

UGANDA / JUDGMENT

Kamau v Rex (Criminal Appeal No. 290 of 1950) [1950] EACA 94 (1 January 1950)

[1950] EACA 94

COURT

East African Court of Appeal

BEFORE

Nihill, C.J, Thacker J

CASE / FILE NUMBER

Criminal Appeal No. 290 of 1950

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APPELLATE CRIMINAL

Before Sir Barclay Nihill, C. J., and THACKER, J.

KAMITI S/O KAMAU, Appellant (Original Accused)

REX, Respondent (Original Prosecutor) Criminal Appeal No. 290 of 1950

(Appeal from decision of R. M.'s Court at Nairobi-I. R. Gillespie, Esq.)

Penal Code, sec. 58 (1) (c)—Seditious publication—Plea of "Guilty", Criminal Procedure Code, sec. 205 (2)—Admission to be recorded as nearly as possible in the words used by accused—Strict compliance necessary—Finding of fact that publication is seditious necessary in spite of plea of "Guilty".

Accused, the editor of a newspaper known as "The Hindi ya Gikuyu", was charged on three counts, under sec. 58 (1) (c), of publishing three seditious publications. He admitted his guilt on all three counts, and his pleas were entered as "Guilty", and without finding as a fact that the publications were seditious, the Magistrate proceeded to sentence, imposing sentences of imprisonment and fine, after hearing appellant in mitigation, and the submissions of prosecution. Accused appealed against the sentences.

Held (4-9-50).—(i) That section 205 (2), Criminal Procedure Code, should be strictly complied with and where an accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him.

(R. v. Byarufu, Criminal Appeal No. 24 of 1950, referred to.)

In this case, however, appellant knew and understood English, and it was safe to assume that his pleas meant that he was responsible for the publications in question, and had no defence.

(ii) That in spite of the pleas of "Guilty" the Magistrate, though he had doubtless applied his mind to the matter, should have found as a fact that the publications were seditious in law.

Appeal dismissed. Sentences varied.

Cases referred to: Rex v. Byarufu, Criminal Appeal No. 24/1950.

Appellant present, unrepresented.

Templeton, Crown Counsel, for the Crown.

JUDGMENT.—This is an appeal against sentence only.

The appellant is a literate member of the African community who both speaks and understands English. He was charged before the Resident Magistrate, Nairobi, and convicted on three counts of publishing a seditious publication contrary to section 58 (1) (c) of the Penal Code. These counts on the Magistrate's record are numbered as counts four, five and six, because at the same trial the printers of the publications alleged to be seditious were also before the Court on counts one, two and three. So far as this appellant is concerned the learned Magistrate recorded his pleas as follows: \$-\$

Count 4: "I plead guilty".

Count 5: "Guilty".

Count 6: "Guilty".

In a recent case in the East African Court of Appeal (Rex v. Byarufu, Criminal Appeal No. \$24/1950\$) stress was laid on the necessity for Magistrates to comply strictly with the provisions of section \$205/2\$ of the Criminal Procedure Code, where it is laid down that where an accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him. In this case, however, the appellant knows and understands English, so we think

v.

it safe to assume that he did say in effect to the Magistrate on each count "I plead guilty" and that he meant by that "I am responsible for the publication and I have no defence under the section". The Magistrate next heard the appellant in mitigation and on a later date after hearing counsel for the prosecution to pass sentence. From the record it nowhere appears that the learned Magistrate found as a fact that the documents which were the subject matter of the three charges were in law seditious publications. We do not consider that the mere fact that the appellant had pleaded guilty relieved him from the necessity of doing this for the test was not the admission by the appellant that he had a seditious intention, if that can be assumed from his plea, but whether the document as published by him was of such a nature that it disclosed that the appellant had

put his intention into effect thereby making the document a seditious publication.

The ingredients of a seditious intention are laid down in section 57 (1) of the Penal Code, sub-paragraph (i) to (iv). We think it highly probable that the learned Magistrate did address his mind to section 57 before convicting the appellant, but since he has not said so or given his reasons why in his opinion the documents are seditious publications, we have felt it our duty, although the point is not taken by the appellant in his memorandum of appeal, to look at the documents ourselves and to come to our own finding in regard to them. The publication which formed the basis of the fourth count is a letter from a correspondent to a newspaper known as "The Hindi ya Gikuyu", of which the appellant is the editor. Again we think the learned Magistrate should have taken evidence from the translator of the publications, all of which are apparently in the Gikuyu language. Since, however, the defence has never challenged the translations as incorrect, we accept them as they appear on our record. Taking, then, the English translation of the fourth count document we are satisfied that it does constitute a seditious publication. The appellant has asked us to remember that the writer of the letter is an African, not very skilled in the meaning of words who, because of his immaturity, can only express his thoughts in an exaggerated and flamboyant manner. We appreciate the point, but as we have tried to impress upon the appellant, who has argued his own case before us, politely and moderately, we are not concerned with the writer of the letter but with the appellant, who gave it publication. The appellant cannot take his stand on any other basis than that of an educated member of his community and we are quite satisfied that he must have realized the inflammatory effect of such a letter or immature readers of his newspaper and to illiterate members of the African community by whom no doubt his newspaper is read. The general argument in the letter is that Europeans are engaged in a conspiracy to make life intolerable for the African in his reserve by such measures as "terracing" and bush clearing so that African labour may be exploited for the benefit of the European. In this conspiracy, according to the writer, the chiefs and elders are aiders and abettors because they love their own bellies and put their own interests before the interests of their own people. We can conceive that put moderately and free from distortion and gross misrepresentation such a thesis might have been kept within the limits of fair political comment, but using the language that he did it seems to us perfectly evident that the intention of the appellant's correspondent must have been to raise discontent or disaffection amongst the inhabitants of the Colony and to promote feelings of ill-will and hostility against Europeans and the chiefs of the African community. According to the writer, Europeans want to drive African women away from their homes so that in the end they will become women of loose character—what could be better calculated to raise disaffection and hostility than this? In publishing this letter, therefore, it must be assumed that the appellant intended the consequences which would naturally flow from such publication and that he should have known and must have known that amongst those consequences would be the creation of disaffection and hostility.

In our opinion, therefore, the appellant has been properly convicted on the fourth count. As regards sentence a fine of Sh. 400 or three months' S. I. in default cannot possibly be regarded as excessive. We accordingly uphold the conviction and sentence passed on the appellant on this count.

We now come to the fifth count which presents no difficulty at all. The publication here consists of an editorial written by the appellant and headed 'Observations by Editor'. In it we consider that the appellant directly advocates a policy of physical force as the best means, indeed the only means of securing greater political representation. He quotes recent happenings in Uganda where "blood has been spilt" as an example of success achieved by such methods, and he goes on "If we should want freedom we must prepare ourselves to buy it with blood and monies". It is true that the appellant concludes his article on a quieter note, for it seems that all he really wants is four more representatives in the Legislative Council. The appellant has stated to us that when he used the word "fight" he meant to "fight politically" in the sense of "fighting an election". Perhaps he did, but in order to encourage people to fight politically, it is not necessary to tell them to spill their blood and when such expressions are used the writer of them cannot be heard to complain when people take him perhaps a shade too literally. We have no hesitation in holding that this editorial is a seditious publication and in affirming the conviction. When we come to the sentence we are a little puzzled. In our view this publication is so much the most seditious and harmful of the three in that it contains an incitement to violence that we are surprised that the learned Magistrate was content to impose a fine only. Mr. Templeton for the Crown has suggested that perhaps the learned Magistrate mixed up the fifth and sixth count and really intended that his sentence of eight months' S. I., which he imposed on the sixth count, should be given for the fifth count. We feel we can hardly assume this, but as we are of the opinion that a fine of Sh. 800 is an inadequate sentence in respect of the document the subject of the fifth count, whereas we think the sentence on the sixth count is excessive, we propose to set aside the Magistrate's sentences on the fifth and sixth counts and to substitute our own.

We have definitely come to the conclusion that the appellant cannot escape a sentence of imprisonment on the fifth count. The appellant knows as well as this Court that in April, 1948, serious rioting occurred in Uganda at Kampala and other places. He knows also that a few months ago that acts of lawlessness, accompanied by threats and intimidation, were widespread in Nairobi at a time when labour in the city was being called upon to stage a general strike. He knows also that many persons of his community were arrested because of these unlawful activities and that some of them received stiff sentences of imprisonment. The appellant published his editorial on 22nd December, an editorial which we have described as a direct incitement to violence. It would be manifestly wrong to excuse the person who sowed the seed of violence and show him indulgence, when those who listened to and obeyed his exhortations are serving prison sentences. The appellant, as he also did in the Court below, has stood before us in the white sheet of the penitent. Perhaps he is genuinely sorry for his behaviour and we will accept his assurance that he is finished and done with seditious political agitation. It is in his favour that he has not sought to justify his misdeeds. He has told us that he has a widowed mother dependent on him. In truth his appeal to this Court is in effect a petition for clemency,

but the exercise of the prerogative of mercy does not lie with us but with His Excellency the Governor and it is to that quarter that the appellant should turn if he so desires. We are solely concerned with the legality of his conviction and sentence. Leaving out of account the offence committed by the appellant on 17th November, 1949, which formed the subject matter of the fourth count and treating him as a first offender under section 58 of the Penal Code, he is still liable to a maximum punishment of two years' imprisonment or to a fine not exceeding two thousand shillings or to both such imprisonment and fine. The appellant has put forward a strong plea in mitigation both before the learned Magistrate and before us and his conduct since his arrest has been quite the reverse of aggravating. Taking all

these circumstances fully into account, we think a proper sentence to impose in respect of the fifth count is one of six months' simple imprisonment to run from the date of his conviction, namely 20th June, 1950.

This leaves us with the sixth and last count. Although the appellant pleaded guilty before the Magistrate he has argued before us that the publication which is the subject matter of this count is not in fact a seditious publication at all. He claims that it is fair comment on a law passed by the Legislative Council and should therefore be regarded as coming within exception \$(b)\$ of section 57 (1). We could accept this submission if it were not for the violence of the language used. The law in question which we understand is commonly known as the Spiv Bill contains some fairly drastic provisions concerning the direction of the work shy under certain circumstances into useful employment. We can well believe that its provisions are held in great disfavour by the class of the community against whom in the public interest it was directed. Moreover, it is in the appellant's favour that he wrote this article and published it as a pamphlet apparently before the Bill became law. A man commits no offence in a free country by expressing himself forcibly on what he considers to be the iniquity of some projected Government measure, for in such a case quite genuinely, his intention may be to prevent the passage of legislation which he considers will be detrimental to his class or his country. The same principle applies equally, of course, where the genuine intention is to obtain the repeal of some law regarded by him as obnoxious. It is just such instances that exception \$(b)\$ of section 57 of the Code is meant to cover. Nevertheless, there is a right way and a wrong way of voicing criticism and if the language used is so extreme as to lead to the reasonable inference that the person using it is not concerned primarily with redress of the matter complained of by constitutional means but is attempting to raise discontent and disaffection amongst His Majesty's subjects, and alternatively, or in addition, is seeking to promote feelings of ill-will and hostility between different classes of the population of the Colony, then a seditious intention is established, and an offence is committed. Applying this test to this document, which is headed "Kenya Plan", we have come to the conclusion, after very careful consideration, that the appellant has overstepped the line which divides sedition from forceful political agitation. The gist of the article is that the Europeans, when they came to Africa, found the institution of slavery in existence and that they are now trying to re-establish it. Furthermore, "the new slavery" is much worse than the old, and the appellant concludes, "Listen once again ... Government has leave to seize you and make you a slave. She also has leave to seize your land grant some to Europeans"—we regard the words

"Listen once again" as significant, because they must mean, "I have told you this before".

Certainly the appellant had done so; how can he then regard it as wrong if this Court, in assessing the nature of his intention as the writer of the Kenya plan, bears in mind his incitement to violence in the document which formed the subject matter of count five? Looked -at in this way the "Kenya Plan" document in our eyes becomes a part of the appellant's plan to raise discontent and disaffection and to encourage people to get what they want by violence if they cannot get it peaceably. We consider then that the appellant has been properly convicted on this count also. As regards sentence, in our view there is little to choose between the Kenya Plan and the document which formed the subject matter of the fourth count, we therefore impose a similar sentence.

In the result the convictions on all three counts are upheld and the appellant is subject to the following sentences: -

- Count 4, a fine of Sh. 400 or three months' S. I. in default.
- Count 5, six months' simple imprisonment as from 20th June, 1950.

Count 6, a fine of Sh. 400 or three months' S. I.

If the fines are not paid the appellant will undergo in all 12 months' S. I. as from 20th June, but if the fines are paid or a portion of them his sentence of six months' S. I. in default will be reduced *pro rata*.

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