

43, 1954

1.

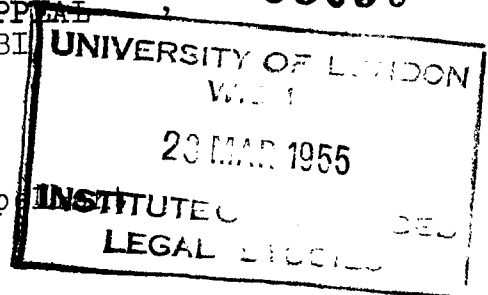
IN THE PRIVY COUNCIL

No.35 of 1954

O N A P P E A L

FROM HER MAJESTY'S COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBI

38036



B E T W E E N :-

KURUMA SON OF KANIU . . . App  
- and -  
THE QUEEN ... .. Respondent

CASE FOR THE APPELLANT

- |     |   |                             |
|-----|---|-----------------------------|
| 10. |   | <u>Record</u>               |
|     | 1. This is an appeal from a judgment of Her Majesty's Court of Appeal for Eastern Africa at Nairobi dated 27th March 1954 dismissing the Appellant's appeal against his conviction by an Emergency Assize of the Supreme Court of Kenya sitting at Nairobi on 8th, 10th and 11th February 1954, whereby he was found Guilty by Acting Judge E.J.E.Law (overruling the three Assessors' unanimous verdict of Not Guilty) of the offence of unlawful possession of ammunition contrary to regulation 8A(1)(b) of the Emergency Regulations, 1952, and sentenced to death. | Pp. 19 - 24<br>Pp. 16 - 19  |
| 20. | 2. The Appellant is 20 years of age and of good character without previous convictions of any sort. For 2 years he had been in the regular employment of a European farmer near Thika and on the occasion of New Year's Day, 1954, he had leave of absence from his employer to visit his Reserve.  | P. 14 1.3<br>P. 11 11.33-40 |
| 30. | 3. Accordingly on 1st January 1954 at 10 a.m., dressed in a coat and shorts, he was riding his pedal bicycle from Thika towards Nyeri along a road which he need not have chosen, but on which there was to his knowledge a permanent police road block near the Chania river, where all travellers were stopped.   | P. 11<br>P. 11 1.42         |
| 40. | 4. At the Chania road block the Appellant was stopped by an African police constable John Nyaundi Ogwang, who according to the case for the prosecution checked the Appellant's papers, found them in order, and then proceeded to search him by  | P. 2 11.8-12                |

Record

feeling his clothes from the outside.

- P. 9           5. Regulation 29 of the Emergency Regulations, 1952, confers a power of search without warrant only upon a police officer "of or above the rank of Assistant Inspector". The said search by Police Constable Ogwang was made without warrant or authority of any sort and was illegal and constituted an assault and trespass upon the Appellant's person. The Appellant was not asked to and did not consent to the said search, but he did not offer any resistance thereto. 10
- P.3 1.12-13
- P.2 1.12-16       6. According to the case for the prosecution, Police Constable Ogwang felt from the outside of the fob pocket on the right side of the Appellant's shorts objects which appeared to be a pocket knife and 2 rounds of ammunition. Grasping that pocket tightly with one hand, he blew his whistle to summon Police Constable Rattan Singh, who was 40 feet away. Together they took the Appellant to a barbed wire enclosure and there made him take off his shorts. When Police Constable Ogwang held the shorts up, a penknife and 2 rounds of ammunition fell to the ground. It was said that the Appellant had no money on him. 20
- P.2 11.17-20
- P.5 11.28-40
- P.2 11.23-31
- P.3 11.15-17
- P.6 1.35
- P.2 et seq       7. The only evidence implicating the Appellant was that given by Police Constables Ogwang and Rattan Singh, although the said search was conducted in the presence of three other persons who were not called as witnesses, namely Police Constables Sewa Singh and Chotu or Chhotabhai, and Mohinder Singh, a carpenter. The Appellant throughout denied his guilt, both in a voluntary statement to the police, by his plea of Not guilty and by his evidence on oath. 30
- P.5 et seq
- P.6 11.13-24
- P.27
- P.1 11.30-33
- P.11 et seq
8. There were striking discrepancies between the evidence of Ogwang and that of Rattan Singh:
- P.2 1.17       (i) Ogwang said he held the Appellant by the shorts pocket all the time:
- P.4 11.19-21
- P.5 11.29-31       Rattan Singh said Ogwang was holding the Appellant by the neck and one hand.
- P.4 11.22-23       (ii) Ogwang said that the Appellant undid his own fly-buttons Rattan Singh said that Ogwang undid them.
- P.5 11.34-35
- P.4 11.23-25       (iii) Ogwang said that both he and Rattan Singh picked up the Appellant's shorts: 40
- P.6 1.25       Rattan Singh said that he never touched the shorts.
- P.4 11.27-28       (iv) Ogwang said that Rattan Singh picked up the 2 rounds:

		<u>Record.</u>
	Rattan Singh said first that Ogowang did, then that Chhotabhai did.	P.5 11.48-49
	(v) Ogowang said that the 2 rounds and the penknife dropped out of the pocket:	P.6 11.29-30 P.4 11.25-27
	Rattan Singh said that Ogowang took the penknife out, and that only the rounds fell out.	P.6 11.30-33
10	9. A point which impressed the Assessors, although the learned trial judge brushed it aside, was the failure of the prosecution to produce the penknife. The Police Constables claimed that they returned it to their prisoner, which in the case of a man said to be under arrest for and about to be charged with a capital offence, would appear to be an unusual course.	P.15 P.16  P.3 11.32-33 P.5 11.39-40
20	10. According to the Appellant's evidence, he had on him no penknife or ammunition, but a 20s. note, which Police Constable Ogowang appropriated; his shorts were not removed; he was taken to the police station because he had no tax receipt, and he was falsely accused of carrying ammunition only when he demanded his money back.	P.11 11.32-46 P.12 P.12 11.46 11.13-15  P.12 11.47-49
30	11. In accordance with the emergency procedure, there was no preliminary investigation of the charge against the Appellant. He was kept in custody from 1st January 1954, and on 6th February 1954 he received notice of trial for 8th February 1954 accompanied by a list of witnesses for the prosecution and summaries of their evidence. Upon his arraignment a plea of Not Guilty was entered.	P.1
	12. At the close of the case for the prosecution counsel for the Appellant submitted that evidence of the finding of the 2 rounds of ammunition was inadmissible because they had been found in consequence of an illegal search, and he cited <u>Rex v. Hirji Remji Shah &amp; Two Others</u> , Cr, Case 1272/51.	P.9 11.20 et seq
40	13. Without calling on counsel for the prosecution, the learned trial judge overruled the submission, holding that even if the original search was unlawful, evidence obtained in consequence was not thereby rendered inadmissible, following a dictum of Horridge J. in <u>Elias v. Pasmore</u> , 1934 2 K.B. 164.	P.10-11

Record  
P.19 et seq

14. Upon appeal the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P., and Briggs J.A.) held that the initial stopping and searching of the Appellant were unlawful and irregular, but that that did not invalidate the production in court of incriminating articles found in consequence. The Court applied the analogy of an unlawful arrest, which, it said, did not affect the jurisdiction of the court, and referred to The Queen v. Hughes (1879) L.R.4 Q.B.D.614 and other cases. It also said that the matter seemed to be concluded by the decision (as it called it) of Horridge J. in Elias v. Pasmore, above, and dismissed the Appellant's appeal. 10

P.25

15. By Petition dated 10th June 1954 the Appellant sought special leave to appeal in forma pauperis to Her Majesty in Council against the dismissal of his said appeal, which by order of Her Majesty in Council dated 30th July 1954 was granted to him.

The Appellant respectfully submits:-

That his appeal ought to be allowed 20

That the judgment of the Court of Appeal for Eastern Africa should be reversed; and

That his conviction and sentence should be quashed, or

That such further or other order should be made as may be thought just, for the following among other

#### R E A S O N S

(1) Because the court ought not to admit evidence which has been obtained in the course of committing an unlawful and tortious act and by means of that act, especially where (a) that act was committed by servants of the Crown (b) the evidence relates to matters in issue, (c) the evidence is the only evidence implicating the accused, and (d) the nature of the tort is such as to affect the value of such evidence, or in the presence of one or more of the aforesaid circumstances. 30

(2) Because the Crown ought not to be allowed to rely for the whole basis of its case on the commission of a crime or tort by its servants.

(3) Because the court ought not to condone or appear to be condoning the commission of crimes or torts by servants of the Crown. 40

(4) Because Emergency Regulation 29 was clearly designed

to restrict the power of search to Police Officers of sufficient responsibility to resist the temptation to plant evidence or misappropriate property, and to uphold the conviction would be to render the Regulation nugatory.

(5) Because if such evidence is admitted, the Appellant would have no effective redress for the wrong done to him.

10 (6) Because the analogy of unlawful arrest relied on by the Court of Appeal for Eastern Africa is not an accurate statement of the law, or, if it is, the analogy is a false one, in that it goes to jurisdiction and not to the admissibility of evidence.

(7) Because the dictum of Horridge J. in Elias v. Pasmore, 1934 2 K.B. 164 is incorrect.

20 (8) Because if fairness to the accused is the true criterion of the admissibility of such evidence as laid down in the Scottish decisions of Lawrie v. Muir, 1950 S.C.(J) 19, Fairley v. Fishmongers of London, 1951 S.C.(J) 14, and H.M. Advocate v. Turnbull, 1951 S.C.(J) 96, that criterion was not applied either by the learned trial judge or by the Court of Appeal.

30 (9) Because it was unfair to the Appellant to admit such evidence in all the circumstances and especially where (a) the offence was a capital offence, (b) such evidence was the only evidence implicating the Appellant, and (c) such evidence contained so many discrepancies.

DUDLEY COLLARD

No. 35 of 1954

IN THE PRIVY COUNCIL

ON APPEAL FROM HER MAJESTY'S COURT  
OF APPEAL FOR EASTERN AFRICA AT  
NAIROBI

---

K U R U M A S/O KANIU

- v -

THE QUEEN

---

C A S E

- for -

THE APPELLANT

---

GASTER & TURNER,  
81, Chancery Lane,  
London W.C.2.

Appellant's Solicitors.