

UGANDA / JUDGMENT

Rex v Mereru and Another (CRIMINAL APPEALS Nos. 27, 28, 29 AND 30 OF 1939) [1939] EACA 118 (1 January 1939)

[1939] EACA 118

COURT

East African Court of Appeal

BEFORE

Dalton, C.J(Tanganyika), Sheridan, (C.J. Kenya),
Whitley CJ

CASE / FILE NUMBER

CRIMINAL APPEALS Nos. 27, 28, 29 AND 30 OF
1939

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COURT OF APPEAL FOR EASTERN AFRICA

BEFORE SIR JOSEPH SHERIDAN, C. J. (KENYA), WHITLEY, C. J. (UGANDA). AND SIR LLEWELYN DALTON, C. J. (TANGANYIKA)

REX, Respondent

versus

**NGIDIPE BIN KAPIRAMA, LEGWENI s/o NABUNJA, DATIKO s/o PARAKURATI,
KOBELI s/o MERERU, *Appellants***

CRIMINAL APPEALS Nos. 27, 28, 29 AND 30 OF 1939 (Appeal from conviction by H. M. High Court of Tanganyika)

Criminal Procedure — Murder — Charge — Information — Duplicity -Murder of three persons charged in one count-No failure of justice—Trial validity—Tanganyika Criminal Procedure Code, sections 132 and 335.

Appellants were charged in one count with the murder of three persons and convicted thereof. The three killings were all part of the same transaction namely an attack by one party of men on another party of men at one and the same time. There was no suggestion nor anything indicating that the appellants were in any way embarrassed or prejudiced in their defence or that there had been a failure of justice.

Held \$(12-5-39)\$ —(1) That the intention of the legislature in enacting section 132 of the Tanganyika Criminal Procedure Code was that in the case of several offences committed at the same time in respect of different persons there should be one charge or information with a separate count for each distinct offence.

(2) That there was an illegality in the form of the charge but that such illegality was cured by section 335 of the Criminal Procedure Code so long as the accused persons were not prejudiced or embarrassed in their defence or there has not otherwise been a failure of justice.

English and Indian authorities reviewed: *R. v. Odda Tore* and *Guyo Halake* (1 E. A. C. A. 114) and *Mongella s/o Ngui v. Rex* (1 E. A. C. A. 152) followed. (Appeals dismissed.)

Appellants, absent, unrepresented.

Aubrey, Acting Solicitor General (Uganda), for the Crown.

JUDGMENT (delivered by Whitley, C. J.).—In this case four accused were charged in one count with the murder of three victims. The joinder of the four accused was of course perfectly proper but the inclusion of three killings in one count raises an important point of law. We will consider first the English law on this point and then consider how it appears to be affected by the Tanganyika Code. In England the general rule as established by the cases of *R. v. Molloy* (1921 2 K. B. 364); *R. v. Disney* (24 C. A. R. 49) and *R. v. Wilmot* (24 C. A. R. 63) is that no one count of the indictment should charge the defendant with having committed two or more separate offences but an exception to this rule is made in cases where felonious acts have been committed with respect to several persons—as in robbery, with having assaulted A and B, and stolen from A one shilling and from B two shillings—if it was all in one transaction. In such a

case the indictment may charge the prisoner with all these felonious acts in one count. *R. v. Giddings* (174 E. R. 667). The test applied in that case was whether it was one act and one transaction with no interval of time. In the present case the three killings were undoubtedly part of the same transaction namely an attack by one party of men upon another party of men at one and the same time. Accordingly the principle laid down in the *Giddings* case would apply and there would be nothing improper in including all the offences in one count though the Court would no doubt order that they be made the subject of different counts and tried separately if there appeared to be any possibility of the accused being prejudiced or embarrassed through the three offences being tried together. We would add that in the case before us there is no question whatsoever of the accused having suffered any such prejudice from the manner of their trial.

It would thus seem that on general principles the charge was properly framed but we are of course bound by the Tanganyika Criminal Procedure Code and section 132 of the Code provides that: —

"132. (1) Every distinct offence of which any person is accused shall be the subject of a separate charge or information in a separate paragraph termed a 'count'.

- (2) Charges for any offences, whether felonious or misdemeanours, may be joined in the same charge or information if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character.
- (3) Where before trial or at any stage of a trial the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same charge or information or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in a charge or information the Court may order a separate trial of any count or counts charged therein."

The present charge clearly infringes against the provisions of sub-section (1) unless that sub-section can be held to be qualified by sub-section (2) in such a way as to permit of the joinder of more than one offence in one count. It seems to us doubtful whether that is the effect of the section. Reading the two sub-sections together it would appear that the intention is that in the case of three offences committed at the same time in respect of different persons there should be one charge or information with a separate count for each distinct offence.

There are two reported Kenya cases in which similar questions were considered by this Court. The relevant sections of the Kenya Code, on which those cases were decided are sections 243 (3) (1) and 132 (b). Their wording is different but their effect is substantially $\frac{1}{2}$ the same so that the cases may be taken as a useful guide. In *R. v. Odia Tore and Guyo Halake* (1934 E. A. C. A. 114) the information consisted of one count charging the appellants with the murder of two persons. It was held that the count was bad for duplicity but that in the circumstances of the case there had been no failure of justice and that the accused were not embarrassed or prejudiced and that accordingly the convictions should stand and the appeals be dismissed. The other case is *Mongella v. Rex* reported at page 152 of the same volume in which the earlier case was followed but the Court expressed the opinion that it is undesirable to try an accused on more than one charge of murder as it is apparently the practice in England not to join murder charges.

The well-known case of *Subrahmania Ayer* (1901 I. L. R. 25 Madras 61) in which the Privy Council held that disobedience to an express provision as to a mode of trial was not a mere irregularity which could be cured but was an illegality which rendered the trial a nullity was not referred to or considered in either of the Kenya cases which we have cited. At first sight it might appear that in view of that ruling of the Privy Council we should be constrained to declare the trial in this case a nullity and order a re-trial, but two important recent Indian decisions have served to render the effect of that ruling less sweeping than it was at first held to be.

In *Kapoor Chand v. Suraj Prasad* (55 All. 301) the full Bench considered section 537 of the Indian Code of Criminal Procedure on which section 334 of the Tanganyika Code is based and which provides that no sentence, etc., shall be reversed on appeal on account of any irregularity in the charge unless such irregularity has in fact occasioned a failure of justice. It was argued on the authority of the *Subrahmania Ayer* ruling that any mode of trial forbidden by the Code constituted an illegality which could not be cured but the Court declined to adopt that view and

observed at page 311:-

"In this case (Subrahmania Ayer) the accused person was charged with no less than 41 offences committed within the space of two years. Their Lordships of the Privy Council remarked as follows: 'The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the law to say that, when the Code positively enacts that such a trial as that which has taken place here shall not be permitted. that this contravention of the Code comes within the description of error, omission or irregularity.' Their Lordships made the remark in dealing with section 537 of the Code. In a later case, however, namely, Abdul Rahman v. King Emperor, their Lordships pointed out, at page 125, that in the earlier case 'it was possible that it might have worked actual injustice to the accused'. It may be that their Lordships of the Privy Council, in the later case, wanted to point out that section 537 of the Code of Criminal Procedure could not cure the defect in Subrahmania. Ayer's case because the Code contained a provision that an irregularity, which had worked injustice to the accused, could not be cured. But it is significant that although their Lordships of the Privy Council drew a distinction between an 'illegality' and an 'irregularity' in the earlier case, which was decided in the year 1901, the legislature did not introduce the word 'illegality' in section 537 or anywhere else in the Code, although it was amended after that year. This being the state of the law. we do not think that we should introduce a distinction between 'illegality' and 'irregularity'. The sole criterion given by section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the Court to do justice.

but, if in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order, which is just and correct, simply because the procedure adopted was wrong."

In another Full Bench case Emperor v. Erman Ali (1930 I. L. R. 57 Calcutta 1228) Rankin, C. J., observed as follows: -

"The Judicial Committee pointed out in Subrahmania Ayer's case that though in a sense the merest irregularity may be illegal, it does not follow that all irregularities are within the scope of section 537. They did not say or suggest that nothing could be cured under the section if it was illegal, and, as the Division Bench has pointed out, we now have in Abdul Rahman's case an express decision to the contrary. Both decisions are really a condemnation of the view that all illegalities are as such in the same category for the present purposes. In the former case it was idle to suggest that there was no prejudice. The accused had suffered in an aggravated form the very prejudice from which the Code intends to save him. In Abdul Rahman's case the test applied was whether there was ground for any probable suggestion of any failure of justice. The Judicial Committee, in view of difference of opinion in India and of the fact that no case had come before them since Subrahmania Ayer's case in 1901, carefully explained and applied section 537 'for the guidance of the Courts' and this decision must now govern the interpretation of the section unless and until the legislature shall see fit to amend the section.'

These two interpretations of the effect of the Privy Council's judgments in Subrahmania Ayer's case and Abdul Rahman's case were accepted and followed in the later case of Emperor v. Bishan Sabai Vidyarthi (1937 I. L. R. Allahabad at page 798) as being authoritative and binding. They are not necessarily binding on us but we should of course treat them with the greatest respect and we agree with the views taken by the learned Judges of the Indian Full Bench.

We accordingly hold following the two Kenya cases already referred to that in the case before us there has been an illegality in the form of the charge but that it is cured by section 335 if we find that the accused were not prejudiced or embarrassed in their defence or if there has not otherwise been a failure of justice. We do so find. It has never been suggested that there was any such prejudice and we are satisfied that in fact there was none.

On the merits we can see no reason to interfere with the convictions. There is abundant evidence to support them and all four appellants have throughout admitted that they deliberately set out to kill the Masai, who had killed one of the appellants' fellow Wasonjo tribesmen without cause and that they afterwards told the messengers of the Native Authority that they had killed three. The bodies are sufficiently identified. The fact that the appellants apparently genuinely-thought that according to tribal custom they were entitled to take the law into their hands may be a matter for consideration elsewhere but it is no defence in law. The appeals are dismissed.

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