

UGANDA / JUDGMENT

Bashir v Rex (Criminal Appeal No. 328 of 1950) [1950] EACA 88 (1 January 1950)

[1950] EACA 88

COURT

East African Court of Appeal

BEFORE

Nihill, C.J, Thacker J

CASE / FILE NUMBER

Criminal Appeal No. 328 of 1950

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APPELLATE CRIMINAL

Before Sir BARCLAY NIHILL, C. J., and THACKER, J.

MOHAMED BASHIR, Appellant (Original Accused)

REX, Respondent (Original Prosecutor)

Criminal Appeal No. 328 of 1950

(From Original Conviction and Sentence in Criminal Case No. 75 of 1950 of the First Class Magistrate's Court at Meru—R. Brayne-Nicholls, Esq.)

Criminal Procedure Code—Section 134—Charge—Particulars necessary for giving

information as to nature of offence—Defective charges—Alteration of charge —Accused not asked to plead to fresh charge—Section 381 (a)—Defects not curable—Prejudice to accused.

On the 8th June, 1950, the appellant, Mohamed Bashir drove up to the Kichuka-Kibugwa Inspection Barrier in a lorry loaded with skins and was stopped by the tribal policeman on duty, who asked for his licence to remove the skins from the district, and on failing to produce this, he was asked to unload his skins, which he refused to do, and after some argument, he produced a loaded gun, which he pointed at the policeman, ordering his turnboy to lift the barrier, which being done, he drove off in his lorry with the skins.

He was accordingly prosecuted in the Court of the Magistrate, I Class, Meru, on four charges: —

(a) Attempted Murder, section 216, P. C.

- (b) Disobedience of Lawful Orders, section 126, P. C.
- (c) Threatening injury to a public servant, section 103, \$P. C.\$
- (d) Obstructing a Produce Inspector in the execution of his duty, section 20 (1) \$(h)\$, Ord. XVIII of 1948.

All these charges were defective, in that they contained no particulars of the offences charged.

The learned Magistrate, having no jurisdiction to try charge \$(a)\$ for attempting a murder, under section 216, P. C., apparently started the hearing as a Preliminary Inquiry under Part VIII, Criminal Procedure Code, but at some point of the trial this charge was altered to one of Assault, under section 245, P. C. Charge (d), of obstructing a Produce Inspector, was withdrawn. Accused was not called upon to plead to the altered charge \$(a)\$ of Assault.

The accused was found guilty of the three remaining charges, being sentenced to pay a fine of Sh. 500 on the first count, and a fine of Sh. 300 on the second. On the third count he was sentenced to three months' imprisonment with hard labour and a fine of Sh. 1,000, or a further three months in default, being also deprived of his Fire Arms Licence for a period of five years.

Accused appealed.

Held \$(28-8-50)\$.—(1) That the accused cannot but have been prejudiced by the absence of particulars in the defective charges and by the omission to call upon him to plead anew on the new charge, and such defects could not be cured under section 381, Cr. P. C.

- (2) Trial declared a nullity.

Mangat for the appellant.

Templeton, Crown Counsel, for the Crown.

JUDGMENT.—After consideration we have come to the conclusion that from the record it is apparent that irregularities occurred during the course of the proceedings before the First Class Magistrate at Meru of such a nature that we have no option except to declare the trial a nullity. The Crown is, however, at full liberty to institute fresh proceedings if it sees fit. We emphasize this because clearly this is a case where either there has been a defiant disregard of lawful authority, or a restraint on the subject which may have justified the appellant in adopting reasonable methods to overcome it. That seems to us to be an issue
which should be faced and properly tried. The facts which gave rise to the prosecution of the appellant are not seriously in dispute. The complainant who is a tribal policeman told the Magistrate the following story: He was stationed by a road-side barrier when the appellant who is an Indian hides and skin merchant came along in a lorry. The lorry stopped for the barrier and he asked the appellant if he had a licence to move skins out of the district as he noticed that the lorry contained a load of them. The appellant could not produce a licence but he did produce a business card with his name and address. He then told the appellant he would have to unload the skins or he would not let the lorry go on. After some argument the appellant got back into his lorry, took out a gun and

loaded it with two cartridges and pointed the gun at him. The appellant then said to his turnboy: "Go and raise the barrier". The turnboy lifted the barrier returned and got into the lorry. The appellant then drove off. On this story the appellant was charged with a series of offences \$(a)\$ attempted murder which was later changed to assault; (b) disobeying the lawful orders of a public servant; \$(c)\$ threatening to injure persons engaged in the public service; and \$(d)\$ obstructing a Produce Inspector in the execution of his duty. All the charges were defective in form. They were signed by someone who purported to sign for the First Class Magistrate, Meru, and who for all we know may not be a Magistrate at all. Graver still, not one of the charges complied with the provisions of section 134 of the Criminal Procedure Code in that not a single particular was given to the appellant. Manifestly this was a case where clear particulars of the nature of the charges the appellant was to be called on to face was most important. Moreover section 134 lays it down that a charge or information shall contain particulars sufficient to give an accused person reasonable information as to the nature of the offence charged. In this case the appellant was given no information at all. We are far from holding that in every case in which a charge contained no particulars or inadequate particulars this Court would necessarily refuse to apply the provision of what is called "the curative section" i.e. section 381 of the Criminal Procedure Code. The application of that section is in the discretion of the Court on the facts in a particular case in the sense that if the Court is satisfied that the irregularity has not in fact occasioned a failure of justice then it is the plain duty of the Court to apply the section but if the Court is of the opinion that an accused person may have been prejudiced in his defence by reason of the irregularity then the section cannot be applied because in such a case there must have been a failure of justice. In this case we are of the latter opinion. We have not overlooked that the appellant was represented by counsel at the time and that objection to the charges, could have been made, and we think should have been made, at the commencement of the trial. We have had regard to this but we are still of the opinion that even apart from this the trial of the appellant was not a satisfactory one. As we have already stated the appellant was originally charged with attempted murder a most serious offence beyond the jurisdiction of the Magistrate to try by summary procedure. At some stage this charge was withdrawn and an assault charge substituted. This is some indication that the Magistrate started these proceedings as a preliminary investigation and changed his mind after he had heard first witness. We say this because the Magistrate has recorded that the evidence of the first witness was read over to him and his signature appears at the bottom. In the case of the subsequent witnesses this was not done so that it does seem a reasonable inference to make that the Magistrate took the evidence of the first witness as a deposition and subsequently turned a preliminary investigation into summary proceedings. If this is what occurred there is nothing on the record to show that the defence was informed and the appellant was not asked to plead anew to the new charge.

For all these reasons then it is impossible for us to say that the appellant cannot have been prejudiced in his defence and therefore we declare his trial to be a nullity. The convictions entered against him are set aside and the sentence quashed. Any fine paid by the appellant must be remitted to him. We have one last observation to make. From our comparison of the certified true copy of the proceedings with the original it appears to us that the former is not what it is

certified to be. We regard this as a serious matter. In the event of a further trial being heard we order it to take place at Nyeri before a Resident Magistrate.

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