

UGANDA / JUDGMENT

Ruadiba v Rex (Cr. App. No. 44/1938) [1938] EACA 52 (1 January 1938)

[1938] EACA 52**COURT**

East African Court of Appeal

BEFOREGamble, J. (Uganda), Johnston, Ag. J. (Uganda),
Whitley CJ**CASE / FILE NUMBER**

Cr. App. No. 44/1938

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Before WHITLEY, C. J., GAMBLE, J., and JOHNSTON, Ag. J. (all of Uganda)**MABATI BIN RUADIBA, Appellant (Original Accused)****REX, Respondent (Original Prosecutor)****Cr. App. No. 44/1938****(Appeal from decision of Knight-Bruce, J. (Tanganyika))**

Criminal Law—Criminal Procedure—Evidence—Deposition—Hostile witness—Indian Evidence Act, 1872, section 155.

Held (5-5-38).—That the Court should not refer to the depositions of a witness called by the prosecution for the purpose of discrediting her evidence at the trial unless the requirements of section 155 of the Indian Evidence Act have been complied with and the passages of the deposition which are alleged to be inconsistent with the evidence given by the witness at the trial have been properly put to the witness.

Appellant, absent, unrepresented.**Mathew, Crown Counsel (Uganda), for the Crown.**

JUDGMENT (delivered by Whitley, C. J.).—There is ample evidence in this case to justify the finding that the appellant killed the deceased man Kakoma with a spear wound in the throat. The only question which presents any difficulty is whether the evidence was such as to raise a reasonable doubt as to whether the appellant was acting in self defence or under grave and

sudden provocation. Immediately after giving himself up the appellant made a statement to a Magistrate and at the Preliminary Inquiry he stated that he had nothing to add to this. In that statement he alleged that the deceased thrust at him with a spear which pierced his clothing but did not touch his body. The appellant then pulled the spear out of his clothing and from a kneeling position stabbed the deceased through the neck. He showed holes in his clothing to corroborate his story. At his trial he varied the story in his own favour but we think the learned trial Judge was right in his view that the first statement was the more likely to approximate to the truth. The version of what took place upon which the prosecution relied was that of Bwachulelu who may be described as the woman in the case. According to her the deceased made some insinuation as to the relationship between herself and the appellant whereupon the latter stabbed the appellant in the neck. The trial Judge regarded her as the only reliable witness and accordingly found the appellant guilty of murder as did both assessors. We agree that if her version is accepted in toto that would be a proper verdict.

But there were other witnesses whose evidence supported to some extent the statement of the appellant notably a woman Kaitabusha. The learned trial Judge rejected the evidence of this witness on the ground that at the preliminary inquiry she had stated that she did not see the attack at all. We are unable to appreciate how her evidence at the preliminary inquiry was relevant at all in view of the fact that having been called as a witness for the prosecution at the

1

trial her evidence was apparently accepted as true by prosecuting counsel inasmuch as her deposition was not put in, no application to treat her as a hostile witness was made and she was not questioned at all as to her earlier statement. The rules governing the use of depositions at the preliminary inquiry are well established and should be rigorously observed. Section 155 of the Indian Evidence Act provides that the credit of a witness may be impeached by the adverse party or, with the consent of the Court, by the party who calls him by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The proper procedure is to apply for leave to treat as hostile, prove and put in the former statement and then put to the witness the passages which are alleged to be inconsistent with the evidence given by the witness at the trial. It is essential that the witness should be given an opportunity of explaining the alleged inconsistencies as it sometimes happens that apparent inconsistencies are capable of a completely satisfactory explanation. If serious and substantial inconsistencies are proved the effect is to render the witness unworthy of belief and not to make what he said in his former statement available as evidence at the trial. In the present case we consider that inasmuch as the prosecution had not adopted the course which we have indicated above the Court ought not to have paid any attention to the earlier statement. That being so the evidence of Kaitabusha at the trial which had not been challenged should have been given due consideration by the Court. It seems to us that if her evidence had not been rejected the Court must have found that there was at least a reasonable doubt as to whether the deceased did not attack the appellant before the latter stabbed him, in which case the appellant would be entitled to the benefit of the special defence of provocation. He would not be excused altogether because he clearly exceeded

his right of self defence by stabbing his adversary after disarming him but it would be only reasonable to hold that the attack upon him constituted the gravest sudden provocation. We, accordingly, set aside the conviction for murder and substitute a finding of manslaughter contrary to section 185 of the Penal Code.

As regards sentence, we consider that the provocation was such as to render the offence not a serious one. We sentence the appellant to two years' hard labour.

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