

UGANDA / JUDGMENT

Rex v Bayanga (Cr. App. No. 50/1938)

[1938] EACA 56 (1 January 1938)

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COURT

East African Court of Appeal

BEFORE

Gamble, J. (Uganda), Sheridan, (C.J. Kenya),
Whitley CJ

CASE / FILE NUMBER

Cr. App. No. 50/1938

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COURT OF APPEAL FOR EASTERN AFRICA**Before SIR JOSEPH SHERIDAN, C. J. (Kenya); WHITLEY, C. J. (Uganda); and GAMBLE, J. (Uganda)**

REX, Respondent (Original Prosecutor)

KIZA BAYANGA, Appellant (Original Accused) Cr. App. No. 50/1938

(Appeal from decision of 1st Class Subordinate Court of Mwanza, Tanganyika)

Criminal Law—Absence of prosecutor—Validity of trial.

The appellant appealed from a conviction of murder by the First Class Subordinate Court of Mwanza in its extended jurisdiction. There was no prosecuting officer at the trial.

Held \$(6-5-38)\$.—That absence of a prosecutor at a trial does not of itself vitiate the proceedings.

Appellant, absent, unrepresented.

Mathew, Crown Counsel (Uganda), for the Crown.

JUDGMENT (delivered by Whitley, C. J.).—The appellant in this case was convicted of murder by the Magistrate of the First Class Subordinate Court of Mwanza in its extended jurisdiction and the conviction was confirmed by the learned Chief Justice of Tanganyika. We agree with him that there was ample evidence to support the conviction. In his judgment he referred to the fact that at the trial before the Magistrate there was no prosecuting officer and to the question which had been raised at one stage as to whether such absence of a prosecutor might not have the effect of vitiating the trial. Counsel for the appellant informed the Chief Justice that he did not rely upon that point as no prejudice had been caused to the appellant and consequently the point was not

argued.

Before us however Crown Counsel suggested that the absence of any prosecutor at the trial may have the effect of rendering the trial a nullity. He referred us to the authorities and we have no hesitation in ruling that the mere absence of a prosecutor does not of itself vitiate the proceedings. If a Judge or Magistrate takes upon himself to examine the witnesses he does not thereby constitute himself a prosecutor. One of the members of this Court recollects an occasion in England when a Judge did so examine the witnesses rather than hold up a case in the unavoidable absence of counsel and it was never suggested that that was other than a proper course.

It is true that in *Rex v. Page* (2 Cox C. C. 221) a case tried at the Reading Assizes, Maule, J., expressed the opinion that it was unfair to throw upon him the burden of making out the case from a perusal of the depositions but we do not consider that that case goes further than to show that it is desirable if possible that counsel should be instructed to prosecute at Assizes. In *Rex v. Stoddart*, Dickinson's Quarter Sessions 122, 476 referred to in the footnote to *Rex v. Gurney* (11 Cox C. C. 422) Lord Tenterden made the following observations:

"We have at every assizes, and under every commission of gaol delivery in London, at every court of quarter session holden throughout the country, a great number of prosecutions, instituted certainly by private individuals, in which the name of His Majesty is used; but in none of them is it even thought that the person prosecuting has a right to address the jury. The course taken on every occasion of a criminal prosecution is, where there are depositions, that the Judge refers to them, and examines the witnesses one by one, according to those depositions. Where there are no depositions as in cases of this description, it has been usual for the Judge to consult the person prosecuting as to the manner of bringing his case before the court, and as to the witnesses proper to be examined".

If that is a proper course to be taken in a private prosecution. we can see no reason why it should be regarded as improper in a public prosecution. Obviously it is preferable that there should be a prosecuting officer to conduct the case wherever possible but occasions do arise when none is available and we should in the absence of definite authority be reluctant to hold that on such occasions when witnesses are assembled, possibly from long distances, it would be illegal to proceed with the case without a prosecutor.

There is of course a distinction between the cases referred to by Lord Tenterden and the present one in that there was a jury and here we have none, but it seems to us that the same principle must apply and that so long as the accused is not embarrassed or prejudiced there can be nothing inherently wrong in a trial without a prosecuting officer.

In the present case for the reasons we have stated, we decide that the absence of a prosecutor did not have the effect of rendering the trial a nullity.

The appeal is dismissed.

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