

UGANDA / JUDGMENT

# Rex v Nunes (Cr. App. No. 16/35.) [1935] EACA 139 (1 January 1935)

**[1935] EACA 139**

## COURT

East African Court of Appeal

## BEFORE

Gamble. Ag. J. (Kenya), Webb, J

## CASE / FILE NUMBER

Cr. App. No. 16/35.

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**APPELLATE CRIMINAL.****Before WEBB, J. and GAMBLE, Ag. J.**

PAUL DAVID NUNES, Appellant (Original Accused)

 $\mathbf{\$21}$  REX, Respondent (Original Prosecutor).

Cr. App. No. \$16/35\$ .

Criminal Law-Perjury-Particularity of charge-Private prosecution-Permission to prosecute-Appeal-Right of prosecutor to appear on appeal—Criminal Procedure Code, sections. 340, 86.

\$Held\$ (4-6-35).—(1) That the alleged false statement must be set out. with exactitude in all material particulars.

- (2) That permission to a private person to conduct a prosecution may be implied although permission was not formally asked for or granted.
- (3) That a private prosecutor is not entitled to be heard on. an appeal.
- (4) That reference should not be made to the judgment in. the case in which the perjury is alleged to have been committed..

The facts of the case sufficiently appear in the judgment.

Kaplan for the appellant.

The prosecutor is not entitled to be heard, section 340 contemplates the hearing only of the appellant or his advocate and the Attorney General.

Permission to prosecute was not given, therefore the proceedings before the magistrate were a nullity: Criminal Procedure Code, section 86 \$(1)\$ . Section 84 shows that written permission. is required. Permission was never asked for: had it been asked for I would have opposed. Under the Indian Penal Code, section. 193, there can be no prosecution for perjury without the sanction. of the Court in which the offence was committed.

The charges are indefinite and bad, they mean nothing without reference to the record in Cr. Case 159/1934. Charge of perjury must be precise: Archbold (28 Ed.) 1231. In any event the statement forming the basis of the second charge, even if false, was not material.

The prosecutor called the attention of the resident magistrate. to a passage in the judgment in Cr. Case 159/1934: this was irregular; R. v. Brittain (17 Cox C. C. 627); it would prejudice the magistrate.

JUDGMENT.—The appellant appeals against his conviction on. two charges of perjury alleged to have been committed in the trial of Criminal Case No. 169/1934 Rex v. Daroga and others.

The prosecution was conducted by one of the accused in that case, and the first point raised in this appeal was whether the private prosecutor was entitled to appear on the appeal, the Attorney General having intimated that he did not propose to take part in it. While section 86 of the Criminal Procedure Code contemplates that a prosecution before a magistrate may be in certain circumstances conducted by a private prosecutor, when one comes to section 340, dealing with appeals to the  
Supreme Court, one finds this provision, "After perusing such record and hearing the appellant or his advocate, if he appears, and the Attorney Général, if he appears, the Court may etc."; if it had been intended that a private prosecutor should have the right of appearance the section would naturally have referred to the "respondent" and not to the Attorney General alone, particularly as prosecutions by the Attorney General or some one appointed by him and by private prosecutors are distinguished in sections 83 to 86. For this reason we have held that the private prosecutor is not entitled to appear on the appeal.

It has also been argued that the trial before the resident magistrate was a nullity because the prosecutor did not formally ask for and receive permission to conduct the prosecution. Section 86 (1) provides that "Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Governor in this behalf shall be entitled to do so without permission". The latter part of the section obviously refers to section 83 (1) which empowers the Governor to appoint generally, or in any case, or for any specified class of cases, in any local area, one or more offices to be called public prosecutors, and to section 84 which provides that a public prosecutor may appear and plead without any written authority. In Criminal Appeal No. 11/1935, we have already held that in exactly similar circumstances to those in the present case it should be implied that the resident magistrate gave his permission; but in that case the appellant was not professionally represented and the point was not argued. It is now said that the reference in section 84 to "written authority" shows that formal permission to prosecute must be given. In our opinion all that section 84 means is that a court is to take judicial notice of the appointment of a

permission, and in all the circumstances we are of opinion that it should be assumed that he gave his permission when he allowed. the trial to proceed.

The second charge upon which the appellant was convicted was that he "knowingly gave false testimony as follows: I could swear that Mangat was there the last week in August: he came nearly every evening between say the 25th August and the end r in la apar  $\mathcal{L} = \mathcal{L} \times \mathcal{L}$

of August". Here again there is nothing in the charge to show what place was meant by the word "there", and on that ground, for the reasons we have already given, the charge fails. Apart from this, and assuming, as was apparently intended, that by "there" was meant the house which was subsequently burned. we are of opinion that this statement, even if false, was not material to the charges upon which the prosecutor was tried: the fact that he visited that house at the end of August, as many other persons may likewise have done, was not a fact from which any inference could possibly have been drawn as to whether or not he participated in setting it on fire on the 9th September. On this ground also the conviction on this charge fails.

There is another matter to which we desire to refer. It appears that the prosecutor, when replying to a submission made by the advocate for the appellant that no case had been made out against him, invited the resident magistrate to refer to a particular passage in the judgment of His Honour the Chief Justice in Criminal Case \$159/1934\$. In our opinion this was irregular: it is for the magistrate to decide on the evidence given before him whether or not the accused is guilty of the charge and he is not entitled to have regard to observations made by another Judge upon the trial of another case, which, if they are unfavourable to the accused, must inevitably affect the mind of the magistrate to his detriment.

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