

UGANDA / JUDGMENT

Rex v Nyamasaro (Criminal Appeal No. 34 of 1940) [1940] EACA 14 (1 January 1940)

[1940] EACA 14**COURT**

East African Court of Appeal

BEFORE

Francis, J (Uganda), Sheridan CJ, Webb CJ

CASE / FILE NUMBER

Criminal Appeal No. 34 of 1940

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR JOSEPH SHERIDAN, C. J. (Kenya), WEBB, C. J. (Tanganyika) and FRANCIS, J. (Uganda)

REX, Respondent

v.

NYAMASARO s/o MUHERE, Appellant Criminal Appeal No. 34 of 1940**(Appeal from decision of H. M. High Court of Tanganyika)**

Criminal Procedure—Prosecution witness recalled by Judge after close of defence case—Matter arising ex improviso—English Law—Indian Evidence Act. section 165.

Appellant appealed from a conviction of murder of a woman who had been shot outside her hut by an arrow and had named the appellant as her assailant. The appellant in his evidence said that he lived at a considerable distance from the deceased's hut, and had not been anywhere near that place at the time of the murder, that he did not know the deceased, that he never possessed a bow or arrows and that it was not the custom of people living in his district to carry or have bows or arrows. None of these allegations were put in cross-examination to prosecution witnesses who had testified to the fact that appellant was the assailant. At the close of the case for the defence the trial judge recalled a headman who then gave evidence that the appellant lived quite close to the deceased's hut and must have known her and ridiculed the suggestion that the appellant and those living in his district did not carry or possess bows and arrows.

Held (25-4-40).—That the act of the trial Judge in recalling the headman in the circumstances judged in the light of English decisions was not open to criticism and that it was not
necessary to comment on the apparently wider powers given by section 165 of the Indian Evidence Act. *R. v. Sullivan* (1923, 1 K. B. 47) followed.

Appellant absent, unrepresented.

Hone, Attorney General, Uganda, for the Crown.

JUDGMENT (delivered by SIR JOSEPH SHERIDAN, C. J.).—It is apparent from the record and the memorandum of appeal that the appellant's case received the most careful consideration from his Counsel, Mr. Willis.

We have had the advantage of a full criticism by the learned Attorney General of Uganda of the various grounds of appeal raised and of the case in general.

In the result we are agreed that there was no misdirection on the part of the learned Judge and that there is sufficient evidence to support the conviction, particularly in the identification of the accused by the deceased women at the time of the shooting. Even though the learned Judge was not satisfied that the evidence of those other witnesses who were present at the shooting was reliable as to their own identification of the accused, it is confirmatory of the deceased having called out his name, thus indicating that she had known him previously, a fact confirmed by other evidence, even though the accused denied any knowledge of the deceased.

Then there is the evidence of the old man Nyimwi which is corroborative of the accused having been the person who shot the deceased.

As to whether the learned Judge acted correctly in recalling the witness Nkururu, all we need say is that even if his doing so be viewed in the light of English decisions such as *Rex v. Sullivan* (1923, 1 K. B. 47) it is not open to criticism. The accused's evidence denying such matters as a previous acquaintanceship with the deceased must have taken the Crown by surprise and in such circumstances an application by Crown Counsel for the re-call of Nkururu must have succeeded. This being so the Judge, according to the principle laid down in English decisions, was entitled to re-call the witness.

In the present case it is unnecessary for us to comment on the much wider powers with regard to the re-calling of witnesses that would appear to exist under S. 165 of the Indian Evidence Act to which, together with the commentaries therein in Woodroffe and Ameer Ali's work on the Law of Evidence, our attention has been drawn by the learned Attorney General.

The appeal is dismissed.

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Prepared on 13 October 2026 · Esheria