JUDICIAL CHOICE DURING THE MAU MAU REBELLION IN KENYA 1952-1960

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1 Introduction

This article explores the concept of judicial choice through an analysis of reported judgments handed down by colonial judges during the Mau Mau rebellion in Kenya, which lasted from 1952 to 1960. In response to a series of uprisings in Kenya following the end of the Second World War, the governor, Sir Evelyn Baring, promulgated a series of emergency regulations; one of these, which principally governed the possession of arms and ammunition, is the focal point of this article. In this analysis, which exposes differences of opinion between judges in the Supreme Court of Kenya and those in the Court of Appeal for Eastern Africa it will be seen that some lower-tier judges in certain instances failed to display the same integrity and competence as their colleagues in the Court of Appeal. Consequently, the article explores the emergence of new kinds of layered judicial identities within the colonial state.

Following the end of the Second World War, Kenyan society entered a period of political crisis, which was fuelled by a series of uprisings. The first issue was that although there were approximately five million Africans in the territory they were virtually unrepresented either in government or the legislative council.  

The second issue was land. The large-scale appropriation of land by settlers was deeply resented from the start of colonial rule and disputes arising from this became a major political issue for the colonial government from the 1930s onwards, mainly because of significant increases in the African population and the strengthening of boundaries between white farms and African reserves. From the early 1940s the cost of living began to outpace wage rises for the first time, and the hardest hit were those in low wage occupations who had lost access to land at a time of agricultural boom. 

2 Idem at 10.
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The struggle of Kikuyu squatters to assert and protect their rights went through a number of phases. The first sign of resistance came in 1929 and this was followed by localised actions in the 1930s. In the early 1940s a more widespread and organised movement took shape.\footnote{Idem at 40.} By 1948 the squatter movement had become an essential part of Kenyan nationalism. The squatters comprised many different ethnic groups but were dominated by the Kikuyu.\footnote{Idem at 41.} The Mau Mau movement as a whole was influenced rather than controlled by nationalist leaders and may be described as an \textit{ad hoc} response to the prevailing conditions in colonial Kenya.\footnote{F Cooper \textit{Africa since 1940: The Past of the Present} (Cambridge, 2002) at 73.} Furthermore, the Depression of the 1930s created a fiscal crisis that forced the government to encourage peasant production. This policy continued until 1944, when settlers and the government decided to scale back peasant production in favour of large-scale state projects, such as communal terracing and grass-planting campaigns. This was part of a general movement against emerging African capitalists and their representatives in the Kenya African Union and the banned Kikuyu Central Association; John Lonsdale and DA Low have termed this “the second colonial occupation”.\footnote{DW Throup \textit{Economic and Social Origins of Mau Mau} (London, 1987) at 4; J Lonsdale & DA Low “Introduction” in DA Low & A Smith (eds) \textit{History of East Africa} vol 3 (Oxford,1976) 1-63 at 12.} Government-appointed chiefs replaced their traditional counterparts and played a major role in implementing government policy as teachers, agricultural instructors, and clerks.\footnote{Throup (n 7) at 5.}

The colonial government first became aware of Mau Mau in 1948 as a result of the renewal of unrest among Kikuyu squatters on white settler farms.\footnote{Throup (n 7) at 2, 3.} Sir Phillip Mitchell, Kenya’s governor between 1944 and 1952, had a reputation as a pro-African administrator in Tanganyika and Uganda. His governorship was a failure, however, because he was anxious to placate the settlers so that his development plans would not be derailed. At the same time, he continued to promote indirect rule and allied himself with British-appointed chiefs, who became increasingly dictatorial, and he failed to accommodate African politicians.\footnote{The White Highlands in Central Kenya where European farmers settled in relatively large numbers were characterised by a cool climate and fertile soils.} A quarter of a million Africans lived on farms in the White Highlands, and constituted approximately a quarter of the total Kikuyu population and half the farm labour force.\footnote{Also termed “labour tenants”: J Lonsdale “Mau Maus of the mind” (1990) 31 \textit{J of African History} 393 at 394.} In 1950 Mau Mau was banned and two years later violence erupted on the farms, in the Kikuyu reserves as well as in the slums of Nairobi. The squatters’ position was threatened with the introduction of increased restraints on cultivation and grazing rights. Following the assassination of Waruhiu wa Kungu, a prominent chief who was loyal to the British, Governor Baring declared a state of emergency; Jomo Kenyatta was
soon arrested along with 180 others. By 1954, the number of police had tripled and the Kikuyu Guard numbered over 20,000.12

Mau Mau was overwhelmingly a Kikuyu movement. Most whites knew little of Kikuyu society and few spoke the Kikuyu language, and consequently they accepted the widely held stereotypes, circulating at the time, of Mau Mau fighters as bestial murderers. The Kikuyu were uncertain how to maintain social order, and became an increasingly divided people riven by mutual hostility.13 The government armed chiefs and tribal policemen in order to encourage so-called “loyalists” to resist Mau Mau; the latter suffered huge losses during the first year of the war, with a death rate of approximately 10 per cent. One reason for this relatively high rate of attrition was that tribal police possessed arms, which Mau Mau fighters needed most and were willing to risk their lives to obtain.14 Loyalist Kikuyu chiefs played a crucial role in defending the interests of the colonial government; they saw the violence of the 1950s as the result of a long process of “shuffling through the successive African leadership groups who hoped that economic, social and political progress would come through co-operation with the government”.15 African leaders failed to achieve this, however, which resulted in deep divisions within African society. Examples of this were the urban-rural dichotomy and the fact that the rebellion came close to civil war among the Kikuyu in a number of areas. Despite these multiple disunities Mau Mau has been described by Carl Rosberg and John Nottingham as the “expression of a frustrated modern nationalism” rather than a narrow and isolated cult.16

2 The Colonial Legal Service

The judges who served in Kenya in the 1950s were part of the Empire-wide Colonial Legal Service. The historiography of the colonial judiciary has tended to portray judges as a monolithic group of “trained lawyers who were part of an Imperial legal mandarinate and took an appropriately lofty view of the law”.17 In reality, the Colonial Legal Service was a complex hierarchical structure within which judges of widely differing skill and experience served. Like other successful members of the Colonial Administrative Service, many judges had attended public schools as well as the universities of Oxford or Cambridge, and there was a clear link between attendance at these institutions and promotion to the higher ranks of the judiciary. Nine out of eleven judges in the Court of Appeal for Eastern Africa and eight out of eleven of Kenya and Tanganyika’s chief justices had attended either Oxford or Cambridge. The figure for High Court judges in

12 Lonsdale (n 9) at 394.
13 Idem at 396.
14 Idem at 397.
16 C Rosberg & J Nottingham cited in Lonsdale (n 15) at 350.
Tanganyika was 72 per cent, while only 56 per cent of Kenya’s Supreme Court judges had
gone to Oxbridge.\textsuperscript{18} Although virtually all colonial judges were called to the Bar before
leaving for the colonies, many did not serve a period of pupillage; this hampered their
chances of success, since the chief criterion for colonial period of appointments and future
promotions in the Colonial Legal Service was professional experience at the English Bar
and the number of territories within which individual judges had served.\textsuperscript{19}

Once officers joined the Legal Service, transfers and promotions were closely
connected. This is demonstrated by the fact that the highest-ranking judges in Kenya
had served in the largest number of territories prior to their appointment in East Africa.
Despite the presence of French, Roman-Dutch, Muslim and customary law in different
parts of the Empire, the general principles of English law were applied throughout, and
the official policy of the Colonial Office was that a practical knowledge of English law
was of far greater importance than a knowledge of local conditions. This was one of the
reasons why members of the Colonial Legal Service were subject to more transfers than
officers of other branches of the Colonial Service.\textsuperscript{20} During the state of emergency a large
number of magistrates were temporarily elevated, at the discretion of the governor, to
the Supreme Court Bench, which increased the disparity between the qualifications and
experience of judges in the Supreme Court and those in the Court of Appeal for Eastern
Africa.\textsuperscript{21}

3 Judicial choice

The principal aim of this article is to assess the judiciary’s interpretation of regulation 8 of
the Emergency Regulations, 1952, passed under the Emergency Powers Order-in-Council,
1939, which was principally concerned with the possession of arms and ammunition. It
draws on legal theory developed in South Africa, especially that relating to judicial choice
during the apartheid era. In separate studies, two South African legal historians, Hugh
Corder and Christopher Forsyth, have analysed the decisions of the Appellate Division of
the Supreme Court of South Africa. The first covered the period between 1910 and 1950,
and the second focused on the period between 1950 and the early 1980s.\textsuperscript{22} Both authors
attempted to prove how and why the judges exercised judicial choice. They began by
looking at judges’ backgrounds such as their social origins, qualifications and professional
experience before considering selected themes relevant to apartheid South Africa such as
race relations, land issues and the treatment of detainees covered in judgment by these

\textsuperscript{18} Judicial Department Staff Lists Kenya Government Printer (1950-1959); “Who was Who” available at
\textsuperscript{19} C Jeffries Partners for Progress (London, 1949) at 141-142; GG Alexander Tanganyika Memories: A
\textsuperscript{20} C Jeffries The Colonial Empire and Its Civil Service (Cambridge, 1938) at 143.
\textsuperscript{21} National Archives Kew: Public Records Office, Colonial Office Series: Internal Correspondence, East
Africa Dept, 12 Apr 1943.
\textsuperscript{22} H Corder Judges at Work: The Role and Attitudes of the South African Judiciary (Cape Town, 1984);
CF Forsyth In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South
Africa (Cape Town, 1985).
justices. As there is a vast body of Appellate Division case law on these subjects, they were able to analyse how individual judges tended to make decisions. Forsyth rejected those jurisprudential theories that deny the reality or importance of the judges’ role. In particular, he focused on the variant of Austinianism that characterised the apartheid South African judiciary. Austinianism viewed the interpretation of statutes as little more than a judge’s search for the legislature’s intention, so that the legislature bore the criticism directed at repressive laws. Rather than adopting this jurisprudential approach, he chose to analyse a select group of cases in order to reveal how and why judges chose to deliver their judgments.\textsuperscript{23}

A study of judicial choice in colonial Kenya is important for two reasons. First, its analysis allows the researcher to chart changes in judicial attitudes over time. Secondly, it allows the researcher to “identify those areas of law in which the judges rather than the legislature must bear part of the responsibility for baleful developments in the law”.\textsuperscript{24} John Dugard has held that the South African judiciary adopted a narrow approach to its interpretative function and that it took the view that its task was merely to discover the intention of the legislature.\textsuperscript{25} Corder and Forsyth, however, were able to identify cases in which judges were able to exercise judicial choice, thus sometimes giving judgments that did not favour the apartheid regime. In addition to Corder and Forsyth’s work, a number of studies have used reported cases as a principal research method. Examples include \textit{The Politics of the Judiciary} by John Griffiths and \textit{The Law Lords} by Alan Paterson, which begin with chapters on the social and professional backgrounds of judges and how they were appointed.\textsuperscript{26} Griffiths went on to examine cases relating to personal rights, industrial relations rights and property rights. By examining these cases he was able to identify examples of judicial creativity, judicial policy and the political role of the judiciary.

\textit{Nyali Ltd v Attorney General}\textsuperscript{27} is arguably the most important constitutional case from the colonial period in East Africa. The following passage from Lord Denning’s judgment is widely regarded as “the clearest statement of the judicial view that justified the exercise of the widest jurisdiction by the Crown in a protectorate”.\textsuperscript{28} In particular, it expresses the “[colonial] courts’ unwillingness to allow challenges to the legal bases of colonialism”\textsuperscript{29}.

\textsuperscript{24} Forsyth (n 23) at 102.
\textsuperscript{25} J Dugard “The judicial process, positivism and civil liberty” (1971) 88 \textit{SALJ} 181 at 182.
\textsuperscript{26} GG Griffiths \textit{The Politics of the Judiciary} (London, 1991); A Paterson \textit{The Law Lords} (London, 1982).
\textsuperscript{27} (1956) 1 QB 1 (CA).
\textsuperscript{28} HF Morris & JS Read \textit{Indirect Rule and the Search for Justice: Essays in East African Legal History} (Oxford, 1972) at 49.
Although jurisdiction of the Crown in the protectorate is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area ... The Courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The Courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown, the Courts will not permit it to be challenged.30

This greatly circumscribed judges’ powers as they were unable to inquire into the legality of legislation, including regulations proclaimed by the governor during the Mau Mau period that had not been passed by the legislative council. They were, however, able and, in many cases, willing to interpret legislation in ways that ran contrary to the prevailing government policies. Importantly, Lord Denning reminded the Kenyan judiciary that English common law embodied many principles that could be applied to all races throughout the Empire. He added, however, that its many refinements were not always applicable in the colonies and that the common law should be revised. In order for common law and customary law to co-exist, the common law needed to be applied with major qualifications.31 Lord Parker, one of the three judges who heard the Nyali-case expressed the narrow scope of the colonial judiciary’s interpretative powers in the following terms: “All that [colonial judges] can do is to look at the instrument manifesting the exercising of the jurisdiction to see whether it has been lawfully exercised, according to the law in force”.32 Clearly, colonial courts exercised extremely limited powers because they did not challenge the legality of legislation. Despite this, individual judges could and did exercise judicial choice by deciding whether or not the implementation of legislation was lawful. In East Africa, their position was reinforced by the fact that an entirely separate court of appeal was created in 1950.

4 Emergency regulations

The first category of emergency regulations extended the public-order and disciplinary powers of the administration, matters that would ordinarily have come before the courts. These were intended to secure public safety, defend the territory of Kenya, maintain public order and suppress mutiny, rebellion and riots. The powers established by the regulations provided for the detention, deportation and exclusion of persons from Kenya, the requisitioning of property, and the entering and searching of any premises. The effect of this repressive legislation was to place the person and property of Kenyans at the mercy

30 (n 27) at 15.
32 (n 27) at 15.
of the administration. Through these regulations a distinct system of administration, both powerful and centralised, was firmly established in Kenya.\textsuperscript{33}

The second set of regulations reduced procedural and other safeguards relating to serious criminal offences, and curtailed judicial discretion regarding sentencing. The general effect of regulations that fell within the second category was to decrease the safeguards of criminal hearings in order to speed up trials and increase the rate of convictions.\textsuperscript{34} The new procedures allowed trials to take place without preliminary inquiries, and judges were required only to keep shortened and simplified records of court proceedings.\textsuperscript{35} The rules of evidence relating to confessions before police officers were also relaxed. In appeals from magistrates' courts, only a single supreme court judge was now required. These changes, which strengthened the powers of the prosecution, threatened the fundamental safeguards of the criminal trial.\textsuperscript{36}

Fifty reported cases relating to the state of emergency are contained in the Kenya Law Reports (KLR) and East Africa Court of Appeal Law Reports (EACA) series.\textsuperscript{37} Thirty-four cases were brought under regulation 8 of the Emergency Regulations, 1952; two were brought under the Kenya Criminal Procedure Code, 1930;\textsuperscript{38} nine were murder cases, and five were concerned with miscellaneous offences. Only one Privy Council case was reported, namely an appeal against a conviction for the unlawful possession of ammunition.\textsuperscript{39} The thirty-four reported cases brought under regulation 8 of the Emergency Regulations fall into eight categories: definition of component parts of firearms; unlawful possession of ammunition; unlawful possession of firearms; consorting; joint possession of firearms and ammunition; judicial notice of armed conflict and gangs; lawful authority and lawful excuse; and withholding information. In order to illustrate aspects of judicial interpretation during this period, some cases falling into these categories will now be analysed.

\section{Firearms and ammunition}

There were large-scale firearm thefts between the start of the state of emergency in October 1952 and the end of 1953, the period when the Mau Mau movement was at its strongest. During that period, the military lost thirty-one weapons and recovered five, the police lost 101 and recovered thirty, and the tribal police lost 121 and recovered fifteen.

\begin{itemize}
  \item Ghai & McAuslan (n 29) at 411.
  \item The most important of these were the Emergency Regulations, 1952 and the Emergency (Emergency Assizes) Regulations, 1953. Emergency Regulations were passed under the Emergency Powers Order-in-Council, 1939.
  \item During preliminary inquiries, the decision on whether or not the trial should go ahead was based on evidence provided by witnesses for the prosecution.
  \item Ghai & McAuslan (n 29) at 159-160.
  \item A separate catalogue exists in the Kenya National Archives for the hundreds of unreported cases relating to the Mau Mau rebellion.
  \item Regulations were promulgated under this code outlawing the practice of administering oaths, which were an integral part of the recruitment process for Mau Mau fighters.
  \item Kuruma s/o Kaniu v Regina (1954) 21 EACA 242. Privy Council Appeal 35/1954 was reported in (1954) 21 EACA 364.
\end{itemize}
The most serious theft of firearms occurred during a raid on the Naivasha Police Station on 26 March 1953. A Mau Mau gang under the command of “General” Dedan Kimathi stole forty-seven weapons, including eighteen automatic rifles and 3,780 rounds of ammunition. The tribal police and Kikuyu guards often had little support from the army or police, which partly explains why a large number of firearms were not recovered. By the end of 1954, the arms position was reaching a state of equilibrium. During the first twenty months of the state of emergency, the Criminal Investigation Department kept an accurate record by calibre of all ammunition stolen and recovered. By the end of 1953, 159,300 rounds had been reported lost and 8,600 recovered. An analysis of a sample of 880 spent .303 cases revealed that 70 per cent were made between 1942 and 1948. Based on these figures, FD Corfield has argued that most of the ammunition was in the hands of Mau Mau fighters and amounted to approximately 150,000 rounds.

4.2 Home-made guns

Numerous cases came before the Court of Appeal on the point of law whether home-made guns fell within the meaning of the definition of a firearm set out in the Regulations as “a lethal barreled weapon of any description from which any shot, bullet or any other missile can be discharged, or which can be adapted for the discharge of such shot, bullet or other missile.” In Kamau s/o Njeroge and another v Regina, the appellants were found in possession of two lengths of piping designed as gun barrels, seven bolts adapted as gun bolts and a metal clamp designed as a gun breach. The trial judge sitting in the emergency assize court was Goudie Ag J. He was unable to conclude whether or not the appellants were aware of the presence of the bolts, which were found inside a stove, or of the clamp. Nevertheless, he ruled that the pipes were component parts of a firearm and the appellants were sentenced to death. On appeal, Nihill P concluded that all the prosecution had been able to prove was that the piping was suitable raw material from which barrels of home-made guns could be made. In this case, the bore of the piping could not have taken any type of shot then available in Kenya. He ruled it would be stretching the definition of a firearm too far to hold that a piece of material which, if fashioned in a particular way, was a component of a gun. In other words, the two lengths of piping could be called component parts of a gun only if they could be assembled with other parts, without any intervening process, into a weapon. He was unable to conclude that the metal pipes formed part of a weapon and the appeal was allowed.

41 Regulation 8A of the Emergency Regulations.
42 (1954) 21 EACA 257. In case titles, s/o denotes “son of”, w/o denotes “wife of”, and d/o denotes “daughter of”.
43 The law reports provided for the following post-nominal letters to be used after the surnames of judges: in the Supreme Court of Kenya, puisne judges and chief justices used the post-nominal letters “J” and “CJ” respectively. In the Court of Appeal for Eastern Africa judges of appeal, vice-presidents and presidents used “JA”, “V-P” and “P” respectively. The letters “Ag” denoted acting appointments. When puisne judges heard cases in the Court of Appeal, the territory in which they served was placed in brackets after their post-nominal letters.
44 With the concurrence of Jenkins JA and Bourke J (Kenya).
Certain interpretations of regulation 8 led, however, to bizarre judgments. One example is the judgment of Sherrin Ag J in KINGORE S/O WANGOMBE V REGINA.45 The appellant had been convicted of being in unlawful possession of a Very pistol (flare gun). The definition of a firearm, as set out in the Emergency Regulations, included any weapon adapted or designed for the discharge of a “noxious liquid” or gas. After hearing the facts, Sherrin had reached a number of conclusions: Very pistols were not designed as weapons but rather as signalling instruments; the flare gun had a barrel from which a missile or noxious liquid could be discharged; and the gun was potentially lethal. The appellate judges disagreed with his view that the pistol was inherently lethal and that a missile could be discharged from it. They agreed, however, that “there was just enough in the rather scanty evidence given by the so-called expert from which the judge could infer that an illuminant squib or rocket fired from a Very pistol when used as a weapon could be noxious”.46 Even though it was clear that no noxious liquid was contained in the gun in question, the appeal was dismissed.

Cases involving the possession of home-made guns came before the courts in increasing numbers, and there are numerous judgments which examine the issue of evidence given by expert witnesses. One such case was GITHENJI S/O KABIRO AND ANOTHER V REGINA.47 In convicting the two appellants of possession of firearms, Law Ag J simply held that “the two firearms are lethal weapons capable of discharging bullets”.48 The Court of Appeal held, however, that the prosecution had not proved whether or not the home-made guns were firearms falling within the definition. They identified problems in the prosecution’s case whose evidence was based on the statement of a policeman who was not speaking as an expert. As a consequence, his testimony that each of the “guns” had all the components necessary to fire ammunition was rejected, and the appeal was allowed.49 In a similar case, GATHERU S/O NJAGWARA V REGINA,50 another police officer was called as an expert witness. No evidence was led concerning the length of time he had served as an officer, or when he had examined any home-made weapon other than the one which was the vital piece of evidence in this case, and the appeal was allowed.

4 3 Possession of ammunition

By 1954, possession of ammunition, in however small a quantity, had become a capital offence. Two cases illustrate the complexities that faced the courts when dealing with this issue. In KURUMA S/O KANIU V REGINA,51 the appellant had been walking along a public road when he was stopped and searched by a police constable at a roadblock. Two bullets were found in one of his pockets. The defence lawyer submitted that the search was unlawful, since only police officers of or above the rank of assistant inspector had

45 (1953) 20 EACA 198.
46 Idem at 200. Squibs are tiny equivalents of sticks of dynamite.
47 (1955) 22 EACA 368.
48 Idem at 368.
49 Ibid.
50 (1954) 21 EACA 384, with the concurrence of Worley V-P and Briggs JA.
51 (n 39).
the power to search a person. He also submitted that the police were authorised to search only someone whom they reasonably suspected of being in possession of stolen goods. After considering the facts, Law Ag J found that the initial stopping and searching of the appellant had been unlawful and irregular. Nihill P agreed, but with reference to English common law in support of the trial court’s decision he dismissed the appeal. The case was then taken to the Privy Council, which considered whether the fact that the evidence was illegally obtained should have rendered it inadmissible. The appellant was a man of good character who had obtained permission from his European employer to visit his reserve. He knew there was a roadblock on the road he chose to use, where he was liable to be stopped and searched; nevertheless, he decided to proceed even though there were a number of alternate routes. The Committee eventually concluded that the test to be applied was whether the evidence was relevant to the matters in issue. Significantly, in dismissing the appeal the Committee declared that there were “matters of fact which caused them some uneasiness” and which they wished to call to the attention of the secretary of state.

The second case is *Mwangi s/o Wambugu v Regina*, where the appellant was found in possession of a single 9 mm bullet. He had been living with a Mau Mau gang for several months and claimed he had been forced into their service. During his time in the bush, the government had dropped “surrender leaflets” by aircraft offering amnesty to Mau Mau fighters who turned themselves in, and the appellant had decided to escape and surrender to the authorities. Before he left, he had decided to steal one round of ammunition to prove he had been with the Mau Mau gang. He did not have, or even claim to have, lawful authority for his possession of the bullet, and the legal issue before the trial court was whether he had a lawful excuse for such possession. The excuse relied on by the appellant was the invitation to surrender and the implied promise of immunity contained in the leaflets. The trial judge, Law Ag J ruled, however, that this invitation was a document of an administrative nature that had no legal effect in itself. He further commented that the expression “lawful excuse” was not defined in the Emergency Regulations. On appeal, Nihill P ruled that Law Ag J had interpreted “lawful excuse” far too narrowly by deciding it could be defined only by statutory law (the regulation contained only the words “lawful authority”). The significance of this case lies in the fact that the Court of Appeal decided to move beyond the narrow confines of the Regulations by ruling that the distinction between lawful authority and lawful excuse lay in the state of mind of the possessor. In the Regulations, lawful authority was absolute: if possession was proved, an appellant was deemed to be guilty. The Court of Appeal, however, chose to extend the scope of the law by providing that lawful excuse was a valid explanation that justified possession. The appellant was able to demonstrate an intention to deal with the arms or ammunition in a public-spirited way (in this case, handing the bullet to the police) instead of in a subversive way, and the appeal was allowed.

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52 With the concurrence of Worley V-P and Briggs JA.
53 Privy Council Appeal 35/1954 (n 39) at 367.
54 (1954) 22 EACA 246.
55 With the concurrence of Worley V-P and Briggs JA.
4 4 Possession of firearms and ammunition

In *Kimari s/o Mihindi and five others v Regina*, 56 a large patrol of security forces, during the course of a sweeping operation, discovered six Mau Mau fighters in a concealed hideout. One was found in possession of a home-made gun and another had five rounds of ammunition in his breast pocket. Nihill P held that where persons are found together in a confined space, the presence of a few small objects such as rounds of ammunition in the pocket of one of them is not necessarily known to the others so as to make them in joint possession of the bullets. 57 He added that it was likely that all six appellants knew of the existence of the bullets but that “likelihood is one thing and proof beyond all reasonable doubt is another”. 58 He found that if there was any doubt in the judges’ minds about a material fact, the benefit of that doubt went to the accused person and he accordingly allowed the appeal.

Proving the intention of accused persons charged with possession of arms and ammunition was often problematic. In *Mwangi s/o Nganga v Regina*, 59 the appellant and two others had burgled a house, and his role had been to act as guard over the servants. Among other items, the other two men had stolen ammunition and a pistol. Mwangi was convicted by McCready Ag J of possession of seventy-four rounds of ammunition contrary to the Emergency Regulations 60 as well as of robbery. He was sentenced to death on the first count and to twenty years’ imprisonment with hard labour on the second count. On appeal, Worley Ag P held:

As regards sentence, the robbery was aggravated, as being by more than one person, but this was a first offence and the sentence of 20 years was in effect a life sentence and the maximum. We thought it manifestly excessive and considered that the learned Judge had based it on a supposedly proved intention to steal ammunition if available. 61

The conviction and sentence for unlawful possession of ammunition was overturned and the sentence for robbery was reduced from twenty to twelve years’ imprisonment with hard labour.

In *Kamau s/o Njeroge and another v Regina*, 62 discussed above, one of the issues was whether two lengths of piping constituted component parts of a firearm. Although the Appeal Court allowed the appeal based on this point alone, it also used the case to discuss the issue of joint possession. Goudie Ag J had chosen to apply the definition of possession contained in the Kenya Penal Code of 1930, which was wider than the common-law definition. 63 Under the Penal Code, if there were two or more persons in a

56 (1955) 22 EACA 472.
57 *Idem* at 472, with the concurrence of Worley V-P and Briggs JA.
58 *Idem* at 477.
59 (1954) 21 EACA 308.
60 Regulation 8A(1)(b) of the Emergency Regulations.
61 (n 59) at 310, with the concurrence of Jenkins Ag V-P and Briggs JA.
62 (n 42).
63 Section 5 of the Kenya Penal Code, 1930. This replaced the Indian Penal Code and was modelled to a greater extent on English law: see JS Read “Crime and punishment in East Africa: the twilight of customary law” (1964) 10 Howard LJ at 164-186, 165.
party and one or more of them had anything in his possession with the knowledge and consent of the others, all were deemed to have possession of the article. Under common law, however, to establish possession the prosecution needed to prove that the person not in possession had a power of control over the person carrying the article. As there was nothing in the regulations stating that the definition in the Penal Code had to be applied, the Court of Appeal ruled that the narrower common-law definition was applicable. This favoured accused persons, since it was far more difficult for the prosecution to prove power of control than simple association.

4 5 Consorting and demanding supplies

In *Gathere s/o Ndegwa v Regina*, the appellant was convicted of consorting with an armed gang, the only evidence against him being his own statement to the police. Nihill P criticised the trial judge, Corrie J, stating that an essential ingredient of the offence was the reasonable presumption that the accused had acted or was about to act in a manner “prejudicial to public safety or the maintenance of public order”. There was nothing in his statement to the police that could prove this and the appeal was allowed.

In *Mutemi s/o Kathiu and another v Regina*, a party of tribal policemen, while on a patrol, had discovered the two appellants and some others who were taken by surprise in the bush. Four of the appellants’ party had disappeared and soldiers from the King’s African Rifles had opened fire. In response, shots, identified by the soldiers as pistol shots, had been fired from the bush. MacDuff J ruled that at least one of the party was armed with a pistol, and each member of that party must have known that one of its members was so armed; accordingly, he sentenced them to death. The Appeal Court disagreed, ruling that the area was “infested with terrorists” and it was a reasonable possibility that someone who was not part of the gang had fired the shots.

Both *Gathere s/o Ndegwa* and *Mutemi s/o Kathiu* were heard in 1954 and illustrate the Court of Appeal’s impartial interpretation of the regulation relating to the offence of consorting. By 1955, this changed radically with the landmark decision of *Wanjiru w/o Thairu and another v Regina*. Wanjiru had been convicted of consorting with an armed gang and sentenced to death. The main issue before the court had been her relationship with the gang, and the only activity that linked her to the gang was that she used to cook for them. The Court was divided on the issue and while Worley V-P and Briggs JA dismissed the appeal, Nihill P held that as the facts established only that she had cooked for the gang, she should have been charged with contravention of a non-capital offence. What is significant about this judgment is the statement by Worley that “the mere existence of an armed gang of Mau Mau terrorists is, at the present day in Kenya, prejudicial to public

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64 (1954) 21 EACA 220.
65 *Idem* at 220, with the concurrence of Worley V-P and Briggs JA.
67 (n 66) at 329.
68 Regulation 8C(1) of the Emergency Regulations.
69 (1955) 22 EACA 456.
safety and the maintenance of public order and any person consorting with and actively assisting the gang in its activities, acts in a manner contravening Regulation 8C (1)”.

Nihill disagreed with this statement arguing that it was unfair to charge all suspects with a capital offence without carefully examining the facts of each case. In this case, the prosecution had established only that she had cooked for the gang:

To my mind the evidence had clearly established that she had knowingly consorted with armed persons [but not in a way that was prejudicial to public safety or the maintenance of public order] and that accordingly she could have been convicted under Emergency Regulation 8C (2) and sentenced to imprisonment not exceeding ten years. Alternatively she might have been charged with harbouring members of the gang or furnishing them with supplies; in either case not a capital sentence … I am not prepared to say that my colleagues are wrong in law [but] I am still of the opinion that the Crown might well have charged this woman with the lesser offence only.

This judgment by Worley and Briggs set out the principle of judicial notice of armed conflict and gangs that effectively lowered the standard required for proving the most serious type of the offence of consorting with others who had contravened the Emergency Regulations. Simply by proving that accused persons were part of an armed gang, courts were automatically authorised to convict them of a capital offence.

In Nguru s/o Murogu v Regina, the appellant had approached a hut at about eight o’clock at night and asked for food. He was dishevelled, unkempt and hungry, and looked as though he had been living in the open. His first words were “[m]y need is only food”. He used no threats, expressed or implied. At the trial he said he had been captured by Mau Mau terrorists, had escaped and was on his way to surrendering himself to the authorities. Goudie Ag J rejected the story of capture and escape and convicted and sentenced him to death in terms of regulation 8F. In terms of this regulation, it was an offence to demand commodities for the use of terrorists whether or not the persons demanding them were terrorists themselves. The Appeal Court concluded that the question whether the supplies were to be used by terrorists (which might have included the appellant) should be decided on inferences drawn from the circumstances in which the demand was made, and allowed the appeal.

4 6 Confessions

The significant case of Githinji s/o Njaguna and another v Regina provides an example of the wide-spread settler prejudice of certain judges. As was the case in apartheid South Africa, it is now clear that the colonial security forces in Kenya often behaved in a callous manner towards many of the detained persons in their custody. Although much of the blame may be attributed to draconian legislation, it is apparent from a reading of the cases that the Supreme Court often failed to protect detainees from the police.
Clearly, although the law did not compel the courts to adopt such a course, they chose to interpret the law in a way that favoured the executive.\(^75\) Githinji was convicted by Goudie Ag J of possession of a home-made gun without lawful authority or excuse, and a second appellant, Mwangi s/o Mweru, was convicted of consorting with a person who was in such possession, and both were sentenced to death.\(^76\) Although their appeals were dismissed by Worley V-P,\(^77\) the judgment had a major impact on the law relating to confessions during the state of emergency. Githinji had been found hiding in a maize field with a home-made gun near his feet. In respect of Mwangi, Goudie held that there was abundant evidence that he had been in the company of Githinji at the time of the arrest.\(^78\) In Mwangi’s own sworn evidence he admitted having previously consorted with Githinji, but his real defence was that he had been a prisoner of a Mau Mau gang and that he and the others were on their way to surrender at the time of their arrest. He made a similar statement to the Criminal Investigation Department in Nakuru, which was tendered as evidence by the prosecution at the trial. The defence counsel, however, argued that this evidence was inadmissible because it had been made involuntarily as a result of “inducement”.\(^79\) Goudie then correctly followed the procedure of a “trial within a trial” but decided to overrule the objection and admit the statement in evidence. Worley V-P severely reprimanded him, stating that in doing so he had “gravely misdirected himself on the issue before him”.\(^80\) The case’s importance lies in the judges’ *obiter dictum* on the treatment of detainees rather than on their decision to dismiss the appeals against conviction for possessing ammunition and unlawful consorting.\(^81\) Mwangi testified to a police inspector that following his arrest, he had been taken to a screening camp where he was interrogated by a clerk and two *askaris*.\(^82\) What follows is his harrowing account of what happened at the screening camp:

They put a rope around my neck and the other end put round neck of accused 1. They said ‘If you don’t say what we ask you, you will die’. Before being questioned we were beaten up and the rope tightened. We were very frightened. I said we had killed nobody. We were beaten again and they put it to us we had killed two persons. We denied this. They asked us how we went into forest, and we said we had been captured by Mau Mau. We were beaten up again. I said I was prisoner. The askaris beat us with open palms and with butts of rifles on head and body.\(^83\)

\(^{75}\) Forsyth (n 23) at 105-106.

\(^{76}\) Contrary to regulations 8A(1)(a) and 8C(1) of the Emergency Regulations.

\(^{77}\) With the concurrence of Jenkins and Briggs JJA.

\(^{78}\) (n 74) at 410.

\(^{79}\) *Idem* at 411.

\(^{80}\) *Ibid*, with the concurrence of Jenkins and Briggs JJA.

\(^{81}\) *Idem* at 414.

\(^{82}\) The term used to describe Africans who served in the army or police force in colonial East Africa.

\(^{83}\) (n 74) at 414.
The appeal judges ruled that Goudie had entirely ignored the allegations of ill-treatment (which were not contradicted by the prosecution), and had failed to address the substance of the objection raised by the defence counsel. Although the Court of Appeal dismissed both appeals, the judges concluded that such methods were a “negation of the rule of law which it is the duty of the Courts to uphold, and when instances come before the courts of allegation that prisoners have been subjected to unlawful and criminal violence, it is the duty of such Courts to insist on the fullest inquiry with a view to their verification or refutation”.

The judgment has a further significance in that it demonstrates the effect of the Court of Appeal's decision rule of law. It referred to three legal principles that were binding on lower courts as well as a *quaere*. First the court held that “[i]t is the duty of every judge and magistrate to examine with the closest care and attention, all the circumstances in which a confession has been obtained by a police officer from an accused person, particularly when it is alleged that the accused person has suffered ill-treatment before making the confession”.

Secondly, the court held that the powers to detain suspects in terms of the Emergency Regulations were not exercisable where a person had been arrested on a capital offence. Thirdly, the Court ruled that the power to detain suspected persons in police custody pending trial did not authorise the handing over of that person to another authority. Finally, the Court enquired what legal powers of detention were held by “screening teams” and under whose authority they acted.

47 The powers of the executive

Following the declaration of a state of emergency in 1952, the legislative powers of the governor became, in certain material aspects, exactly co-extensive with those of the legislative council. Among other issues, the Court of Appeal had to decide whether the governor, like the legislative council, could legislate retrospectively. In *Corbett Ltd v Floyd*, Briggs JA ruled in favour of the governor, noting that the legislation under which the Emergency Regulations were issued was passed in the shadow of impending war and there was nothing novel in taking such emergency steps:

> No legislature has ever been more jealous of its powers than was the Roman Senate of early republican times; but on many occasions of emergency it decided it was in the public interest that all its authority should be delegated to one man as dictator, who thereafter wielded, during the term of his appointment, powers no less absolute than those of an Asiatic monarch.

He went further by defending the passing of such legislation during the Mau Mau rebellion:

86 (n 74) at 410 (my emphasis).
87 (1958) EA 389.
88 *Idem* at 392.
It has never in twenty years been suggested that the Order in Council was itself *ultra vires* and although since the end of the War, measures taken under it have been criticised as undemocratic and destructive of liberty, it has never so far as we are aware been suggested that such measures were incompetent.\(^{89}\)

In essence, Briggs’s argument was that the judiciary could not engage in an assessment of the legality of legislation, and confirmed the then prevailing judicial attitudes that the courts had no constitutional role in the limitation of executive authority.\(^{90}\)

### 5 Conclusion

The entire system of administration of justice was streamlined during the state of emergency so that as many cases as possible could be processed. This was primarily because the courts were flooded with cases after new offences were created. Nevertheless, on a number of occasions the appeal judges chose to extend the scope of the law by moving away from literal interpretations of the regulations. In some cases, they chose to import common-law principles, which enhanced the rights of accused persons. The cases discussed in this article highlight disparities between the attitudes and legal skill of the judges of the Supreme Court of Kenya and those of the Court of Appeal for Eastern Africa. The detailed analyses of case law not only illustrate the nuanced role of the judiciary within the colonial state, but also reveal the judges’ legal ability and impartiality in a way that descriptive accounts cannot. The article demonstrates two divisions within the colonial state. The first was between the judiciary and the executive, as the former attempted to maintain some form of independence. The second was within the judiciary itself. This is evident in the ways that Supreme Court judges and judges of appeal framed their judgments. The article suggests that the Colonial Legal Service comprised a group of lawyers with differing levels of legal skills, aptitude for administering law in the colonies and experience. It also argues that the judges of appeal were not part of the colonial state to the same extent as their junior brethren who had been in the colony for longer periods. Many junior judges identified with the views of volatile settlers and African loyalists, which seriously undermined the legitimacy of their judgments. Conversely, the appeal judges’ experience of Empire enabled them to distance themselves from the rules of conduct that facilitated the smooth running of the colonial state. Clearly, colonial judges at all levels shared the racist and backward-looking ideology of the colonial state. In a number of cases, however, the professionalism, legal adroitness and wide experience of Empire enabled judges in the Court of Appeal for Eastern Africa to exercise their judicial powers with discernment.

\(^{89}\) *Ibid*, with the concurrence of O’Connor P and Forbes JA.

Abstract

This article relates to Kenya in the 1950s and focuses on judicial decisions made during the Mau Mau rebellion. It offers a new vantage point from which to view a colonial legal system by examining judicial decisions made during that rebellion, which was spearheaded by members of the Kikuyu ethnic group. Following the declaration of a state of emergency in October 1952, regulations promulgated by the governor introduced a range of new offences, many of which carried mandatory capital sentences. An analysis of case law reveals that on a number of occasions, appellate judges chose to extend the scope of the law by moving away from literal interpretations of the regulations. With time, it became apparent that the magistrates’ courts and the Supreme Court of Kenya had become part of the counter-insurgency machinery, while the Court of Appeal for Eastern Africa largely tried to maintain its own independence and sphere of influence as moral guardian of the “rule of law” and as a check on overweening executive power.