

UGANDA / JUDGMENT

Rex v Rono (Criminal Appeal No. 431 of 1948) [1948] EACA 81 (1 January 1948)

[1948] EACA 81**COURT**

East African Court of Appeal

BEFORE

Nihill P

CASE / FILE NUMBER

Criminal Appeal No. 431 of 1948

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APPELLATE CRIMINAL.**Before SIR BARCLAY NIHILL, C. J.****REX, Respondent (Original Prosecutor) \$v\$.****KIPLANGAT ARAP RONO, Appellant (Original Accused) Criminal Appeal No. 431 of 1948**

Criminal Law—Perjury—Penal Code, section 104—Denial of accuracy of statement to police officer—Statement recorded as a joint statement of two persons—Practice—Court calling witness after close of defence—Incurable irregularity—Criminal Procedure Code, sections 150 and 381.

The appellant and one Kiplamai arap Sang were arrested on a charge of stock theft and made statements to a police officer which incriminated one arap Misoi. The police officer recorded their admissions as a joint statement since what they said was identical, and only for the use of the Court Prosecutor. At the trial of arap Misoi the appellant was called as a Crown witness, and being treated as hostile the statement was put to him and he denied that it was the statement he had made. Accordingly he was charged with perjury in that he knowingly gave false testimony that his statement recorded by the police officer was not the statement he had made. At his trial the 3rd Prosecution witness testified that he had acted as interpreter for the making of the statement and that Constable Kipsaina was also present. On his defence, the appellant denied making the statement as read to him but agreed that Constable Kipsaina was present at the relevant time. After the close of the defence the Court called Constable Kipsaina as a witness. The appellant was convicted and sentenced to six months' H. L.

Held \$(30-9-48)\$.—(1) That as the statement was not that of the appellant alone, but one taken jointly from the appellant and another, it could not provide a proper basis for a prosecution for perjury.

- (2) That a Judge should not call a witness in a criminal trial after the case for the defence is closed, except in a case where a matter arises *ex improviso* on the part of the prisoner, which no human ingenuity can foresee.

Dictum in *R. v. Harris* (1927) 2 K. B. 587 quoted and followed.

Circular to Magistrates No. 13 of 1938, 18 K. L. R. 184 referred to.

- (3) That in the present case the point concerning which the Court thought it necessary to call the additional witness was not one which arose **ex improviso**, and this irregularity could not be cured by section 381 of the Criminal Procedure Code.

Appeal allowed.

Appellant absent, unrepresented.

Modi for the Crown.

JUDGMENT.—The trial of the appellant in this case was in more than one respect an unsatisfactory one. He was charged with having made a false statement in the Resident Magistrate's Court at Eldoret, in that he denied the accuracy of a statement said to have been made by him to a police officer. This statement was produced and there was evidence that it bore the left thumb-print of the appellant; and there was also evidence from the police officer who took the statement that it was read over to the appellant in Swahili, and translated into Nandi by an interpreter. The statement, however, was not the statement of the appellant alone, but a statement which the police officer says was taken jointly from the appellant and another man who was with him. The statement in such circumstances cannot provide a proper basis for a prosecution for perjury.

From the judgment it appears that the Magistrate himself was cognizant of this difficulty, but he concluded that the objection was merely technical. I am not able to accept this conclusion. A police officer who takes a statement is

expected to take it down in the actual words used. It is idle to suppose that in the present case such a procedure could have been followed. Another irregularity occurred at the trial which is also fatal to its conviction. After the case for the defence had been closed the Magistrate called a police constable as a witness for the Court. This he had power to do under section 150 of the Criminal Procedure Code; but it is settled practice both in this Colony and in England that a Judge should not call a witness in a criminal trial after the case for the defence is closed except in a case where a matter arises, *ex improviso*, which no human ingenuity can foresee, on the part of the prisoner. This was the dictum laid down in *Rex v. Harris* (1927), 2 K. B. 587, and it has been followed on more than one occasion both by this Court and by the East African Court of Appeal. Furthermore, the attention of all Magistrates in the Colony was called to the necessity of

The appeal is allowed and the conviction quashed. The appellant unless he is serving a sentence for another offence, which appears possible, to be set at liberty forthwith.