

UGANDA / JUDGMENT

Rex v Mitha (Criminal Appeal No. 221 of 1944) [1945] EACA 12 (1 January 1945)

[1945] EACA 12**COURT**

East African Court of Appeal

BEFORE

Sheridan CJ, Whitley CJ, Wilson CJ

CASE / FILE NUMBER

Criminal Appeal No. 221 of 1944

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR JOSEPH SHERIDAN, C. J. (Kenya), SIR NORMAN WHITLEY, C. J. (Uganda), and MARK WILSON, Acting C. J. (Tanganyika)

REX, Respondent (Original Prosecutor)**ALLIBHAI MITHA, Appellant (Original Accused)****Criminal Appeal No. 221 of 1944**

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

Criminal Law—Perjury—Section 99 (1) Uganda Penal Code—Proof of false statement—Uganda Evidence Ordinance, Section 78—Materiality of statement.

Held \$(16-2-45)\$.—(1) The position regarding proof of the false statement is quite different here from the English practice because under section 78 of the Uganda Evidence Ordinance the Court may presume that the evidence recorded was the evidence actually given.

- (2) The Court has a discretion and may either accept the record as proof or call for oral evidence of some person who was present in Court when the perjury was committed.
- (3) To constitute perfury the alleged false evidence must be on a material point. Appeal dismissed.

Slade for the Appellant.

Phillips, Crown Counsel (Kenya), for the Crown.

JUDGMENT (delivered by SIR NORMAN WHITLEY, C. J.).—This is a second appeal and accordingly only lies on a point of law.

The appellant was charged with having committed perjury in a civil suit in which he was the plaintiff in the District Court, Kampala. There were four counts and the Magistrate, Mr. Hughes, convicted him on the first and second. On appeal to the High Court the conviction on the first count was quashed. This second appeal to this Court is from the conviction on the second count.

In the civil suit the appellant sued a woman, Sherbanu Monji Merali, as sole proprietress of the Mwanza Transport for the balance of instalments due in respect of a hire purchase agreement for the sale of a motor lorry M412. This agreement was entered into in 1941 in Mwanza, where the parties then resided. The defendant removed to Kampala before the suit was instituted.

In her defence the defendant alleged that nothing was due inasmuch as the plaintiff had taken back the lorry in full settlement of his claim under the hire purchase agreement. In an affidavit dated 19th March, 1943, the plaintiff (present appellant) specifically denied having taken the lorry back.

It would thus appear that one of the principal issues in the civil suit was whether the appellant had taken the lorry back.

On the hearing of the suit before Mr. Doyle in Kampala, in May, 1943, the onus was held to lie on the defendant. After the close of the defendant's case the appellant gave his evidence and the second paragraph of his cross-examination reads as follows: -

"I have never seized the lorry M412. I have never brought it to Mwanza. I do not know that the number has been changed to MZ155. I have not changed the number. Karsein Lira has never brought the lorry to Mwanza for me. Lalji Jiwan is not running a lorry numbered either M412 or MZ155. He is running no lorry for me. I have never given instructions to anybody to have the number of M412 changed to MZ155."

The perjury alleged in the second count, the subject of this appeal, was the second sentence: "I have never brought it to Mwanza". At his trial the appellant admitted that he did take the lorry to Mwanza from Nansio by boat, but said that he did this under instructions from the agent of Mwanza Transport and not in exercise of his right to repossess under the hire purchase agreement. His explanation of what was recorded is that counsel first asked him "Did you seize the vehicle?" to which he replied "No", which was true as he never seized the lorry under the agreement. Then counsel asked "Did you seize the vehicle and bring it to Mwanza?" He thought this was being put to him as though the seizing and taking to Mwanza were one continuous action and accordingly he answered "No".

If that explanation be true it is, of course, a complete answer to the charge of perjury. The learned Magistrate disbelieved this explanation and, in our opinion, the reasons which he gave for rejecting it were sound. Moreover, the subsequent answers given by the appellant show that he was disclaiming all knowledge of or connexion with the return of the lorry to Mwanza. If he really wished to tell the truth to the Court surely he would have explained then in the civil suit, as he did later at his trial, that he did take the lorry to Mwanza, but not on his own account.

Mr. Slade contends that the alleged evidence of the appellant upon which the charge of perjury was based was not properly proved. The only evidence as to what the appellant said was the record of the case before the Magistrate. Mr. Slade admits that by virtue of section 78 of the Uganda Evidence Ordinance the Court may presume that the evidence recorded was the evidence actually given, but he relies upon section 4 as showing that the Court has a discretion and may either accept the record as proof or call for the oral evidence of some person who was present in Court and can speak as to the words actually uttered by the person accused of perjury. We agree that that is so and that such discretion must be exercised judicially. But we are unable to agree with the suggestion that the Magistrate ought, in this case, to have called for oral evidence. Indeed, it is difficult to imagine who could have been called who could be expected to recollect the exact words used by the witnesses nearly twelve months previously. Mr. Slade referred us to the English practice as set out in Archbold, but the position there is quite different since a judge is not required by law to record the evidence and there is nothing equivalent to our section 78.

We do not think that there is any substance in the objections that the words alleged to have been uttered were not sufficiently clear and unambiguous to found a perjury charge and that the attention of the appellant was not sufficiently called to the particular statement at the time he made it. Nor do we think that there was any such misdirection by the learned Magistrate as would justify us in quashing the conviction.

The last ground of appeal is that the alleged false evidence was not on a material point. We agree with Mr. Slade's contention that, if it was in fact not material, the conviction could not stand even though the appellant mistakenly thought it was material and that his perjury would be likely to assist his case in the civil suit. We are, however, satisfied that the question whether or not the appellant took the lorry to Mwanza was a material question in the civil suit. The appellant, as plaintiff, was seeking to recover the whole of the unpaid instalments. Prima facie he would not be entitled to the instalments if he had by seizure resumed possession of the lorry, so that one of the main issues before the Court was whether or not the appellant had seized the lorry. If the Court was satisfied that the appellant took the lorry to Mwanza it would inevitably be the more inclined to think that he had seized the lorry.

The appeal fails on all points and is dismissed.

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