Commissioner of the remote West Suk District in the Rift Valley Province. The warrants were issued at Kapenguria, where Mr. Wilson had his headquarters. He was empowered to issue warrants as he had for the past year held a special appointment as a first class magistrate.

Later that day, three of the accused were brought to Kapenguria and placed under arrest and charged. The following day, the remaining three were brought to Kapenguria and arrested and charged. All had been in detention, under Emergency powers granted the Attorney-General, since the Emergency was declared the month previously.

The bearded Kenyatta, who is about 60 and was a student of B. Malinowski at the London School of Economics and who was awarded a doctorate of philosophy in anthropology, was charged with (1) managing an unlawful society from August 12, 1950 until October 21, 1952, when he was detained, and with (2) being a member of an unlawful society. The society in question was Mau Mau, which had been proscribed as dangerous to good government in Kenya by an Order of the Governor-in-Council on August 12, 1950. Mr. Kenyatta is a Kikuyu.

The other defendants were charged with (1) assisting in the management of an unlawful society and with (2) being members of an unlawful society.

Mr. Kubai, a Kikuyu, was chairman of the Nairobi branch and a member of the KAU executive committee. Mr. Oneko, a Luo aged 33, was general secretary of KAU. Mr. Kaggia, a Kikuyu aged 30, was secretary of the Nairobi branch and a member of the KAU executive committee. Mr. Ngei, an Mkamba aged 28,was assistant general secretary of KAU and an executive committee member. Mr. Karumba, a Kikuyu aged 50, was chairman of the Chura Divisional Branch.

All six were remanded in custody till November 24 and Mr. Wilson made the following order:

"Under the provisions of Section 79(A) Criminal Procedure Code I transfer this case to Mr. R. S. Thacker, Q. C., being a magistrate with jurisdiction.
F. Wilson
First Class Magistrate
18.11.52."

Mr. Thacker arrived at Kapenguria on the 24th and the six accused formally pleaded not guilty before him. The case was continued till Dec. 3. The defendants were lodged in jail. In signing the remand order, Mr. Thacker described himself as "Acting R. M. Northern Province."

On Nov. 28, Mr. Kapila filed a motion before the Supreme Court of Kenya in Nairobi, seeking a change of venue to Nairobi or "some other convenient place in the Central Province." He charged that Mr. Thacker was prejudiced against Mr. Kubai. The motion was refused.

Trial began at Kapenguria on Dec. 3 and continued for a total of 58 court days till March 24. (The Court of Appeal, in its judgment rendered several days later, recited the background of the case and said there were several delays during the trial. The Court added: "There was also a break for quite another reason, the nature of which, most happily, we need not examine." The trial had been interrupted while the Crown sought to have Mr. Pritt punished for contempt of court because of remarks made by him. The Crown was not successful.)

Judgment was delivered on April 8. Mr. Thacker found the defendants guilty as charged and sentenced each to seven years imprisonment at hard labor on each charge, the sentences to run concurrently.

Appeals were lodged with the Supreme Court of Kenya on April 21 and a hearing on the appeals was set for July 1. Sixty grounds for appeal were cited in Kenyatta's case. For all the defendants, the total was 183 grounds. The question of jurisdiction was not raised.

On June 23, six months after the start of the trial at Kapenguria, the following notice appeared in the Gazette:

"Government Notice No. 984
The Courts Ordinance
(Cap. 3)
In pursuance of the provisions of Section 7 of the Courts Ordinance, the assignment by me of Mr. R. S. Thacker, Q. C., acting resident magistrate, to the Rift Valley Province on and from his appointment to act as resident magistrate, is hereby notified.
Dated this 19th day of June, 1953.
E. Baring
Governor."

Mr. Whyatt told the Court of Appeal judges: "Three weeks before the July 1 trial date it came to the attention of the prosecution quite by accident that the West Suk District had been transferred to the Rift Valley Province." Mr. Thacker's assignment had been to the Northern Province. The transfer of West Suk had taken place on June 10, 1950.

Mr. Pritt s appeal before the Supreme Court was heard at Kitale. The defendants were in court. On the second day, Mr. Whyatt related, "My learned friend, when he was developing his argument, referred to Kapenguria as being in the Northern Province and Mr. Stevenson (the special prosecutor sent out from England for the case) corrected him. On the 9th, Mr. Pritt interrupted his argument to form this new ground of appeal."

Mr. Pritt attacked the validity of the trial and resulting convictions on grounds that Mr. Thacker, being assigned to the Northern Province, had no jurisdiction to try the case in the Rift Valley Province. It was agreed that consideration of the 183 other points would be put off and that the jurisdictional matter would be dealt with separately and at once.

Mr. Stevenson argued that the law provides that magistrates are appointed "in and for the colony."

Hence no specific assignment to the Rift Valley Province was necessary to confer jurisdiction on Mr. Thacker, Mr. Stevenson argued. He was legally able to try a case anywhere in the colony. Section 7* of the Courts Ordinance, which the Governor had invoked in the assignment of Mr. Thacker to the Northern Province, is merely an administrative device which does not affect the jurisdiction conferred by the appointment, Mr. Stevenson said.

The two judges---Mr. G. B. Rudd and Mr. Henry Mayers---refused to accept this argument. "In our view the appointment makes a magistrate eligible for assignment and it is by virtue of his assignment that his local jurisdiction arises," they said, agreeing with Mr. Pritt.

Mr. Stevenson contended secondly that Mr. Thacker had been appointed a special magistrate under a different provision of the Ordinance---Section 5. In this case, no assignment under Section 7 would be necessary.

To this the judges replied that the Governor s notification of appointment in the Gazette on November 19 did not mention Section 5. "Where an appointment made and the action taken pursuant to it are such as one would expect to find in what we may call an ordinary appointment under the Letters Patent, we do not consider that a special appointment under Section 5 should be presumed," the judges said.

Mr. Stevenson's third point was that the intention of the government had always been to assign Mr. Thacker to whatever province in which Kapenguria was situated and that the assignment to the Northern Province was merely an error of nomenclature.

The judges said: "In our view the instrument of assignment must be construed in the same way and in accordance with the principles of construction applicable to any other written instrument and therefore we must give effect to the expressed intention of the instrument without seeking to enquire into the motive which may have led to the execution of it."

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*Section 7: "The Governor may from time to time assign each or any Magistrate of a subordinate court of the first, second or third class respectively to such province or district as he shall think fit, and every magistrate shall forthwith exercise jurisdiction in such province or district as the case may be, without further appointment or notification, provided that the notification of such appointment shall subsequently be published in the Gazette."

There remained one point raised by Mr. Stevenson. He said the defect in jurisdiction could be "cured" by Section 379*of the Criminal Procedure Code.

The judges declared that Section 379 was not applicable in this case. Mr. Thacker had no authority to try the case at Kapenguria, because of his Northern Province assignment, and no authority to try it in the Northern Province, because the defendants had been arrested and charged in the Rift Valley Province and hence had to be tried there. "We accept Mr. Pritt's contention that this trial took place in the proper place, but before the wrong court and that therefore Section 379 of the Criminal Procedure Code cannot be applied to cure the defect," the judges said.

The judgment concluded:

"For all these reasons we are regretfully of opinion that the transfer to the learned Trial Magistrate of the trial and consequently the convictions and sentences are nullities and we quash them accordingly and order the retrial of all the appellants. We think it unfortunate that an appeal of this nature should have been decided upon an error of jurisdiction without a decision upon any question which goes to the merits whether of law or fact."

The decision, handed down July 15, hit white Kenya like a roundhouse right. Opinion was voiced in private that the Attorney-General, a Colonial Office appointee, should be replaced. The fact that the case was still pending stifled public criticism although veiled criticism of the Attorney-General was voiced in the Legislative Council by European elected members. While there was no prospect that Mr. Kenyatta and the others would be freed---they could always be held in Emergency detention---many Europeans felt that while they were trying to sandbag one part of the levee, someone had blasted a hole in it elsewhere. Europeans held various opinions---seemingly no two people agree on everything in individualistic Kenya---but some thought that the case against the defendants at Kapenguria was weak. Nevertheless all were convinced that Mr. Kenyatta was running Mau Mau and whether the case was weak or not, they were satisfied with the convictions.

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* Section 379: "No finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding, in the course of which it was arrived at or passed, took place in a wrong province, district or other local area, unless it appears that such error has in fact occasioned a failure of justice."

Asians and Africans I talked with were almost unanimously of the opinion that the government had no case at Kapenguria. They said if the convictions had not been set aside on grounds of jurisdiction, they should have been as a matter of justice. Asians generally were of the opinion that Mr. Kenyatta was guilty nevertheless. Some but not all Africans maintained he was innocent.

Europeans complained that the African fails to understand the legalisms of British justice and that the reversal would appear to Africans only a result of weakness and indecision in the European camp. The decision would undermine the position of the loyal Africans and embolden the Mau Mau terrorists, these Europeans said.

When the government's appeal opened on August 17 before the Court of Appeal for Eastern Africa, a cross appeal had been filed by Mr. Pritt. He asked that the retrial order be set aside. His clients then would be out from under any current legal action but the government could, if it saw fit, file new charges against them.

For the appeal, the government had rolled out its heavy artillery in the person of the Attorney-General himself. Mr. Somerhough, who handled the Kapenguria trial, was assisting. Mr. Stevenson was back in England.

Having concluded his recital of the background of the present hearing, Mr. Whyatt told the judges he would present three arguments, the second being an alternative of the first and the third an alternative of both. The arguments, it developed, were contradictory of each other, but they they were designed to be considered separately and without reference to each other. This led Sir Newnham to comment: "We are like the young lady being pursued by three beaus." Mr. Whyatt would win his appeal if the judges accepted any of the arguments.

The first argument was a reiteration of one of Mr. Stevenson's points.

"Mr. Thacker was appointed by an instrument under the Letters Patent as a resident magistrate for the whole of the colony of Kenya and consequently by virtue of the provisions of Section 3 * of the Courts Ordinance Mr. Thacker was entitled to assume the duty of trying any case within the competance of a first-class magistrate anywhere in the colony and no assignment was necessary to enable him to try this case at Kapenguria."

"Without any assignment whatsoever?" Sir Enoch Jenkins asked. "Yes, as a matter of strict law, my Lord," Mr. Whyatt replied.

Mr. Whyatt said he challenges "root and branch" the Supreme Court's declaration that "in our view the appointment makes a magistrate eligible for assignment and it is upon that assignment that his jurisdiction hinges." He cited as an analogy the case of a provincial commissioner appointed to a province--- he ex-officio becomes a first-class magistrate without assignment under Section 7. "Take the case of a man appointed as resident magistrate for the Coast Province---I'm keeping away from the muddled area---he is competent to hold his court in the Coast Province, the same as a provincial commissioner, without any assignment under Section 7," Mr. Whyatt said.

Section 3 contains no phrase "subject to the provisions of Section 7," Mr. Whyatt pointed out. "It is plain and straightforward." Neither did Section 3 say that a magistrate was powerless unless assignment under Section 7, Mr. Whyatt went on.

What is the purpose of Section 7, then? he asked. Answering, he said it is not "surplusage." It is designed to provide "the machinery for directing the changing of a magistrate between jurisdictions without fresh appointment." Mr. Whyatt continued: "Having been once so appointed, if it is required that he go to another jurisdiction, Section 7 is used. Section 7 does not apply to an initial appointment. Yet another reason Section 7 could not apply to an initial appointment is that it talks about 'without further appointment.'"

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* Section 3 (sub-section 2): "Every resident magistrate and administrative officer shall be deemed to have been duly appointed to hold within his province or district a subordinate court of the class corresponding to his appointment."

"When a resident magistrate is appointed 'in and for the colony,'" Mr. Whyatt said, "he is appointed to the Coast Province, the Central Province, the Southern Province and every other province. Every province is his province." He quoted legal authority that a person can hold two judicial offices. But it is still true, he said, to say that where a magistrate exercises jurisdiction, he is a magistrate of a court of that place. He can properly be called a magistrate of Nairobi, Kapenguria or any other place.

Why was Mr. Thacker assigned to the Northern Province? Mr. Whyatt asked. "There was no necessity in law, but sometimes it is advisable that some publicity be given to the division of judicial duties." It is an act of superogation. "It doesn't do any harm and it doesn't do any good," Mr. Whyatt said.

With that he concluded his first argument and a luncheon recess was declared. As in the United States, reporters departed, muttering about "legal nonsense." Unlike U. S. reporters, they all know shorthand and are able to get quotes that are at least a little more accurate. There was only one court stenographer---a girl employed in the Attorney-General's office---and she was not attempting a word by word transcript.

While waiting for the start of the afternoon session, I talked with W. W. W. Awori, an African member of the Legislative Council from North Nyanza and acting president of the Kenya African Union at the time of its proscription. He was attending the hearing in his capacity as editor of Habari Za Dunia, a Swahili language newspaper. I asked him if the Africans in the gallery understood the proceedings. He said only a few understood---the rest had come just to watch.

Mr. Whyatt began his submission on the second argument. "The propositions of Section 7," he said, "are directory and not imperative and consequently substantial compliance with the provisions of Section 7, as distinct from straight, absolute, literal compliance, is sufficient and it is substantial compliance to assign a magistrate to a province without specifying it by name."

Section 7, he said, is designed "to enable the Governor to direct magistrates to local areas where needed with a minimum of trouble and to enable local citizens to know where the head executive officer has assigned judges."

An appointment can be made to a town and not to a province, Mr. Whyatt said. Was Mr. Thacker assigned to a place, to wit: Kapenguria? Mr. Whyatt asked. "The fact that the learned magistrate signed his name with 'Acting Magistrate, Northern Province,' made no difference. That's not evidence that he wasn't sent to Kapenguria. It's evidence he thought he was in the Northern Province and he was not alone in the belief." The spectators chuckled.

Anyway, Mr. Whyatt went on, Mr. Pritt and Mr. Kapila had provided evidence that Mr. Thacker had in fact been sent to Kapenguria---they had demanded a change of venue from there. "In fact," said Mr. Whyatt, "if there is any doubt at all, the trial did not take place at Kapenguria." Mr. Pritt interrupted to say: "I must protest because if the Supreme Court judges are correct, it was not a trial at all." Laughter came from the spectators and judges.

Summarizing, Mr. Whyatt said: "Section 7 is directive. Substantial compliance with the provision requiring assignment to a province is enough and assignment to a place is a province is enough. Mr. Thacker was assigned to Kapenguria; ergo, he was assigned to the province in which it is situated; ergo he was assigned to the Rift Valley Province."

That concluded the first day's session. Money in the press box was riding on Mr. Pritt. Bar room experts opined that night that the Crown's case was doomed.

Mr. Whatt began his third argument when court convened Tuesday morning. Taking up another of the points raised by Mr. Stevenson before the Supreme Court, Mr. Whyatt said Section 379 overrides technical objections as to jurisdiction based on geographical errors if no failure of justice has occured as a result. Mr. Whyatt said he would agree in the argument that Mr. Thacker "was a magistrate of the Northern Province and of no other."

"We are concerned with a properly constituted Northern Province Court which inadvertently is sitting outside the territorial limits of its jurisdiction," Mr. Whyatt said. The Supreme Court of Kenya, he added, dealt with this point with "startling brrrevity." Mr. Whyatt rolled his "r" so much that their Lordships had to ask him to repeat the word.

"If ever a statutory provision proclaims its objective from the rooftops, this one does. Its aim is to prevent a frustration of administration of justice by technicalities of this kind," Mr. Whyatt said. Section 379 has eight "crucial and critical words"---"the trial took place in a wrong province."

Mr. Thacker "may have been offside but he was wearing the right jersey," Mr. Whyatt declared.

(The Supreme Court had held that Mr. Thacker was on the right field, but wearing the wrong jersey. The court said 379 did not apply because it was not a case of a court being in the wrong province, but of a court convening in the proper place, but presided over by the wrong judge. Section 379 would apply only if Mr. Thacker were competent to try the case in his own jurisdiction, but, because the accused had been arrested in the Rift Valley Province, they had to be tried there.)

Mr. Whyatt said there was no question but that Mr. Thacker, being a first-class magistrate, had competency to try the accused. He cited an Indian law case involving the Indian equivalent of Section 379. A magistrate who was competent to hear a case in his own district heard it in another. The defendant appealled after he was convicted, charging that the judge lacked jurisdiction and that the conviction was a nullity. The conviction was upheld, however, on grounds that the judge was "otherwise competent" to hear the case and that no failure of justice had been shown. Mr. Thacker, too, was otherwise competent, Mr. Whyatt said.

With that, Mr. Whyatt concluded his case. It had taken him six hours. A luncheon recess was declared.

Mr. Pritt opened up that afternoon. The spectators roused themselves out of a partial slumber. Mr. Pritt has a reputation for witty buffoonery and sarcasm. The spectators were not disappointed. He had the judges and the prosecutors laughing as well. Only once did Sir Barclay tell him to "get on with the case." Since his clients were respondents, Mr. Pritt was confined to answering the points raised by the Attorney-General.

"This was not a court at Kapenguria, but a Northern Province Court that lost its way," Mr. Pritt twitted the prosecutors in his opening statement. He hinted at "further proceedings to which this case may unhappily go."

Taking Mr. Whyatt's first point---that a magistrate's jurisdiction is colony-wide and that he legally needs no further assignment---Mr. Pritt said: "A magistrate has to get a prerogative appointment under the Letters Patent and then something has to be done to give him jurisdiction." That something, he said, is an assignment under Section 7. Mr. Whyatt's claim that a magistrate is magistrate of each and every province "is a strange way to deal with the phrase 'for his province,'" Mr. Pritt declared, referring to the phrase that occurs in Section 3.

Section 7 gives the government "positive power and it is to be assumed that it was done for a reason." Assigning Mr. Thacker to the Northern Province "implies he was not given jurisdiction in any other province," Mr. Pritt said. He added: "There is no justification for saying as my learned friend said that you can't use Section 7 for assigning a new magistrate to a province but that you can use it the second time around in transferring him."

Mr. Pritt recalled Mr. Whyatt's statement that Section 7 has a "publicity value." Mr. Pritt went on to say: "Side by side with saying that is one of the principal functions of Section 7, he urges a construction that destroys that value for the first appointment." Referring to Mr. Whyatt's assertion that a magistrate might be assigned to two provinces, Mr. Pritt said: "If you gave him the whole colony, that would be all right with my learned friend. It remains an abuse of the language to say if you appoint him for the colony, every province is his."

Touching on Mr. Whyatt's statement that Section 7 is an act of superogation, Mr. Pritt said: "My Lords, we all have our crosses to bear and we sympathize with those who have to put forth arguments as weak as that." Regarding the Governor's assignment of Mr. Thacker to the Northern Province: "My Lords, it was very definitely a decision that they were not sending him to the Rift Valley Province."

On Wednesday morning, after bows were exchanged, Mr. Pritt resumed. "The reason why they assigned Mr. Thacker to the Northern Province was that they wanted to hold the trial at Kapenguria and they thought it was in the Northern Province." Mr. Pritt asked the judges "to arrive at the conclusion that there is no ground for inferring and imagining that at the time when the Governor was making a formal, written assignment, that at the same time he was making an informal assignment that was not even oral---an assignment that if he had been asked about at the time he would have said wasn't so."

Turning to Mr. Whyatt's second argument, Mr. Pritt said: "If this case should go to the Privy Council, I wonder what they will try next. They tried the Northern Province and it didn't work, so they tried the Rift Valley Province and that didn't work, so now they're trying an assignment to Kapenguria."

Disagreeing with Mr. Whyatt's contention that Section 7 can be construed as directory, Mr. Pritt said since it confers jurisdiction, it must be strictly construed. In the case of an inferior court, jurisdiction cannot be presumed. It must be shown to exist. Accordingly, said Mr. Pritt, an assignment to a place in a province should not be presumed to be an assignment to that province or district.

"There's no evidence at all on who sent Mr. Thacker to Kapenguria," said Mr. Pritt. "We are presented with the guess that someone, unknown, somehow, unknown, somewhere, unknown and somewhen, unknown---but before December 3---decided that Mr. Thacker should sit in Kepenguria and sit in the schoolhouse." With mock outrage, Mr. Pritt objected to Mr. Whyatt's having "called Mr. Pritt and Mr. Kapila as witnesses." He referred to Mr. Whyatt's assertion that the fact that Mr. Thacker had been sent to Kapenguria was proved by the change of venue plea. "It isn't sufficient to prove that he was sent there; it has to be proved that he was sent there by His Excellency under Section 7," Mr. Pritt concluded.

Attacking Mr. Whyatt's third argument---that Section 379 cures the defect---Mr. Pritt said in the afternoon session, referring to Mr. Whyatt's reference to a court sitting "inadvertently" at Kapenguria, "Anything less inadvertent than the sitting of this court at Kapenguria cannot be imagined." He recalled the change of venue efforts and said, "And I covered 3,000 miles of abominable roads to and from Kapenguria."

"There is, my Lords, a confusion that exists in my learned friend's arguments---though not as prominent as other confusions---about the difference between a court and a judge," Mr. Pritt said.

"If the only thing wrong was that the trial took place in a wrong province, then the saving and curing clause works. If this was a Northern Province Court, then it could have been sitting wrongly."

But, said Mr. Pritt, if the prosecution says this took place in a wrong province, then they have to admit it was a Northern Province Court. But could it have been a Northern Province Court, Mr. Pritt asked, answering: "No, because the district commissioner, in taking cognizance of the case, established it as a Rift Valley Court."

"There was nothing wrong but that to this court there came a gentleman who was assigned to the Northern Province," Mr. Pritt said, evoking laughter. Did the fact that Mr. Thacker was a Northern Province magistrate make it a Northern Province Court? Mr. Pritt asked, and answered: "No more than your lordships sitting in a courtroom in London would constitute a Court of Appeal for Eastern Africa."

"The court in which Mr. Thacker sat and the court in which Mr. Wilson sat were the same court---a Rift Valley Court. The plain truth was that this was a Rift Valley Court and there was sitting in it a stranger!" Mr. Pritt declared, amid much laughter.

Referring to Mr. Whyatt's complaint that the Supreme Court judges dealt with Section 379 with "startling brrrevity," Mr. Pritt told a story of a man who purchased a dachshund and later complained to the seller that the dog's legs were too short. "My Lords," said Mr. Pritt, "the very pertinent answer was: 'They reach the ground.'"

The next day---Thursday---Mr. Whyatt polished up his arguments in reply to Mr. Pritt. That afternoon Mr. Pritt argued his appeal to have the retrial order canceled. He said since the Supreme Court made no order as to custody (the defendants having reverted to detention status), this amounted to a discharge from custody.

Where there has been a long trial which proved to be a nullity, it might be thought routine to order a new trial, he said. "I want to suggest that that is not the normal order, although I do not deny it is an order that can be made. In my submission the order which ought to be made here is, quite simply, one setting aside the finding and the sentence, discharging the accused and leaving the Crown to start another prosecution if it can do it and wants to do it." A new trial is not necessary or automatic and in his opinion the Supreme Court had no right to order one, he said. His clients have been subjected to great financial strain, he said.

Mr. Pritt asked alternatively that certain conditions be imposed by the Court of Appeal on any new trial. He asked that (a) a pre-trial hearing be held first to acquaint the defendants with the particular allegations, (b) that a more accessible place (Kapenguria was "hideously inaccessible") be designated for the trial and that (c) the Crown make a "substantial" payment to his client for money "lost." It seemed as if Mr. Pritt did not expect to have these conditions granted, but was bringing the matter up anyhow.

Mr. Griffith-Jones, the Solicitor-General, replied for the Crown that afternoon. He said when a trial is declared a nullity in England a retrial is ordered. It was apparent from the Supreme Court judgment that the defendants were not discharged, he said. "Nowhere has my learned friend quoted authority that a court can impose conditions." Attacking Mr. Pritt's proposed conditions he said (a) the Attorney-General decides whether preliminary inquiries should be held, (b) it is not for an appeal court to decide where a subordinate court should sit and that (c) "My Lords, no authority is quoted and I suggest before embarking on such a course that more authority than our learned friend be required."

In his reply, Mr. Pritt said it was not his duty to "go running around the country believing the Kenya government was so incredibly incompetent that it did not know where Kapenguria was."

The hearing was over. It was 5 p.m. Thursday and the judges said they would rule at 3 p.m. Saturday. The names of Mr. Kenyatta and the other defendants had been mentioned only four times---by the Registrar in calling the case each morning.

Mr. Pritt and Mr. Kapila flew to Lokitaung Prison Friday to see their clients. Lokitaung is in the vast desert of the Northern Province, only a few miles from the Sudanese border. Europeans in Nairobi glumly predicted that Mr. Pritt would win. Some said Mr. Kenyatta would face additional charges as a result of recent investigations if brought to trial again.

At 3 p.m. Saturday, I drove to the Law Courts Building to hear the reading of the judgment. About 500 Africans were gathered near the entrance. They were silent. An even heavier police guard had been posted in and around the building. A squad of askaris carrying rifles sat in a truck parked next to the entrance, ready to be speeded to a trouble spot.

Both the press box and the spectators' sections were filled. Some of the spectators had waited two hours. A European police officer I had met previously found room for me and a friend in the spectators' gallery. The spectators were silent, but there seemed to be a certain tenseness. Mr. Pritt and the young policeman assigned as his bodyguard arrived and joined Mr. Kapila. Mr. Whyatt, Mr. Somerhough and Mr. Griffith-Jones arrived. European policemen had taken up stations in the African gallery. Previously askaris had been on duty there. The Registrar rapped for order and the three judges entered and bowed. Counsel and some of the spectators returned the bow.

Sir Barlcay adjusted his horn-rimmed spectacles and began reading the 28-page judgment in Criminal Appeal No. 228 of 1953.

He first took up Point One of Mr. Whyatt's argument.. He recalled that Mr. Pritt and the Supreme Court had said that appointment makes a magistrate eligible for assignment and that it is by virtue of the assignment that his local jurisdiction becomes effective.

The appeal court finds Mr. Pritt's distinction "fallacious," Sir Barclay read. "We think that when an administrative officer is appointed to a province or a district as the case may be, or when a resident magistrate is appointed to a named province, that is all the statute requires and no further action is needed to clothe him with full jurisdiction to hold his court and to hear and determine causes within the local limits of his court."

"But," Sir Barclay continued, "we find it difficult...to go the whole way with the Attorney-General on this first head of his argument." The court agrees that "it is not essential in every case to use Section 7 on initial appointment." But since Mr. Thacker was appointed "in and for the colony," and not for a particular province, Section 7 is needed to give him jurisdiction. If he had been appointed to the Rift Valley Province, Section 7 would not have to have been used.

"On the first head, therefore, our conclusion is that in the particular case which we are considering, it was necessary for the governor to make an assignment under Section 7."

Mr. Whyatt had failed to clear the first hurdle.

Sir Barclay turned to the second point---that Section 7 is directory, not obligatory, that substantial compliance was enough and that it was substantial compliance to send Mr. Thacker to a particular place.

Examining Section 7, the appeal court found that the Governor may make an assignment in any way he chooses---orally, in an informal note or in a formal instrument. "But however it is done, the signification of the Governor's command immediately and effectively vests the magistrate with full authority to exercise jurisdiction and hold his court in the province or district to which he has been assigned. It is true that Section 7 demands that the assignment shall subsequently be published in the Gazette, but the word 'subsequently' is so imprecise that no legal meaning can be attached to it... We have no doubt that where the legislation imposes no time limit for the action which is to be done, the command must be regarded as merely directory and, consequently, that failure to publish the notification will not invalidate the act of assignment or nullify the actions of the person assigned."

The appeal court's judgment went on to say that the judges of the Supreme Court "have given too much weight to the terms of the notification and too little weight to the facts which, in our view, shew the actual assignment made by the Governor." The facts are, the appeal judges continued "(1) the transfer of the case from Mr. Wilson to Mr. Thacker 'a magistrate with jurisdiction,' (2) the holding of a Court by Mr. Thacker at Kapenguria, (3) the application for a change of venue from Kapenguria and (4) the undoubted fact that the trial took place at Kapenguria."

"From these facts we think the only reasonable inference is that the Governor, or perhaps someone duly authorized by him, directed Mr. Thacker to proceed to Kapenguria to try the respondents. We understand Mr. Pritt to say that this was not an impossible view of the facts but that it would be a strong thing for this Court so to find at this stage. We think, however, that it is the only reasonable interpretation of the facts and that the designation of the Northern Province in Notification No. 1228 was <u>per incuriam</u> and attributable entirely to the mistaken opinion that the West Suk District still formed a part of that province.

"That being so, the only remaining question on this head of the argument is whether that was a sufficient compliance with Section 7. We think it was."

The judges then cited authority to the effect that in deciding whether a statute is imperative or directory, "the question is in the main governed by considerations of convenience and justice."

"Applying these tests to Section 7," the judges said, "we are of opinion that it may properly be regarded as directory only, and that a substantial compliance with its provisions is sufficient. The language used permits an assignment to be made without any formality: is it then to be construed as meaning that if, in an emergency, a magistrate is required urgently to go to another District or Province and he is told orally, or over the telephone, to go at once to Mombasa to take over the Court there, that this is not a sufficient assignment to the Coast Province in which Mombasa is situated? It would be absurd to suppose that the Legislature expected or demanded in such a case a formal compliance with the words of the section."

The object of the act is "to provide for the distribution or posting of magistrates to the provinces and districts of the Colony, and this is more effectively done in practice by directing them to go to the places where Courts are established than by merely telling them to go to a particular province or district."

The June notice in the Gazette which said that Mr. Thacker had been assigned to the Rift Valley Province from the time of his appointment "correctly expresses the true intention of the Governor, which was to assign Mr. Thacker to whatever was the province in which Kapenguria was situated."

The judgment concluded with: "On this second head of the argument, therefore, the appeal of the Crown succeeds."

Mr. Whyatt had won his case.

Sir Barclay then went on to read that even though the third point of Mr. Whyatt's argument did not have to be considered now, the judges did so because of the possibility of further appeal. They agreed with Mr. Pritt that the trial took place in the proper province but before the wrong judge. If the Crown's appeal had rested on this point alone, it would have failed. Mr. Whyatt's citation of the Indian case as applicable in this case was not correct. That judge could have tried the case in his own district while Mr. Thacker could not have.

The decision on Mr. Pritt's cross appeal to set aside the retrial order was an even more hollow victory for him.

The judges said even though the outcome has "now no relevance" because Mr. Whyatt had won his case, "mindful of the fact that this conclusion may be found to be erroneous by a higher court we think it appropriate that we should indicate our view on them."

Instead of ordering a retrial, the Supreme Court should have ordered the defendants "tried by a court of competent jurisdiction." It is "illogical to order a retrial of persons who have never been lawfully tried."

"In the result therefore this appeal is allowed. The order of the Supreme Court directing a retrial is set aside and the convictions entered against and the sentences imposed upon the six respondents by the Resident Magistrate are restored."

Sir Barclay had finished. There was not even a stir in the courtroom. Tradition and rigid rules forbid anything but strict silence. Perhaps also many of the spectators had not yet waded through the legal language.

Mr. Pritt arose and notified the judges that he would appeal to the Privy Council in England. He said his petition for leave to appeal would be filed early in October. It was agreed between Mr. Pritt and Mr. Whyatt that the hearing before the Supreme Court of Kenya on the 183 other points raised by Mr. Pritt would be postponed till after the Privy Council had ruled in the jurisdictional matter.

With that, their Lordships bowed. Counsel and some of the spectators returned the bow and the judges left the court. An elderly woman said to Mr. Whyatt, "Congratulations, John." Reporters crowded around the Registrar for copies of the judgment. The spectators left the galleries in silence. Mr. Pritt rode away from the Law Courts Building in Mr. Kapila's car. The 500 Africans were still standing in front of the building. They applauded Honorary Chief Pritt, then quickly dispersed when his car was out of sight. The police relaxed.

I had tea with Mr. Pritt and his bodyguard at his hotel later in the afternoon. He lived up to his reputation for charm and wit. (His bodyguard had told me previously, "I can't agree with anything the bloke says, but he certainly is pleasant." Mr. Pritt said, "I can't discuss the case because it's still pending and I can't talk about the situation in Kenya because the Kenya government won't let me open my mouth." He said Mr. Kapila would probably go to England for the Privy Council appeal. If leave to file is granted, the case would be heard in March, Mr. Pritt said. Kenyatta and the others were in "good health and good spirits" at Lokitaung, he said.

I drove to the airport to see what sort of a sendoff Mr. Pritt might get there. There would be no Africans there, of course, because of the 7 p.m. curfew for all but those Africans who have evening employment.

En route, I was stopped at Duke Street by a crown of Asians and Africans in the street watching a fight going on between two Sikhs and an African. The African's shirt had been torn off and one of the Sikhs was waving a club at him. The African started to pick up a rock but another African pulled him away. Amid what sounded like curses, uttered in many languages by many individuals, the Africans withdrew.

Mr. Pritt's farewell party at the airport bar was attended by a half a dozen well-dressed young Asians and their sari-clad women. The bodyguard said to me, "I'm glad that's over. I havn't had a good night's sleep in weeks. Every time I heard a noise, I was out of bed in a second, listening at his door."

A few minutes later and Mr. Pritt's plane was disappearing into the twilight, bound for Khartoum. A few days later and the attentions of Nairobi's citizens had turned to new matters.

Cordially,

David E Reed

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