

UGANDA / JUDGMENT

Rex v Suke and Others (Criminal Appeals Nos. 220, 221 and 222 of 1947) [1947] EACA 55 (1 January 1947)

[1947] EACA 55

COURT

East African Court of Appeal

BEFORE

Graham Paul CJ, Nihill P, Thacker J

CASE / FILE NUMBER

Criminal Appeals Nos. 220, 221 and 222 of 1947

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COURT OF APPEAL FOR EASTERN AFRICA

Before NIHILL, C. J. (Kenya), SIR G. GRAHAM PAUL, C. J. (Tanganyika), and THACKER. J. (Kenya)

REX, Respondent (Original Prosecutor)

(1) SUKE d/o SAMWE, (2) NJOKA s/o MLUMBA, (3) KITADU s/o AHUNGU, Appellants (Original Accused)

Criminal Appeals Nos. 220, 221 and 222 of 1947

(Appeals from decision of H. M. High Court of Tanganyika)

Criminal procedure—Joint trial—Irregularity—S. 346 Tanganyika Criminal Procedure Code—New trial.

The three appellants were jointly charged with murder. Before the conclusion of the second appellant's defence the learned Judge proceeded to convict the first and third appellants, but deferred sentence until the completion of the second appellant's case. In due course he, too, was convicted. All three appellants appealed.

Held (11-11-47).-(1) That the course adopted by the learned Judge was irregular and such irregularity was not curable under S. 346 Tanganyika C. P. C. as it may have occasioned a failure of justice.

- (2) That in joint trials all the accused have a right to hear all the witnesses for the defence, to cross-examine all such witnesses and address the Court on the evidence of all such witnesses.
- (3) That the Court of Appeal will not order a new trial in order to allow a prosecution to fill a gap in its case against an appellant which might have been filled at the first trial and it would hesitate to do so when a nullity was declared on account of an irregularity for which the prosecution was responsible but as neither of the above conditions applied to the present case it was a proper one for this Court to order a new trial.

Convictions quashed and new trial ordered.

Appellants absent, unrepresented.

Sir James Henry, Crown Counsel (Tanganyika), for the Crown.

JUDGMENT (delivered by NIHILL, C. J.).—In this case the three appellants whose appeals we have consolidated were tried together and convicted for murder in the High Court of Tanganyika. The prosecution alleged that the three appellants had acted in concert with another not before the Court and known in the district as a "lion-man" to bring about the death of the deceased. The evidence led followed a pattern which has become only too familiar to us in our consideration of other similar cases coming from the same district, but in this instance it is not necessary for us to consider its sufficiency or otherwise because it is clear that owing to action taken by the learned trial Judge during the proceedings the trial of the appellants must be declared a nullity. All three appellants were represented by the same counsel, who intimated after the second appellant had given evidence that he wished leave to call a witness on the second appellant's behalf at a later stage. The learned Judge gave leave and proceeded to hear the defence of the third appellant. At its conclusion the witness for the second appellant was not available and it appeared could not be made available until two days later. Instead of adjourning the trial the learned Judge heard an address from the defending counsel in relation to the first and third appellants only and then proceeded to sum up to the assessors, and after taking their opinion in respect of the two above-mentioned appellants he found them both guilty of murder, but deferred sentence and reasons for the conviction. In fairness to the learned Judge it must be said that from his record it would appear that he fully explained the position both to the accused themselves and to their counsel and he obtained their consent. This fact does not, however, in our opinion, in any way cure the irregularity of the course adopted. In a joint trial, where the prosecution has established a case for each person joined on the information to answer, each step in the proceedings from then on until judgment must be taken in the presence of all accused as joint prisoners at the bar. A Judge might for some exceptional reason break off the trial of one accused and direct a separate trial, de novo before a different jury or different assessors. However, this is not the position in the present case. Here a witness was called whom the first and third appellants had no opportunity to cross-examine, neither was their counsel able to address the Judge and jury on the new evidence in so far as it affected the case against them if it did so. Furthermore in the same sense the trial Judge: himself having already convicted them could neither weigh the value of the evidence, nor direct

the assessors. A glance at the evidence given by this belated witness will suffice to show the impossible position the Judge had put himself in. The witness, who was the wife of the second appellant, testified that on the day of the crime her husband never left home at all until after the alarm had been sounded. Now if this witness had been believed by the learned Judge, the credibility of the prosecution witness Kimpundu (second prosecution witness), who had testified that he had seen all three appellants together taking the "lion-man" to the scene of the killing must have been shaken, and it is doubtful whether the learned Judge could have convicted any of the appellants, although in fact he had already done so in respect of two of them. . The trial Judge did not believe the alibi, but this makes no difference to the principle. Clearly the irregularity committed is not one curable under section 346 of the Tanganyika Criminal Procedure Code for it may in fact have occasioned a failure of justice. In joint trials all the accused have a right to hear all the witnesses for the defence; to cross-examine all such witnesses and address the Court on the evidence of all such witnesses.

In our opinion, as we have already indicated, the effect in law of the wrong course taken by the learned Judge is that the entire joint trial-including the convictions and sentences—is a nullity.

We have come to the conclusion that this is a proper case for this Court to order a new trial. This Court will not exercise this power in order to allow a prosecution to fill a gap in its case against an appellant which might have been filled at the first trial and it would hesitate to do so where a nullity was declared on account of an irregularity for which the prosecution was responsible. Neither of the above considerations applies to the present case. Had the joint trial of the three appellants proceeded on its proper course it is probable that all three of them would have been adjudged guilty by both Judge and assessors. We therefore order that the convictions of the three appellants be quashed and the death sentences set aside. The three appellants are remanded in custody to be retried. in the High Court by a different Judge.

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