

UGANDA / JUDGMENT

Rex v Bux (Criminal Appeal No. 239 of 1947) [1947] EACA 67 (1 January 1947)

[1947] EACA 67

COURT

East African Court of Appeal

BEFORE

De Lestang J, Nihill, C.J

CASE / FILE NUMBER

Criminal Appeal No. 239 of 1947

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APPELLATE CRIMINAL**Before NIHILL, C. J., and DE LESTANG, J.****REX, Respondent (Original Prosecutor)****AHAMED DIN S/O MOHAMED BUX, Appellant (Original Accused)****Criminal Appeal No. 239 of 1947****Criminal Procedure—Recall of witness.**

The prosecution asked and obtained the leave of the Court to recall a witness after he had given evidence though before the close of its case.

Held (15-9-47).—That this was a matter for the discretion of the Court.

B. Figgis for the Appellant.

Holland, Crown Counsel, for the Crown.

JUDGMENT.—The short point for our consideration in this appeal is whether the Magistrate was justified in allowing the prosecution to recall their main witness in the face of a strong objection lodged by the defence. The witness in question, Mr. Wilkie, had given evidence in chief to establish that a generator found on the premises of the appellant was in fact a generator recently stolen from an engine in the possession of the Construction Company, Nairobi. Counsel for the appellant at the hearing elicited in cross-examination of this witness admissions which somewhat detracted from the value of his evidence on the question of identification. The re-examination of this witness was confined to one question which did little to rehabilitate him.

Later in the hearing, but before it had closed its case, the prosecution asked leave to recall Mr. Wilkie, which was granted. Mr. Wilkie then came out for the first time with an explanation that the red paint, to which he had referred in his first examination, was there on the generator, because the position in which it was attached to the engine prevented the green paint spray or brush reaching that part of the generator. It was surprising that this fact was not elicited from Mr. Wilkie when he was first called as it was certainly a point needed by the prosecution engaged on the difficult task of proving that the generator found in the possession of the appellant (which was not of an uncommon type) was in fact the generator stolen from the Construction Company.

Mr. Figgis, for the appellant, has submitted that if a prosecution be permitted to recall a witness shaken in cross-examination to give further or fuller evidence of facts which must have been known or should have been known at the time he gave his original evidence in chief, grave prejudice can thereby be occasioned, and the length of criminal proceedings will be inordinately prolonged. Mr. Figgis was not able to cite to us any authority in support of the proposition that it is improper for the Court to allow a witness for the prosecution to be recalled before, the prosecution closes its case and we ourselves have not been able to find one. Many of the cases we have examined stress that it is only in special circumstances that the Court will permit the prosecution or a plaintiff to recall a witness once the case against the other party has been closed, which suggests that an application to recall a witness before the closing of a case will not ordinarily be rejected. In Taylor on Evidence, 1920 Edition, Volume II, para. 1477, it is stated: "If a question has been omitted in the examination in chief and cannot, in strictness, be asked on re-examination as not arising out of the cross-examination, it is usual for the counsel to request the Judge to make inquiry, and such a request is generally granted". Again at the beginning of the same paragraph: "The Judge always has a discretionary power, with which the Court above is very unwilling to interfere, of recalling witnesses at any stage of the trial and of putting such

questions to them as the exigencies require. He will seldom, however, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact, though the application will in general be entertained if made before the closing of the plaintiff's case". The point appears even clearer in Phipson on Evidence (Seventh Edition, p. 467): "So the Judge may at any stage of the trial, either at his own instance or that of a party, recall a witness (including the prisoner, R. v. Seigley, 6. C. A. R. 106) for further examination or cross-examination, though after a party's case is closed this will only be allowed in special circumstances".

The opinions in the text books we have quoted find reflection in section 150 of the Criminal Procedure Code which, if anything, goes further in the discretion it places on the Court to recall a witness at any stage of the trial if it appears essential to a just decision of the case. The proviso to the section which gives a right of cross-examination in cases where a witness is recalled by the Court shows that it is contemplated that a witness so recalled may adduce fresh evidence either for the prosecution or the defence. It is clear therefore to us that in the instant case the Magistrate had a discretion to allow the witness to be recalled, and that it would be improper for the Court to question that discretion seeing that the recall of the witness took place before the

prosecution had closed its case. Neither are we prepared to concede that prejudice was occasioned to the defence by the Magistrate's decision. His counsel did not cross-examine on the fresh evidence, and the witness had already stated in his evidence in chief that he had no doubt whatever that it was the generator which had been removed from the engine. All that the fresh evidence furnished was an additional reason for that belief which cross-examination might or might not have shaken. On this point therefore we cannot accept the contention of the appellant and we are left to consider whether the evidence as a whole was sufficiently conclusive to enable the Magistrate to find that the generator was the generator stolen from the complainant's engine. We are of opinion that the evidence of Mr. Wilkie, who can be classed as an expert and which was so emphatically expressed, cannot be disregarded and that on this evidence the Magistrate was justified in his finding. On this finding the explanation given by the appellant was obviously untrue, and this, coupled with the presence in the accused's premises of other motor parts which in our view the evidence sufficiently proves to have been stolen, establishes without reasonable doubt his guilty knowledge.

The memorandum of appeal has also raised the question of sentence. It is urged that this Indian trader, who has no previous convictions, has been too harshly dealt with, but in view of the prevalence of this type of theft for which receivers provide a ready market, we cannot say that the Magistrate has imposed a sentence so excessive in character as to require review by this Court.

The appeal is dismissed.

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Prepared on 13 October 2026 · Esheria