

UGANDA / JUDGMENT

Rex v Banyanga (Cr. App. No. 167/1937) [1938] EACA 42 (1 January 1938)

[1938] EACA 42

COURT

East African Court of Appeal

BEFORE

Francis, Ag. C.J. (Uganda), Lane, Ag. J, Law, C.J
(Zanzibar), Sheridan, (C.J. Kenya)

CASE / FILE NUMBER

Cr. App. No. 167/1937

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COURT OF APPEAL FOR EASTERN AFRICA**Before SIR JOSEPH SHERIDAN, C. J. (Kenya); SIR CHARLES LAW, C. J. (Zanzibar); FRANCIS, Ag. C. J. (Uganda); and LANE, Ag. J. (Kenya).****REX, Respondent (Original Prosecutor)****KIZA s/o BANYANGA, Appellant (Original Accused)****Cr. App. No. 167/1937****(From H. M. High Court of Tanganyika)**

Murder—Extended jurisdiction—Revision—Retrial—Appeal—Order detrimental to accused—Criminal Procedure Code (Tanganyika), secs. 12 (3), 16, 17, 18, 317.

The appellant appealed from a conviction of murder in a retrial ordered by the High Court of Tanganyika exercising its revisional jurisdiction when the case came before it for confirmation of a death sentence passed by a Court in the exercise of extended jurisdiction. The appellant had no opportunity to appear or be heard in the revision proceedings.

Held (29-1-38).-That the order for retrial made on revision was an order to the prejudice of the accused and the accused not having been given an opportunity of being heard, the order cannot support the second trial. The conviction and sentence in that trial must be quashed, the effect of which is that the conviction and sentence passed in the trial held in the exercise of extended jurisdiction are restored, thereafter the case to come before the High Court for confirmation under section 16 or for the making of such order as may be deemed advisable in revision bearing

in mind that the accused or his advocate must be given an opportunity of being heard before an order is made to his prejudice.

Trivedi for the appellant.

Branigan, Acting Solicitor General (Tanganyika) for the Crown.

JUDGMENT (delivered by Sir Joseph Sheridan, C. J.).—This is an appeal from a decision of the High Court of Tanganyika in a re-trial which was ordered by the High Court exercising its revisional powers when the case came before it for confirmation of a death sentence passed by a Court in the exercise of extended jurisdiction. The learned Acting Solicitor General at first argued that the order of the High Court directing a new trial could not be upheld and that consequently the re-trial which took place before Mr. Justice McRoberts should be set aside as it was based on an order which was made without jurisdiction. He submitted that the absence of jurisdiction was due to the High Court having no revisional powers in cases which came before it under section 16 Criminal Procedure Code (Tanganyika). On his attention being attracted by the Court to the case of *Rex v. Kamunan s/o Bulyeye* (2 E. A. C. A. 122), and the original record of the proceedings in this Court from which it appeared that the question as to whether the High Court possessed revisional powers in such cases had been considered and decided in the affirmative, he withdrew his submission. It would appear that the same question came before the Court in the earlier case of *Rex v. Juma Mayenza* (1 E. A. C. A. 109), where it appears from the short judgment that the Court's view was that the High Court in cases coming before it from Special District Courts possessed revisional powers (the case was from Uganda, but the legislation on the point is similar to that in force in Tanganyika).

The learned Solicitor then submitted, on the assumption that the High Court possessed revisional powers, that the particular order was bad for the reason that it was an order by which the accused was prejudiced, and was made without his being given an opportunity of being heard. The relevant section provides that, "No order shall be made to the prejudice of an accused person unless he has an opportunity of being heard either personally or by an advocate in his own defence". The particular prejudice alleged was that by the making of the order for a new trial the accused's right of appeal to this Court was taken away. But it has to be considered whether at the time the order was made there existed any such right of appeal. Turning to section 17 of the Criminal Procedure Code we find that the accused's right of appeal does not arise until after the sentence of death has been confirmed by the High Court. In the present case the sentence was not confirmed, the High Court deciding to exercise its revisional powers and order a new trial.

But then it may be argued that an order in revision directing that a new trial be held is an order to the prejudice of the accused and that before such an order is made he or his Counsel should be given an opportunity of being heard. One can conceive the result of a hearing being that the High Court may decide to confirm the sentence (in which case there is a right of appeal to the Court of Appeal) or alter the finding and sentence or make some other order to his advantage. Such being so, it cannot be said that the accused is not prejudiced by not having had a hearing. We agree with the learned Solicitor that in judging the question of prejudice we are not entitled to

speculate and say that if the first trial were allowed to stand the accused would probably have his appeal dismissed. In our opinion, therefore, the order of Mr. Justice Wilson being an order to the prejudice of the accused and the accused not having been given an opportunity of being heard the order cannot support the second trial. The consequence is that the conviction and sentence in that trial must be quashed, the effect of which is that the conviction and sentence passed in the trial held in the exercise of extended jurisdiction are restored, thereafter the case to come before the High Court for confirmation under section 16 or for the making of such order as may be deemed advisable in revision bearing in mind that the accused or his advocate must be given an opportunity of being heard before an order is made to his prejudice.

While we have no intention of fettering the High Court when this case comes before it once more, because of the importance of the question at issue we are of the opinion that the Attorney General should be given an opportunity of being heard and arguing the question as to whether the absence of a prosecutor in a case tried in the exercise of extended jurisdiction or indeed in any case should have the effect of nullifying the proceedings. We also think that Counsel might be assigned to the accused when the case once more comes forward. We should like to say that we are not prepared to subscribe to a dictum that in every case the absence of a prosecutor must have the result of vitiating the proceedings.

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Prepared on 13 October 2026 · Esheria