

UGANDA / JUDGMENT

Kisoï and Others v Reginam (Criminal Appeals Nos. 27-35 (inclusive) of 1955) [1955] EACA 347 (1 January 1955)

[1955] EACA 347

COURT

East African Court of Appeal

BEFORE

Bourke J, Nihill P, Worley VP

CASE / FILE NUMBER

Criminal Appeals Nos. 27-35 (inclusive) of 1955

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL (President), SIR NEWNHAM WORLEY (Vice-President) and PAGET BOURKE, Acting Justice of Appeal

(1) MBITHI s/o KISOI, (2) KIMEU s/o SOMBA, (3) MUNYAO s/o KITUKU, (4) MULI s/o WANGUNE, (5) KUMDU s/o MUNIA, (6) MAIDAI s/o MATIME, (7) KILONZO s/o MTULA, (8) GUNDO s/o MYUA, (9) MACHIOLI s/o MWAKABE, Appellants (Original Accused)

 $\mathbf{v}$

REGINAM, Respondent

Criminal Appeals Nos. 27-35 (inclusive) of 1955

(Appeal from the decision of H. M. High Court of Tanganyika, Crawshaw, J.)

Alternative charges based on same evidence—Transfer of name of accused to count with which he was not charged—Irregularity—Agent provocateur— Mens rea-Societies Ordinance, section 20-Penal Code, section 60 (1) (d) and (2)—Criminal Procedure Code, sections 260 (2) and 346.

On count 1, the first- and fourth-named appellants were charged with administering an unlawful oath contrary to section 60 (1) (d) of the Penal Code. The fourth appellant was convicted thereon, but, in the case of the first appellant, the trial Judge allowed the information to be amended by transferring this appellant's name to the second count which count charged the second, third, fifth, sixth, seventh and eighth appellants with being present at and consenting to the administration of an unlawful oath, contrary to the same section. On this count all these appellants and the first appellant were convicted. The ninth appellant was charged on count 3

with taking an unlawful oath without compulsion, contrary to section 60 \$(2)\$ of the same Code and he was convicted thereon. On count 4 all nine appellants were charged and convicted for attending an unlawful meeting, contrary to section 20 of the Societies Ordinance (Cap. 11), this count not being charged as alternative to count 2. The evidence to support count 4 was the same as adduced for count 2.

The ninth appellant attended the oath-taking ceremony as a police informer playing a part for the police. Later he withdrew his co-operation with the police and for this reason, he was prosecuted.

In support of the conviction of the first appellant on count 2 the Crown relied on section 260 (2) of the Criminal Procedure Code which provides: "Where, before a trial upon information or at any stage of such trial, it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. All such amendments shall be made upon such terms as to the court shall seem just."

Held (6-6-55).—(1) The amendment allowed by the trial Judge was improper rendering the trial of the first accused on count 2 a nullity. The instant case was not one of a "defective" information but of a lack of evidence to support count 1 against accused 1, so that section 260 (2) aforesaid was inapplicable information in which the accused is named or on which he has been arraigned and to which he has pleaded. In this case the accused person concerned had not been charged with count 2. The irregularity was not curable.

- (2) It had not been established whether, in attending the oath-taking ceremony the ninth accused was acting as agent provocateur or with mens rea. That subsequently the said accused wished to have nothing more to do with the police did not establish an irresistible inference that at the time he took the oath, he had a guilty intent.
- (3) As no evidence was led to support the fourth count, other than that proffered for the second count, except as against the first accused, the fourth count must be regarded as alternative to the second count, so that the fourth count should, as convictions were entered and sentences passed on count 2 against the second, third, fifth, sixth, seventh and eighth accused persons merely have been left on file without convictions being entered and sentences passed thereon.

Appeal of first appellant from conviction on count 2 allowed.

Appeals of second, third, fifth, sixth, seventh and eighth appellants dismissed.

Appeal of ninth appellant allowed on both counts 2 and 4 with which he was charged

Cases referred to: R, v. Hughes, (1927) 20 C. A. R. 4; R. v. Jennings (1949) 33 C. A. R. 143; Cosma s/o Nyadago v. R., ante page 450.

Appellants all absent, unrepresented.

Summerfield (Acting Solicitor-General, Tanganyika) for respondent.

JUDGMENT (prepared by Nihill (President)).—These nine appellants who are all members of the Wakamba tribe living in Tanganyika, were arraigned before the Supreme Court of Tanganyika sitting at Tanga on the following charges. The first and fourth appellants were charged with administering an unlawful oath contrary to section 60 (1) \$(d)\$ of the Tanganyika Penal Code. The second, third, fifth, sixth, seventh and eighth appellants were charged under the same section with being present at and consenting to the administration of an unlawful oath, and the ninth appellant was charged with taking an unlawful oath, not being compelled to do so, contrary to section 60 (2) of the Penal Code. In addition all the appellants were charged with attending a meeting of an unlawful society contrary to section 20 of the Tanganyika Societies Ordinance (No. 11 of 1954). In the result all the appellants were convicted on all counts as charged except that, as regards the first appellant the trial Judge allowed the information to be amended by transferring the name of this appellant to the second count from the first count. As will appear hereafter we have held that this was an improper amendment and rendered the trial of this appellant on this count a nullity. We have upheld his conviction on the fourth count so that his appeal is allowed in part only.

As regards the second, third, fourth, fifth, six, seventh and eighth appellants we have dismissed their appeals and they remain convicted on the second and fourth counts. We have allowed the appeal of the ninth appellant in full.

We now give our reasons for the above decisions. The convictions of the second to the eighth appellants rest on the evidence of the main prosecution. witness, Samwel (P. W. 2). His evidence was accepted by both the learned trial Judge and the assessors. He was certainly not an accomplice and his evidence does not require corroboration, although there was in fact some corroboration. On this evidence there can be no doubt that all these appellants were present at a Mau Mau oath-taking ceremony in a consenting capacity, and subject to the concluding paragraph of this judgment they have all been properly convicted on the offences charged against them and their appeals are dismissed.

With regard to the first appellant the evidence of Samwel established that he attended the *Mau Mau* oath-taking ceremony. He has therefore been properly convicted on count 4 and his appeal against conviction on that count is dismissed. It is in respect of his conviction on the second count that his appeal must be allowed. Mr. Summerfield, for the Crown, sought to rely on the provisions of section 260 of the Tanganyika Criminal Procedure Code but this section has no applicability to what happened here. That section confers in sub-section 2 a

discretion on a court of trial to order on its own motion the amendment of a defective information either before trial or at any stage of the trial, but the information must be one in which the accused person is named or on which he has been arraigned and to which he has pleaded. In the present case this appellant was not charged on the information with the offence specified in the second count. He was not arraigned on this count and never pleaded to it. In fact

this is not a case of a defective information at all. The defect was not in the information but in the prosecution evidence which could not support the charge that the appellant had administered an unlawful oath at the oath-taking ceremony. The Crown might have entered a **nolle prosequi** on the second count and filed a fresh information charging this appellant with being present at and consenting to the administration of an unlawful oath but this course was not adopted. As it is, the proceedings against this appellant on the second count were clearly incompetent and the irregularity cannot be cured by the application of the curative section 346. The conviction of the appellant on this count is quashed and his sentence set aside. The practical result to this appellant is that the term of imprisonment he will have to serve is reduced from five years to three.

Lastly there is the case of the ninth appellant. This certainly presents some unusual features. It is clear from the evidence of Samwel and the police officer, Corporal Ali, that in the beginning this appellant was acting as a police informer or agent. It was on information given by him that Samwel attended the oath-taking ceremony, and it is clear also that the appellant himself knew that arrangements had been made for the police to come to the meeting at a certain time. In fact, the learned trial Judge finds this as a fact, but he does not appear to have directed his mind to the question whether in attending the meeting and in allowing an oath to be administered to him, this appellant was acting as an agent provocateur or with mens rea. Mr. Summerfield has informed us that this appellant was prosecuted because after the ceremony he withdrew his co-operation with the police, but he concedes that at the time he took the oath all the evidence suggests that he was still playing a part. It is to be noted that even after the police had arrested all the persons found in the house, this appellant and the prosecution witness Samwel were released from custody. It would appear that subsequently the appellant, perhaps under the influence of the oath he had taken combined with the threats uttered by the eighth appellant, wished to have nothing further to do with the police but this later conduct does not in our opinion establish an irresistible inference that at the time he took the oath he had the necessary mens rea. As regards attendance at the meeting, which is the offence charged against him on the fourth count, his position does not appear to us to be materially different from that of Samwel. For these reasons we consider that his appeal should succeed. The two convictions entered against him are quashed, and the sentences set aside. So far as the present proceedings are concerned he can no longer be held in lawful custody.

All the appellants have appealed against their sentences also, but in the light of the circumstances reviewed by the learned Judge they are by no means excessive. Except in so far as has been indicated above, the appeals of all these appellants other than the ninth appellant both as regards conviction and sentence are dismissed.

We must, however, add one observation. The question whether the fourth count on the information should have been regarded by the trial court as alternative to the second count was not raised by counsel at the hearing of this appeal and it escaped the attention of the court. In our opinion it should have been so regarded because no evidence was led to support the charge that there had been a meeting of an unlawful society other than the evidence relied on to sustain the

charge on the second count, namely that a Mau Mau oath had been administered at a meeting at which the appellants were present in a consenting capacity. Had the prosecution failed to prove consent but had proved the administration of the oath it would have been open to the court to acquit on count 2 and to convict in the alternative on count 4. $\frac{1}{2}$

Accordingly we consider that the court, after convicting these appellants on count two should have left the fourth count on the file without convicting or passing sentence. As it is, it is arguable, that the appellants have been sentenced twice in relation to the same act (see a recent judgment of this Court in Criminal Appeal No. 142 of 1955 which was also a case from Tanganyika). If the point were of any practical significance to these appellants we would indeed reopen this appeal and hear them further on the matter. Since, however, the learned Judge passed concurrent sentences and the sentences in respect of the second count are heavier than those imposed on the fourth count, the appellants have suffered no prejudice by the error, if error there was.

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