

UGANDA / JUDGMENT

Rex v Ndmaywa and Another (Criminal Appeals Nos. 207 and 246 of 1948 Consolidated) [1948] EACA 70 (1 January 1948)

[1948] EACA 70

COURT

East African Court of Appeal

BEFORE

De Lestang J, Nihill P

CASE / FILE NUMBER

Criminal Appeals Nos. 207 and 246 of 1948
Consolidated

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APPELLATE CRIMINAL

Before SIR BARCLAY NIHILL, C. J., and DE LESTANG, J.

REX, Respondent (Original Prosecutor)

(1) ELIJAH s/o NDMAYWA AND (2) KIARIE s/o MAGOTHE,

Appellants (Original Accused Nos. (2) and (1) respectively)

Criminal Appeals Nos. 207 and 246 of 1948 Consolidated

'Criminal Law-Practice-Recording evidence-Use of the word "they".

(This case is reported on account of the observations of their Lordships upon the use of the plural in the recording of evidence by a Magistrate.—*Editor.*)

Held (30-6-48).—That a Magistrate should always be on his guard, in recording evidence which concerns more than one person, to refrain from using the word "they" without making sure from the witness giving such evidence that it applies equally to the acts or words of each person to whom the witness is referring.

Appellants present, unrepresented.

Todd, Crown Counsel, for the Crown.

JUDGMENT.—In these two Appeals which we have consolidated the appellants appeal against their conviction on a charge of burglary and theft. Before trial before the Magistrate the third person named John Muthoka who was charged with them pleaded guilty to the offence.

As regards the first appellant, who was the second accused before the Magistrate, we have come to the conclusion that the evidence is not sufficient to justify the conviction. The case against him depends solely on the fact that on two occasions he was present with John when some of the stolen property was sold by John to a shoemaker and a dhobi. None of the stolen property was proved to have ever been in the possession of this appellant and in the absence of any such evidence we think the inference drawn by the learned Magistrate, because he was in the company of an admitted thief subsequent to the burglary he was therefore a participant in it, is altogether too far-fetched to be sustainable. In the case of this appellant, therefore, we quash the conviction entered against him and order him to be set at liberty forthwith.

As regards the second appellant who was the first accused in the Court below, we have come to the conclusion that there was sufficient evidence before the Magistrate from which he could infer participation in the burglary. He was first of all found wearing a hat which was identified as part of the property stolen, and subsequently in company with John he pointed out a place on the estate where the bulk of the stolen property was hidden. The appellant before us has submitted that it was really John and not he that pointed this place out to the police, and that he was only a bystander because the police had made him accompany the party.

On this point it certainly is unsatisfactory that the Magistrate has recorded the evidence of the African Police Inspector so far as it concerned this incident in the plural. A Magistrate should always be on his guard in recording evidence which concerns more than one person to refrain from using the word "they" without making sure from the witness giving such evidence that it applies equally to the acts or words of each person to whom the witness is referring.

In this case, however, it is apparent from the judgment that the learned Magistrate was satisfied that both this appellant and the man John had together shown the police the place in the bush where the stolen boxes were hidden. We are not, therefore, disposed to reject the Magistrate's finding on this point, and from it it follows that he could find that this appellant was guilty with John of the offences charged.

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The appeal of the second appellant is accordingly dismissed.

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