

UGANDA / JUDGMENT

Rex v Amina and Another (Criminal Appeals Nos. 259 and 260 of 1948 Consolidated) [1949] EACA 29 (1 January 1949)

[1949] EACA 29**COURT**

East African Court of Appeal

BEFORE

Edwards CJ, Graham Paul CJ, Nihill P

CASE / FILE NUMBERCriminal Appeals Nos. 259 and 260 of 1948
Consolidated

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COURT OF APPEAL FOR EASTERN AFRICA**Before SIR BARCLAY NIHILL, C. J. (Kenya), SIR G. GRAHAM PAUL, C. J. (Tanganyika). and EDWARDS, C. J. (Uganda)****REX, Respondent (Original Prosecutor)** **$\mathbf{v}$** **(1) AMINA D/O ABUBAKER AND (2) HUSSEIN MOHAMED MOTI,**

Appellant (Original Accused Nos. 1 and 2)

Criminal Appeals Nos. 259 and 260 of 1948 Consolidated

(Appeal from decision of H. M. Supreme Court of Kenya)

Criminal law—Increase of Rent and Mortgage Interest (Restriction) Ordinance. 1940—Section 13 (2): Requiring payment of a premium in addition to rent for the grant of a tenancy-Section 8: Accepting excess rent-When an accused charged as aider and abettor may not be convicted.

The appellants Nos. 1 and 2, wife and husband respectively, were jointly charged in the Resident Magistrate's Court, Nairobi, on six counts for offences against the Rent Restriction Ordinance, 1940, namely, on the first and fourth counts with requiring payment of a premium in addition to rent for granting a tenancy contrary to section 13 (2), and on the second, third, fifth and sixth counts with accepting excess rent contrary to section 8.

In each count the first appellant was charged as principal and the second appellant as aider and abettor to the offence. The Magistrate convicted the first appellant on the first count, acquitting her on all other counts, and convicted the second appellant on the first, second, fourth and sixth counts.

On a second appeal to the Court of Appeal: —

Held \$(21-2-49)\$.—(1) That an accused cannot be convicted of being an aider and abettor to an offence which has not been committed.

(2) That since the trial Magistrate had found no offences to have been committed by the first appellant on the second, fourth and sixth counts the conviction of the second appellant as aider and abettor in respect of those offences could not be sustained.

Appeals against conviction on the first count dismissed. Conviction of the second appellant on the second, fourth and sixth counts quashed and sentences set aside.

Rowley v. Rex. 32 C. A. R. 147 referred to.

D. N. Khanna for the appellants.

Modi for the Crown.

JUDGMENT (delivered by Sir Barclay Nihill, C. J.).—In these two appeals which we have consolidated the appellants appeal against a judgment of the Supreme Court of Kenya sitting in its appellate jurisdiction which dismissed their appeals against their convictions in the Resident Magistrate's Court, Nairobi, of a number of offences against the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940. This being a second appeal we are only concerned with questions of law, but the appellants have raised at least five such questions in their memorandum of appeal.

The appellants, who are man and wife, were charged on six counts, but on each count the husband was named not as a principal but as an aider and abettor to the offence alleged to have been committed by his wife. Objection was taken in the Court below and before us to the charges on the grounds of duplicity and misjoinder but, strangely enough, what we regard as a fatal objection to the conviction of the male appellant on any count other than the first count was not raised in the arguments before us and seems to have escaped

the notice both of counsel and the learned Judge who heard the appeal in the Court below. The matter arises in this way: at the conclusion of his judgment the Magistrate found the female appellant guilty only on the first count which charged her with requiring the payment of Sh. 3,000 as "key money" as a condition of a grant of a tenancy of certain premises contrary to section 13 (2) of the Ordinance. The Magistrate then found the male appellant guilty on the same count and also guilty on the second, fourth and sixth counts, the last threenamed counts being counts on which he had found the female appellant not guilty of any offence. As we have already pointed out on each count the male appellant was charged as an aider and abettor only, and it follows therefore that the Court, not having found any offences committed other than an offence on the

first count, the conviction of the appellant as an aider and abettor in respect of those offences, not found to have been committed by the female appellant, must be bad in law. In **Rowley v. Rex**, 32 Cr. A. R. 147, the Court of Criminal Appeal in England in 1948 quashed the conviction of a man who had pleaded guilty as an accessory after the fact to a felony which, because his co-accused were subsequently found not guilty, had in fact never been committed. By section 22 of the Penal Code it is expressly only "where an offence is committed" that aiders and abettors may be charged either with committing the offence or with counselling or procuring its commission. In regard to those counts in which the female accused was acquitted it cannot be said that the offence was committed and therefore the convictions of the male accused as aider and abettor on these counts cannot be sustained.

Having arrived at this conclusion it is unnecessary for us to consider in any detail the objections taken before as to the number and to the framing of the various counts except to say that we see no reason to disagree with the finding of the learned Judge in the Court below who was not prepared to hold, despite the fact that the particulars of the various offences might have been better drafted, that the irregularity, if any, could have occasioned a failure of justice in the circumstances of this case. We are left therefore to consider whether there is sufficient substance in any of the other points raised by the appellants to warrant our intervention in respect of the convictions entered against them on the first count.

Two points taken before the learned Judge in the Court below he was undoubtedly right to reject. It has already been held by this Court in the case of *Rex v. Gajjan Singh*, 14 E. A. C. A. 111, that section 4 of the Ordinance, which requires the consent of the Rent Control Board to any Court proceedings arising out of a dispute between landlord and tenant, cannot be made applicable to criminal proceedings. As regards the submission that because of the wording used in section 20 (1) of the Ordinance it ceased to operate on the date when active hostilities between the United Kingdom and Germany came to an end, namely 8th May, 1945, we approve and adopt the reasons given by the learned Judge for his refusal to entertain this ingenious plea. Although it may seem surprising that either the draftsman or the Legislature should have been content to allow the operation of the Ordinance to depend on so loose a phrase as "one year after the war", we are certainly not prepared to say, in the absence of pronouncement, that a state of peace, as understood by international law, now exists between the United Kingdom and Germany. His Majesty's forces are still in military occupation of a part of Germany and no treaty of peace has as yet been concluded between the two countries. Questions raised in the courts on the construction of such phrases as "duration of the war" in contractual instruments are quite a different matter, and have to be decided on the facts of each case and the intention of the parties. Furthermore, it is a fact well known to all that the circumstances which gave rise to this legislation, which were themselves a product of the war, are still present in the Colony. We might add that this view is supported by the fact that when the Government of Kenya decided that the time had come to repeal the Courts (Emergency Powers) Ordinance, 1944, the Governor did not, as he might have done under section 1 (2) of that Ordinance (Ordinance XI of 1944), issue a proclamation declaring the war to be at an end, which would have had the effect of terminating the operation of the Ordinance. Instead the Legislature enacted a special Ordinance of repeal (Ordinance 65 of 1948).

We now come to a point which appeared in the memorandum of appeal both before us and in the Court below but which has not been dealt with directly by the learned Judge in the judgment appealed against. Mr. Khanna has argued with much emphasis that the charges against the appellants were misconceived because the female appellant is not in fact the landlord of the premises. In the sense that she is not the registered owner this is true, but in the light of the document (Exhibit 1) we have no hesitation in saying that she comes within the expression "landlord" as defined in section 2 of the Ordinance, viz.:

"The expression 'landlord' also includes in relation to any dwellinghouse any person, other than the tenant, who is or would but for the provisions of this Ordinance be entitled to possession of the dwellinghouse"

By Exhibit 1, which is an agreement between the female appellant and the real owner, the former was given possession of the premises and she had in fact exercised the right of putting in tenants. She was in fact the ostensible owner because she exercised all the *indicia* of ownership without being the real owner. She had a status which the expression "landlord" as defined must have been intended to cover and which in our opinion it does cover.

One further point remains which again is a point not raised or pressed in the Court below. It is contended that both the tenants who paid the "key money" and extra rent were the accomplices of the appellants, that the Magistrate never directed his mind to this aspect of the matter and to the necessity for finding corroboration of their evidence, and that if he had done so, in the light of the general dissatisfaction which he expressed in his judgment on the evidence as a whole, he would not have found it. The argument as we understand it is, that in offences such as those with which the appellants were charged, it required the co-operation of a second person to constitute the offence, and that a person, who for his advantage is prepared to give "key money" or rent in excess of that allowed by law is an aider and abettor within the meaning of section 22 of the Penal Code. So far as this argument is directed towards the first count, which is the only one with which we are now concerned, it must fail. The offence set out in this count is that of "requiring" the payment of a premium and there is nothing on the record to show that the would-be tenants "counselled or procured" the appellant to make a demand of them for premium. How could they then be "deemed to have taken part in committing an offence" from which they were destined to be not beneficiaries but victims? We go further and say that we decline to hold as a general proposition that a tenant, who because of his anxiety to obtain or retain living accommodation succumbs to some illegal exaction made by his landlord, is thereby an accomplice to the offence committed by the landlord. It is significant that whereas under the Ordinance it is an offence for a landlord to require or accept "key money" or to accept rent in excess of the standard rent, it is not correspondingly made an offence for a tenant to pay "key money" or excess rent. The background of, and the reason for, this legislation was the fact that owing to war conditions there was a house famine. The Legislature in those circumstances made it an offence for rapacious landlords to exploit the position by exacting premiums or excessive rent from "house-hungry" tenants but deliberately refrained from making it an offence in such a tenant to succumb to the landlord's rapacity. That being so, we do not think that section 22 of the

Penal Code can properly be used to defeat this intention of the Legislature that the tenant should not be punished in respect of an offence under this special legislation. Doubtless a

case might arise where the evidence showed that the inducement and instigation to commit an offence came directly from the tenant or would-be tenant, but such a case can remain to be decided on its own facts. On the case before us we are more than satisfied that the tenants were not **particeps criminis** in the actions of the appellants. True both of them, we believe, stated in evidence that they were aware that an illegal demand was being made on them, and so in case it could be urged that by the facts that they were prepared to condone illegality they have shown themselves to be persons of indifferent character, we would add that in so far as the conviction on the first count is concerned there was evidence of a corroborative character before the Magistrate which supported the evidence of the two tenants. Apart from certain book entries on which the Magistrate appeared to rely when accepting the evidence of the tenant Nagajan Sisodia (P. W. 17) there was the evidence of Jivram Dave (P. W. 10) who deposed to being present on an occasion when the illegal premium was asked for and arranged. It has been urged on us that because the Magistrate remarked in his judgment "perhaps at times there has been shocking lying on both sides" it is not possible for us to discover what parts of the evidence he in fact accepted. He did, however, come to the conclusion that the sum which forms the subject-matter of the first count was in fact paid and we can assume therefore that he accepted so much of the prosecution evidence which was led to establish that fact. There was evidence before the Magistrate on which he was entitled to convict the female appellant on the first count and the male appellant as her aider and abettor and it follows therefore that her appeal and the appeal of the male appellant so far as the first count is concerned must be dismissed. We also affirm the Magistrate's order in respect of the female appellant, namely that she be bound over to come up for sentence within three years under section 340 of the Criminal Procedure Code and the order to pay Sh. 500 costs under section 171 (1). In respect of the male appellant we affirm the Magistrate's order in respect of the fine of Sh. 2,000 or three months' imprisonment with hard labour in default and the order made under section 13 (a) of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, that he repay to the persons entitled the sum of Sh. 3,000. We also affirm the Magistrate's order as regards costs, namely Sh. 500. On the second, fourth and sixth counts we quash the convictions entered against the male appellant and we set aside the various sentences and orders made, and direct that any sums already paid out by him in respect thereof shall be repaid to him.

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