

UGANDA / JUDGMENT

Rex v Kayongo (Criminal Appeal No. 163 of 1943) [1943] EACA 38 (1 January 1943)

[1943] EACA 38

COURT

East African Court of Appeal

BEFORE

Sheridan CJ, Webb CJ, Whitley CJ

CASE / FILE NUMBER

Criminal Appeal No. 163 of 1943

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR JOSEPH SHERIDAN, C. J. (Kenya), SIR NORMAN WHITLEY, C. J. (Uganda), and SIR HENRY WEBB, C. J. (Tanganyika)

REX, Respondent (Original Prosecutor) v.

BEREZERI KAYONGO s/o YOSIA MUSISI, Appellant (Original Accused) Criminal Appeal No. 163 of 1943

Appeal from decision of H. M. High Court of Uganda

Law—Murder—Manslaughter—Provocation—Resistance lawful Criminal to arrest.

The appellant was convicted of manslaughter, but appealed against the sentence of five years imprisonment with hard labour. The prosecution applied for enhancement of the sentence. The facts are sufficiently set out in the judgment of the Court of Appeal.

Held \$(25-10-43)\$ —(1) When a person has without legal excuse or justification violently assaulted another person, his apprehensions, as to what is likely to happen to him on his being arrested cannot be accepted in a Criminal Court as a justification for killing or violently assaulting those who are engaged in the duty of lawfully arresting him.

(2) Upon the facts before the Judge the appellant should have been convicted of murder.

Appeal dismissed and sentence increased to imprisonment with hard labour for life. Appellant absent, unrepresented.

Carnegie, Crown Counsel (Tanganyika), for the Crown.

JUDGMENT (delivered by SIR JOSEPH SHERIDAN, C. J.).—In this appeal an application has been made by the Crown for enhancement of sentence and in our opinion has been very properly made for the accused on the evidence should have been convicted of murder. The short facts of the case are that the accused in a drunken and truculent mood not only resented being asked for his number by his superior officer Lieut. Combe but proceeded to assault that officer, striking him in the face, drawing blood and leaving him in such a condition that he had to be removed to hospital. Thereupon, quite rightly, the askaris who had witnessed the conduct of the accused chased him with a view to arresting him. One of the pursuers, Kisabe, outstripped his companions and came to grips with the accused, both falling on the ground. In the course of the ensuing struggle Kisabe was fatally knifed by the accused. If this is not murder we do not know what is. Up to this time the askaris had in no way done anything more than was necessary to arrest the accused, so that any beating the accused may have received subsequently can have no bearing on the case. We are in complete agreement with the findings of the two assessors that the accused's intention was to kill. The learned Judge in finding the accused guilty of manslaughter referred to him as having been badly knocked about and said: "But as the askaris closed in upon him, he may well have apprehended grievous harm—if not death—and it is proved in fact that he had very good reason for such apprehension". If this statement is intended to mean that the severe beating from which the accused was found to be suffering was received, prior to the fatal assault on Kisabe, we need but say that there is no evidence to support it and indeed that it is contrary to the evidence of Misaki and Sgt. Juma which evidence was presumably accepted and if it is not so intended the statement is irrelevant. We would observe that in a case such as this when a native askari had just without rhyme or reason violently assaulted his superior officer his apprehensions, as to what was likely to happen to him on his being arrested cannot be accepted in a criminal court as a justification for killing or violently assaulting those who are engaged in the duty of lawfully arresting him. The interests of justice demand that the sentence imposed in this case should be enhanced to the maximum. We dismiss the appeal and increase the sentence to imprisonment for life with hard labour.

COURT OF APPEAL FOR EASTERN AFRICA

Before Sir Joseph Sheridan, C. J. (Kenya), Sir Henry Webb, C. J. (Tanganyika) and SIR NORMAN WHITLEY, C. J. (Uganda)

REX. Respondent. (Original Prosecutor)

(1) KAYANDA alias MSILA s/o MKUYU, (2) HAMISI s/o KAFIZI, (3) KUBOLELWA s/o MUBANGA, Appellants (Original Accused)

Nos. 1, 2 and 3)

Criminal Appeals Nos. 173, 174 and 175 of 1943 (Consolidated)

Appeals from decision of H. M. High Court of Tanganyika

Evidence—Confession of co-accused—Corroboration—Statement by deceased person as to the cause of his death—Admissibility—Cause of declarant's death not in question—Indian Evidence Act, Section 32— \$R\$, \$ \nu \$. Abedi bin Kasanga 5 E. A. C. A. `120 followed.\

The appellants were charged with the murder of M. As against the first appellant there was the evidence contained in the confessions of his co-accused made to a magistrate. There was also given in evidence against him a statement made by R., who had been wounded on the same occasion and had subsequently died of his wounds, that Kayanda "is the man who speared me this night".

Held (9-11-43).—That as the death of R. was not in question in this case the statement of R. was inadmissible (Indian Evidence Act, Section 32) and that, there being thus no corroboration of the confessions of the co-accused, the conviction of the first appellant could not stand. Appeal of the first appellant allowed.

Appellants absent, unrepresented.

Carnegie, Crown Counsel (Tanganyika), for the Crown.

JUDGMENT (delivered by SIR HENRY WEBB, C. J.).—The case of Hamisi s/o Kafizi and Kubolelwa s/o Mubanga present no difficulty. Each of them made an independent confession before Mr. Bate, who took every precaution to satisfy himself that these confessions were voluntary, and each agrees with the other as to the respective parts played by these two appellants in the commission of the offence. Each in his memorandum of appeal suggests that at the trial he retracted his confession, Hamisi (when asked by the learned Judge if he wished to say anything about it), saying, "I deny that I told Mr. Bate that I had killed anyone", while Kubolelwa, who must have heard what had passed between the Judge and Hamisi, did not allude to his confession at all. In these circumstances the confessions must be regarded as having been expressly or impliedly denied, rather than retracted, because a confession is only retracted when the maker admits that

he did say what has been recorded, but alleges that it was untrue. (See R. v. Labasha bin Maganga, 3 E. A. C. A. 48). Apart from this there is other evidence against these appellants to be found in the statements of Sumalli, regarding the visit of the three appellants to the witch-doctor, and of the wives of Hamisi and Kubolelwa to the effect that on the night of the murder each of them went out for a while. The appeals of Hamisi s/o Kafizi and Kubolelwa s/o Mubanga are dismissed.

Against Kayanda s/o Mkuyu, however, there is only the confessions of his co-accused and the evidence of Sub-Inspector Sardari Lal (if it be admissible) of an unsworn statement made in the presence of Kayanda by one Rubogi s/o Mkuyu that Kayanda was the man who had speared him. Apparently Rubogi was murdered on the same occasion as Mfanye (for whose murder the appellants

were tried and convicted), but the two murders were not made the subject of a single information. Section 30 of the Indian Evidence Act makes the confessions of Kayanda's co-accused admissible against him, but these statements are not only obnoxious to all the criticisms and suspicion that attach to the evidence of accom-

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plices, but have the additional disadvantage that they were not made upon oath. nor in the presence of the person affected by them; obviously, therefore, it would be most unsafe to convict upon such evidence alone, without corroboration. Rubogi's statement afforded corroboration, if it was admissible, but, in our opinion, it was not. By section 32 of the Indian Evidence Act evidence may be given of a statement made by a deceased person "as to the cause of his death. or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question". In the present case the only person whose death was in question was Mfanye, and therefore, for the reasons given in the case of *Abedi bin Kasanga*, 5 E. A. C. A. 120. we must hold that the evidence of Sub-Inspector Sardari Lal was inadmissible. There being no other evidence affecting Kayanda s/o Mkuyu, his appeal must be allowed, the appellant acquitted and his release directed so far as regards this charge.

* Case reported by Sir Henry Webb, C. J.

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Prepared on 14 October 2026 · Esheria