

UGANDA / JUDGMENT

Rex v Bulejeya (Criminal Appeal No. 68/1935.) [1935] EACA 122 (1 January 1935)

[1935] EACA 122

COURT

East African Court of Appeal

BEFORE

Law, C.J (Zanzibar), Lucie-Smith Ag CJ (Kenya),
Sheridan, J. (C.J. Kenya)

CASE / FILE NUMBER

Criminal Appeal No. 68/1935.

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

COURT OF APPEAL FOR EASTERN AFRICA.

Before SIR JOSEPH SHERIDAN, C. J. (Kenya); LAW, C. J. (Zanzibar) and LUCIE-SMITH, J. (Kenya).

REX, Respondent (Original Prosecutor)

KAMUNAN s/o BULEJEYA, Appellant (Original Accused). Criminal Appeal No. 68/1935.

Criminal Procedure—Trial by Special District Court—Revision— Conviction quashed for irregularities in procedure-Order "that accused be now tried by a Court of competent jurisdiction"-Re-trial-Criminal Procedure Code (Uganda) section 309(1)\$.

The appellant was tried and convicted of murder by a Special District Court. Upon the case coming before the High Court for revision under section 16 of the Criminal Procedure Code, the Acting Chief Justice made the following Order:-

"From the record of this case I have come to the conclusion that the accused has not had a satisfactory trial and that a retrial must be ordered...

At the close of the case for the prosecution the Magistrate does not from his record appear to have taken into account the requirements of section 269 of the Criminal Procedure Code as amended by Ordinance 7/1934\$. The alternatives open to the accused, namely that of making a statement from the dock not on oath and therefore not subject to cross-examination, or of giving evidence on oath so subject, or of saying nothing at all were not put to the accused. Neither is it clear from the record whether the accused was asked if he wished to call any witnesses, from the record it would seem that something was said to the accused about bringing evidence, but the

record is far from satisfying the very clear wording used in section 269 (1) of the Criminal Procedure Code, viz. "the Court shall ... in all cases require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself. Upon being informed thereof the Judge shall record the same."

... Further in addition to these errors of omission, the trial magistrate appears to have almost forced the accused into the witness-box. The accused is recorded as having said: "I only wish to say the following", he was then put on his affirmation and subsequently cross-examined by the Court. There is nothing in the words of the accused I have quoted to show that he had assented to subject himself to cross-examination. I know that with accused persons of a primitive type it is not

easy to explain to them the difference between a statement and sworn or affirmed evidence, but with patience it can be done. In this case I am not satisfied that it was even attempted.

I now come to a further point which concerns the presentation of the case for the prosecution. Before the Committing Court the accused on committal made a long statement. This was not put in as evidence at the trial. In this connection I would refer to High Court Circular No. 9 of 1933 of 24th November, 1933, where it was stated specifically by ABRAHAMS, C. J. that such statements whether they assist the case for the prosecution or the defence should be given in evidence at the trial and that a note should be made on the record indicating that the statement has been admitted. The point that I wish to emphasize here however, is that as it was not put in, the trial magistrate was not entitled to refer to it in any way. He does not do so directly but the only reasonable explanation of certain statements in his judgment, is that it was in his mind and that he was treating it as part of the accused's defence; thus a point made against the accused in the judgment is that he said that he had speared his wife as she was coming in from *outside* and this is compared, to the disadvantage of the accused. with the dying statement of the woman, but the accused did not say this at his trial, it is contained in the statement made before the Committing Magistrate...

The point that I have to decide is whether the errors and omissions I have noted above so go to the root of the matter as to make this trial a nullity. It may be that the accused was not in fact prejudiced by these errors, the magistrate appears to have taken pains to enquire into any points likely to be in favour of the accused... But whether the accused has in fact been prejudiced or not I am satisfied from the record of this case that the charge against him was not inquired into and tried in the manner prescribed for the trial of such offences by the High Court (vide section 15 of the Criminal Procedure Code) and I am therefore unable to confirm the sentence imposed.

This matter has come before me for confirmation of death sentence in pursuance of section 16 of the Criminal Procedure Code, but I exercise in regard to it the revisional powers given to the High Court by section 317 of the Criminal Procedure Code.

I order that the accused be now tried by a Court of competent jurisdiction according to law."

The appellant was again tried and convicted. On revision the Chief Justice of Uganda confirmed the conviction with the following observation: —

"This was a retrial ordered by the Acting Chief Justice owing to irregularities in the previous trial. He said: "I order that the accused be now tried by a Court of competent jurisdiction according to law."

Clearly, the learned Acting Chief Justice was acting on the words "or order him to be tried by a Court of competent jurisdiction" contained in section 309 (1) (a) (i) Criminal Procedure Code. The local Appeal Court of Uganda has recently (since the order of the Acting Chief Justice *supra*) ruled that the words "or order him to be tried by a court of competent jurisdiction" do not confer the power to order a retrial, but only refer to such a position as, when a conviction was recorded by a Court without jurisdiction, then an order can be made for a trial by a competent court. Strength is lent to this view by a perusal of section 423 Indian Penal Code (Sohoni 13th Ed. 891). Our section 309 is obviously based on section 423 and, therein, the words are "order him to be retried by a court of competent jurisdiction (see notes to sections 423, 46 and 47).

I am now dealing with this case on confirmation and revision (section 11 (2) Criminal Procedure Code), and I am doubtful whether, despite the ruling of the Court of Appeal, in the circumstances obtaining, I have power to reverse the order of a Judge of concurrent jurisdiction in the same case.

I consider, therefore, that the proper course is that the convicted person be advised to appeal to the Court of Appeal for Eastern Africa and to make the question of the jurisdiction of the convicting Court a ground of appeal. Care should be taken to see that these notes form a part of the record of appeal to be put before the aforesaid Court of Appeal."

The appellant appealed on the ground (*inter alia*) that the jurisdiction of the convicting Court was, in view of the previous trial, invalid.

Held (12-8-35).—That the words of section 309 (1) of the Criminal Procedure Code (Uganda), which provide that the Court may order the accused "to be tried by a court of competent jurisdiction", should not be construed as being limited to cases where the first proceedings were held without jurisdiction.

(Appeal dismissed. Decision in *\$R\$. v. Cheresio* (Uganda Cr. App. \$10/1935\$) over-ruled.)

Appellant absent unrepresented.

Lewey, Crown Counsel, for the Crown, referred to Indian Criminal Procedure Code, section 423 and *Satis Chandra Das Bose v. Queen-Empress* (27 Cal. 172).

JUDGMENT.—This is an appeal from the High Court of Uganda. The first point raised for our consideration is whether an order made by the learned Acting Chief Justice in the terms "I order that the accused be now tried by a Court of Competent Jurisdiction according to law" is a valid order in the circumstances that the conviction and sentence in the previous trial were quashed on the ground of irregularities. In confirming the

†

$\overline{\{1\}}$

sentence of death which was passed in the trial which was ordered by the learned Acting Chief Justice, the learned Chief Justice said that although the High Court of Uganda in the exercise of its Appellate Jurisdiction in *R. v. Cheresio* (Uganda Cr. App. 10/1935) had held that an order such as was made by the learned Acting Chief Justice was invalid, he doubted whether he had power to reverse the order of the learned Acting Chief Justice; he added: "I consider therefore that the proper course is that the convicted person be advised to appeal to the Court of Appeal for Eastern Africa and to make the jurisdiction of the convicting Court a ground of appeal". This the appellant has done in the ground of appeal "That the jurisdiction of the convicting Court was, in view of the previous trial, invalid". Reverting to the decision of the High Court of Uganda in *R. v. Cheresio* (supra) the learned Judges on the issue in question said "Mr. Mathew has asked this Court to order a re-trial under section 309 (1) (a) (c) of the Criminal Procedure Code referring to the words "order him to be tried by a Court of competent jurisdiction." In our opinion, these words do not confer a general power of re-trial but only permit of such an order being made when the previous trial has been held with lack of jurisdiction. Section 309 of the Criminal Procedure Code is as the learned Chief Justice said in his confirmation order based on section 423 of the Indian Procedure Code.

In an appeal from a conviction if the appellate Court reverses the finding and sentence there are four courses open to it under section 309 (a), viz. 1, acquit the accused; 2, discharge the accused; 3, order him to be tried by a Court of Competent Jurisdiction; 4, commit him for trial.

No. 1 requires no comment except to say that the accused is a free man in the widest sense of the word. No. 2 refers to a case where the trial has been a nullity by reason, for instance, of lack of jurisdiction. In such a case the Crown is free to proceed de novo without an order of the Court. No. 3 in our opinion refers to a case where the accused has been in peril before a Court of competent jurisdiction but where a new trial is ordered by reason of, for instance, irregularities or the misreception of evidence. We cannot find any good reason for construing (3) as limited to a case where the first proceedings were held without jurisdiction. In such a case, as we have said, the proper order is one of discharge, an order which leaves the Crown, as we have said, free to proceed de novo. But where there has been a trial before a Competent Court in which the finding and sentence have been reversed the Crown should not in our opinion be free to proceed again unless a new trial were ordered. We cannot understand why the use of the word try rather than re-try should make any difference in construing the section; the section purports to set out the four courses, any

one of which may be ordered by the Appellate Court on the reversal of a finding and sentence, namely acquittal, discharge, trial, committal for trial. If an order for a trial were to be limited to cases where the first proceeding were had without jurisdiction one would logically have to place the same limited construction on an order of committal for trial. And we are reinforced in this view when we consider the provisions for directing the taking of further evidence in section 312 which can only have reference to a case which has been tried with jurisdiction.

As we understand the argument contrariwise it is this: the words "order him to be tried by a Court of competent jurisdiction" connote that the first proceedings were held without jurisdiction and are only referable to such a case. If that were sound we suggest that the words "order him to be retried by a Court of competent jurisdiction" appearing in section 423 Indian Criminal Procedure Code should be read as referring to a case where the first proceedings were held with jurisdiction but that the finding and sentence were reversed for other reasons, such as irregularities, for it is obvious that retrial is an inapt expression where the first proceedings were held without jurisdiction—in other words where there was no trial. And yet the expression retrial under section 423 Indian Procedure Code has not been so construed; we refer to the case *Satis Chandra Das Bose v. Queen Empress* (27 Cal. 172) in which it was held by RAMPINI and PRATT JJ. that there is nothing in section 423 \$(b)\$ of the Code limiting the power of an Appellate Court to order a re-trial, whether the first proceedings were held with or without jurisdiction. The contention was that the power to order a re-trial was confined to a case where the conviction and sentence were set aside for want of jurisdiction. In the case before this Court a new trial was ordered by NIHILL, Ag. Chief Justice, on the grounds that the accused had been so gravely prejudiced by irregularities and omissions that he was not prepared to confirm the finding and sentence. He said: "From the record of this case I have come to the conclusion that the accused has not had a satisfactory trial and that a re-trial must be ordered" If the learned Ag. Chief Justice had been of the opinion that the omissions and irregularities were of such a character that they could have been cured by "any amendment or any consequential or incidental order that may appear just and proper" (section 309) (1) (b)) his authority to make such an order would not be in question, or if he thought further evidence should be taken under section 312 his action would have been competent. Why then should his action be considered invalid in directing The words of the section are in our opinion a new trial? susceptible of the meaning for which the Crown contends and such is the meaning given to the same words in a similar section in the Kenya Code. What was to happen in the case? It was

$\mathbf{I}$

tried in such a manner that he decided he could not confirm the finding and sentence. The order of the learned Ag. Chief Justice in our opinion was perfectly valid.

As for the merits of the case, the appellant before the trial Court stated that he killed his wife in the belief that she was a thief. This defence, which was not raised in his statement before the committing magistrate, was rejected by the trial magistrate and the learned Chief Justice and there is no reason for our taking a different view. The appeal is dismissed.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/aa/judgment/eaca/1935/122/eng@1935-01-01>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/rex-v-bulejeya-criminal-appeal-no-681935-1935-eaca-122-1-january-1935-unknown-topic-unknown-court-1935>

Prepared on 14 October 2026 · Esheria