

UGANDA / JUDGMENT

Poppe and Another v Rex

(Criminal Appeal No. 250 of 1949)

[1951] EACA 134 (1 January 1951)

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COURT

East African Court of Appeal

BEFORE

Edwards CJ, Paul VP, Rudd J

CASE / FILE NUMBER

Criminal Appeal No. 250 of 1949

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR GRAHAM PAUL (Acting President), SIR DAVID EDWARDS (Chief Justice) (Uganda), and RUDD, J. (Aden)

(1) VICTOR GEORGE POPE and (2) MICHELE SCIARRA, Appellants (Original Accused)

$\mathbf{v}$.

REX, Respondent (Original Prosecutor)

Criminal Appeal No. 250 of 1949

(Appeal from decision of H. M. Supreme Court of Kenya—Thacker, Acting Chief Justice, and Bourke, J.)

Kenya Cr. P. C. sections 218-225—Special provisions relating to the trial of Europeans. European's right to insist on being dealt with by the ordinary procedure of the subordinate Court.

The appellants were convicted by the 1st Class subordinate Court at Nairobi -the first of two offences of theft by a servant and the second of two offences of receiving. Both appellants appealed against sentence.

The Kenya Appellate Court held that although the appellants put themselves forward as Europeans and elected to waive their rights to be tried as Europeans they were deemed by law to be tried under the particular provisions regulating the trial of Europeans. It accordingly declared the trials a nullity and quashed the convictions and set aside the sentences.

Held (10-1-50).—Europeans can relinquish their right to be tried under this Part of the Code by not claiming to be Europeans.

If Europeans do not claim to be such, for the purposes of Part VII of the Kenya Cr. P. C. they can relinquish their right to trial under Part VII.

(This judgment was omitted from the 1950 Reports because *Rex v. Nealm* was published.)

Appeal allowed.

Mr. K. K. O'Connor, Attorney General (Kenya), for Crown, with him Mr. B. Hobson, Solicitor General (Kenya).

Appellants absent—unrepresented.

JUDGMENT.—This appeal raises an important question of interpretation of Part VII of the Kenya Criminal Procedure Code (sections 218 to 225 inclusive). That part of the Code is headed "Special Provisions relating to the trial of Europeans". Two views of the effect of Part VII are before us. The first, the view of the trial Magistrate, is that Europeans have a right when before a subordinate Court on a criminal charge to relinquish their right to be dealt with under the special provisions relating to the trial of Europeans and to insist on being dealt with $\$bv\$$ the ordinary procedure $\$ \quad \text{of } \quad \$$ the subordinate Court. The second view, the view embodied in the judgment of the Supreme Court now under appeal to this Court is that Europeans appearing before a subordinate Court on a criminal charge may not relinquish their right to be dealt with as Europeans but are bound to be tried in accordance with the special provisions relating to the trial of Europeans enacted in Part VII of the Criminal Procedure Code.

It has been suggested in the Supreme Court judgment that the established practice in Kenya is in accordance with the second of the two views to which

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we have referred. The question we have to decide in this appeal, however, is not what the local practice is or has been, but, what in law it must be. That question depends upon a correct construction of Part VII of the Criminal Procedure Code:

The learned Attorney General has argued before us that Part VII of the Criminal Procedure Code must be construed as a whole. We accept that proposition as one of the cardinal principles of legal interpretation, and with respect, we consider that this principle was not present to the minds of the learned Judges in the Court below in their examination of the law involved in the case. Their Lordships' judgment does not make it clear that the exact enactments contained in Part VII were closely examined, and a close examination of these enactments is essential to a

correct view of the law. We find it necessary now to make that close examination.

The first question within Part VII is section 218, and we think, with respect, that the judgment of the Supreme Court must be based upon a misconception as to the effect of section 218. It is quite true that the operative part of section 218 seems to lay down that where a European appears before a subordinate Court, certain procedure shall be followed. In the operative part of section 218 there is no suggestion of any option in the European concerned. But, as we have premised on general principles of interpretation, Part VII must be construed as a whole. Moreover, section 218 actually opens with the words "save as hereinafter provided". Before any effect can be given to the operative part of section 218 the following section in Part VII must be closely examined to see whether, by any of these, the general mandatory part of section 218 is altered or modified.

Quite plainly section 219 alters or modifies or reduces the mandatory effect of the general mandatory part of section 218, but, it is not suggested that any of the sub-sections of section 219 applies to the present case.

The important section for the purpose of our present problem of construction is section 221 which is in the following terms: \$-\$

"If an accused person does not claim to be a European when before the subordinate court before which he is tried or by which he is committed for trial, or if when such claim has been made and disallowed by the committing magistrate it is not made again before the Supreme Court, he shall be held to have relinquished his right to be dealt with as a European and shall not assert it at any subsequent stage of the same case."

Our first comment upon section 221 is that if the opening wording had been "If an accused person does not claim to be tried as a European, ..." there would have been no possibility of argument as between the two interpretations before us. The position then clearly would have been as expressed in the marginal note to section 221, namely, that the "Right to be tried as a European may be relinquished".

What precisely is the meaning in section 221 of the words: "If an accused person does not claim to be a European"? Having regard to the context in which these words appear-the whole of Part VII-we consider that the words must mean "claim to be a European" for the purpose and effect of Part VII. To give these words any other meaning would in our view be absurd. A "claim to be a European" except for the purpose and effect of Part VII would be simply nonsensical irrelevance which we are satisfied was not intended by the Legislature. In short, we consider that the actual wording of section 221 construed in proper relation to the context means precisely what the marginal note says, a right to be tried as a European may be relinquished.

If further demonstration of this interpretation were necessary we might point out that "any accused person" in section 221 must include an accused person who is in fact a European, so that the section clearly intends that a European may, by failing to make a definite claim, relinquish his right to be tried as a European under Part VII.

The terms of section 224 further confirm that our interpretation of section 221 is the correct one. Sections 221 and 224 read together make it manifest that a claim is necessary before an accused person can be dealt with as a European under Part VII and that the claim must be a claim to be dealt with as a European under Part VII.

Coming to the particular facts of this case as revealed by the record of the proceedings in the Magistrate's court we would point out that no claim was made by the appellants. They did not claim to be "Europeans" for the purposes of Part VII. There was no evidence led to prove that they were Europeans. The magistrate apparently assumed, possibly from their physical appearance, that they were **in fact** Europeans and then—in our view quite properly—the Magistrate explained that under section 221 by not **claiming** to be Europeans for the purpose and effect of Part VII they could relinquish their rights to be tried as Europeans under Part VII and quite expressly they did so relinquish their rights, whereupon the Magistrate, quite rightly in our view, proceeded with the trial in the ordinary way.

The learned Attorney General was at considerable pains to examine before us the Indian decisions on the corresponding law in India as to trial of Europeans; but, owing to the differences in the wording of the relative Indian law, we prefer to base our judgment not on Indian decisions but on simple logic and the plain English of the Kenya Criminal Procedure Code as we have done.

Taking that view of the case we allow the appeal, set aside the judgment of the Supreme Court and restore the convictions and sentences of the Magistrate. We remit the case to the Supreme Court with a direction that the appeals against sentences only be considered and decided on their merits.

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