

Kuruma Son of Kaniu - - - - - Appellant

v.

The Queen - - - - - Respondent

FROM

COURT OF APPEAL FOR EASTERN AFRICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE  
8TH DECEMBER, 1954

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*Present at the Hearing:*

THE LORD CHIEF JUSTICE OF ENGLAND (LORD GODDARD)  
LORD OAKSEY  
MR. L. M. D. DE SILVA

[*Delivered by* LORD GODDARD]

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This is an appeal by special leave from a judgment of the Court of Appeal for Eastern Africa dismissing an appeal from a conviction by an Emergency Court of Assize in Kenya whereby the appellant was convicted of being in unlawful possession of two rounds of ammunition contrary to Regulation 8A (1) of the Emergency Regulations of the said Colony and sentenced to death. The ground on which leave had been obtained was that the evidence proving that the appellant was in possession of the ammunition had been illegally obtained and should not have been admitted.

Before detailing the facts it will be convenient to recite Regulation 29 of the Emergency Regulations as it was this that formed the ground on which the objection was taken. Omitting words immaterial for the present case it is in these terms:

“any Police Officer of or above the rank of Assistant Inspector with or without assistance and using force if necessary . . . may stop and search . . . any individual whether in a public place or not if he suspects that any evidence of the commission of an offence against this Regulation is likely to be found on such . . . individual and he may seize any evidence so found.”

On the day in question the appellant, hitherto a man of good character, had leave of absence from the European farmer by whom he was employed to visit his reserve. About 10 a.m. he started off on his bicycle along a main road on which he knew there was a road block where he would be liable to be stopped and searched. This was not the only way to his reserve; he could have gone by another route where he would not have encountered a road block. At the block he was stopped and Police Constable Ogwang examined his papers which were in order and then ran his hands over the outside of the appellant's clothing. According to his evidence believing that he felt in the fob pocket of the appellant's shorts what seemed to be a pocket knife and ammunition he blew his whistle to summon a superior officer Rattan Singh. Neither of these police officers were of or above the rank of Assistant Inspector. They said the prisoner was taken by them to an enclosure where he was made to take off his shorts, which were then shaken and a pocket knife and two rounds fell out. He was then taken to the police station and charged with the offence. The two rounds were marked and were subsequently produced in evidence and it is only right to say that they differed from

those which the police officers then had as part of their equipment. The prisoner all along denied that he was carrying these rounds and at the trial also denied that he had had a pocket knife on him. The police said they had returned the knife to him after he was in custody. No explanation was given of this remarkable action on their part, nor was the knife produced at the trial nor any reason given for its absence. It is also to be observed that three other persons, two police officers and one civilian, were said to have been present when the prisoner was searched, one of them indeed was said to have actually picked up the two rounds after they had fallen from the prisoner's shorts. Their Lordships think it was most unfortunate, considering the grave character of the offence charged, which carries a capital penalty, that these important witnesses were not called by the prosecution: it was not suggested that they were not available. The Assessors were all in favour of an acquittal but the Magistrate overruled them and convicted the appellant.

The first matter to which their Lordships desire to call attention is that the offence was alleged to have been committed at Chania Bridge in Thika in the Central Province. Thika was declared to be a Special Area by the Special Areas (No. 13) Order 1953. By Regulation 22B which amended the Emergency Regulations it is provided that it is the duty of any person in a special area to stop and submit to search by an authorised officer, which means by Regulation 22a a police officer. If therefore Chania Bridge was in Thika, as the indictment alleged, it would appear that the action of the policeman was regular as permitted by law. No point seems to have been taken on this matter at the Assize Court. In the Court of Appeal it was taken but that Court said that as no evidence had been given on the subject beyond the evidence of the Constable who said he was on duty at Chania road block near Thika it had not been proved that the offence was committed in a Special Area, and that it was too late for the Crown to rely upon it. They referred to a case No. 196 of 1951 *Saleh Mohamed v. Rex* as disapproving a dictum of the Supreme Court of Kenya that a magistrate was entitled to have judicial knowledge of the location of all the towns and villages in Kenya. A report of that case was not before the Board and their Lordships have no wish to criticise a decision that they have not read but with all respect to the Court of Appeal it appears to them that this was perhaps an unduly narrow view to take. They think it may well be that when an indictment alleges that a particular offence was committed at a particular place and no challenge or issue is raised at the trial on that point the Court may assume or at least take judicial knowledge that the place is situate where the indictment states it is or that the maxim *omnia præsumuntur rite esse acta* would apply. However the Board will proceed to deal with the case on the footing that there was no power in any police officer under the rank of Assistant Inspector to search the appellant. As it was a direct result of the search that the ammunition was found on the prisoner it is submitted that the evidence was illegally obtained and therefore could not be given or that the Court was bound to ignore it. The proposition must be put in this alternative manner because it appears that no objection was taken when the witnesses were giving their evidence, but a submission to this effect was made at the close of the case for the prosecution.

In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it and in their Lordships' opinion it is plainly right in principle. In *R. v. Leatham* 8 Cox 498, an information for penalties under the Corrupt Practices Act, objection was taken to the production of a letter written by the defendant because its existence only became known by answers he had given to the Commissioners who held the enquiry under the Act which provided that answers before that Tribunal should not be admissible in evidence against him. The Court of Queen's Bench held that though his answers could not be used against the defendant yet if a clue was

thereby given to other evidence, in that case the letter, which would prove the case it was admissible. Crompton, J., said, "It matters not how you get it; if you steal it even, it would be admissible." *Lloyd v. Mostyn* 10 M. & W. 478 was an action on a bond. The person in whose possession it was objected to produce it on the ground of privilege. The plaintiff's attorney however had got a copy of it and notice to produce the original being proved the Court admitted the copy as secondary evidence. To the same effect was *Calcraft v. Guest* [1898] 1 Q.B. 759. There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasised in the case before this Board *Noor Mohamed v. The King* [1949] A.C. at pages 191-2 and in the recent case in the House of Lords *Harris v. Director of Public Prosecutions* [1952] A.C. at page 707. If for instance some admission of some piece of evidence, e.g. a document had been obtained from a defendant by a trick, no doubt the judge might properly rule it out. It was this discretion that lay at the root of the ruling of Lord Guthrie in *H.M. Advocate v. Turnbull* [1951] S.C. (J) 96. The other cases from Scotland to which their Lordships' attention was drawn *Rattray v. Rattray* 1897 25 Rettie 315, *Lawrie v. Muir* [1950] S.C. (J) 19 and *Fairley v. Fishmongers of London* [1951] S.C. (J) 14 all support the view that if the evidence is relevant it is admissible and the Court is not concerned with how it is obtained. No doubt their Lordships in the Court of Justiciary appear at least to some extent to consider the question from the point of view whether the alleged illegality in the obtaining of the evidence could properly be excused, and it is true that Horridge, J., in *Elias v. Pasmore* [1934] 2 K.B. 164 used that expression. It is to be observed however that what the learned judge was there concerned with was an action of trespass and he held that the trespass was excused. In their Lordships' opinion when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortious but excusable but whether what has been obtained is relevant to the issue being tried. Their Lordships are not now concerned with whether an action for assault would lie against the police officers and express no opinion on that point. Certain decisions of the Supreme Court of the United States of America were also cited in argument. Their Lordships do not think it necessary to examine them in detail. Suffice it to say that there appears to be considerable difference of opinion among the judges both in the State and Federal Courts as to whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution. At any rate in *Olmstead et al. v. United States* 48 S.C.R. 564 the majority of the Supreme Court were clearly of opinion that the common law did not reject relevant evidence on that ground. It is right however that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary and therefore one obtained by threats or promises held out by a person in authority is not to be admitted. It is only necessary to refer to *Reg. v. Thompson* [1893] 2 Q.B. 12 where the law was fully reviewed by the Court for Crown Cases Reserved.

As they announced at the conclusion of the arguments their Lordships have no doubt that the evidence to which objection has been taken was properly admitted. The ground upon which leave to appeal was given therefore fails and they have humbly advised Her Majesty to dismiss the appeal. Their Lordships indicated when they announced their decision that there were matters of fact in the case which caused them some uneasiness though they did not consider they were of a nature which according to the settled practice of the Board would entitle them to tender other humble advice. But they thought it right to call them to the attention of the Secretary of State and accordingly they say no more about them.

In the Privy Council

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KURUMA SON OF KANIU

v.

THE QUEEN

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DELIVERED BY LORD GODDARD

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