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UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
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17, RUSSELL SQUARE
LONDON, WC1B 5DR

In the Privy Council.

No. 69 of 1905.

On Appeal from His Britannic Majesty's
Court of Appeal for Eastern Africa.

5

BETWEEN

MAX HERMAN WEHNER *Appellant*

AND

The KING *Respondent.*

Case for the Appellant.

10 This is an Appeal from a judgment delivered on the 7th
March 1905, by His Britannic Majesty's Court of Appeal for Eastern
Africa, which dismissed an appeal from an order made by Judge
R. W. Hamilton on the 1st February 1905, convicting the Appellant
of murder and sentencing him to death.

15 The charge against the Appellant was that on the night of the
16th October 1904, he had murdered a native named Mcharnia by
shooting him with a rifle.

The Appellant is a settler in East Africa, and in the month of
September 1904 he was encamped with two other settlers, named
20 Gibson and Knapp, a few miles from the town of Nakuru. On the
16th October 1904, the Appellant, Gibson and Knapp went into
Nakuru and dined at the dak bungalow there. At 9 o'clock the same
night Knapp left by train for Naivasha.

APPELLANT'S CASE.

The Appellant and Gibson stayed on for some time drinking at the dak bungalow, and then started to return to their own camp. They were accompanied by three native boys, Mcharnia, Juma bin Arab Kirwi and Hamisi bin Wanganga. It was a dark night, and a lantern was borrowed from the steward of the dak bungalow. On 5 their way back to camp, a call was made at the camp of one Groves, and the murder is alleged to have been committed after leaving Groves' camp, and before reaching the Appellant's camp. It is also alleged that the Appellant shot Mcharnia with a particular '303 rifle produced in court at the trial of the present case. 10

The principal witnesses for the prosecution were the two boys, Juma and Hamisi. The material portions of their depositions as given at the present trial are set out below.

p. 18, l. 2.

Juma said : " We started off for the camp. We passed a place where grass had been burnt ; there were some trees in front of us. 15 Accused said, 'What is that ?' I said 'Trees.' We went into long grass. Accused said, 'Where is the road ?' I showed him. He told me to go before him with the light. He told me to cover the light with my hat as there were lions there. I did not hear lions. We found the road we used to pass every day. Accused said it was 20 not the right road. We left the road and went into long grass. He said we were losing the way. He then asked for the road again ; I pointed out the direction. He said, 'No,' it was somewhere else. He then asked the direction of the big water and the little water for drinking every day. We shewed him the way. We went 25 a little further on and accused took out his revolver and fired in the air. Then he called out for the M'kikuyu in the camp, but he did not hear. He then asked Mcharnia where the road was. Mcharnia pointed the direction. He then asked him again. We then went to some little hills, and I sat down to see if I could see the line of the 30 hills. It was very dark and I could not see them, but I saw the big water. Then accused asked Mcharnia where the road was, then he shot him with the gun produced. First, when Mcharnia said he did not know the road, accused struck him on the back of the neck and

knocked him down. As Mcharnia struggled up, catching hold of me, I said to Mcharnia that he would not be beaten again and to let us go. He let go of me. I went on and then the shot was fired. Accused was about three paces off and Mcharnia was quite close to me. He
 5 said, perhaps he would shoot us all. Mcharnia fell down when he was shot and groaned. I dropped the lantern and hat I was carrying and ran away. It was the accused's hat. I and Hamisi ran away to Nakuru. There we went to sleep in the kitchen of Mr. Tulloch. We told his boy what had happened."

10 The evidence of Hamisi is to the same effect.

On or about the 10th November, 1904, some porters refused to work for Knapp, alleging that a porter had been killed by one of the Europeans with him. Knapp complained to the Acting Sub-Commissioner at Naivasha. A police inquiry was ordered. Juma
 15 and Hamisi were produced. On the 12th November, 1904, some bones, a hat, a lantern, a blanket, and an ear ornament, and on the 15th or 16th November, 1904, an empty .303 cartridge case were found some little distance from the Appellant's camp. The Appellant and Gibson were then arrested, and after inquiry by the Town
 20 Magistrate of Nairobi by order dated the 6th January, 1905, he committed the Appellant for trial by the Court of Sessions. p. 14, l. 28.

On the 30th January, 1905, and 1st February, 1905, the Appellant was tried on the charge of murder before Judge R. W. Hamilton, purporting to sit as Sessions Judge of the Court of Sessions at
 25 Nairobi, and a jury consisting of five persons. In addition to the evidence of Juma and Hamisi already referred to, evidence was given as to the finding of the bones, lantern, etc., and medical evidence to the effect that none of the bones produced bore any evidence of a
 30 bullet wound. The story of the prosecution that Mcharnia was shot with the .303 rifle or any other rifle is contradicted by Knapp and by p. 25, l. 34.
 the steward of the dak bungalow, Dukuna, called as witnesses for the p. 28, l. 10.
 prosecution, and also by Groves and Gibson called as witnesses for pp. 30 & 31.
 the defence. All these persons assert that on the night in question the Appellant and Gibson had no rifle of any sort with them.

p. 10. The Appellant was not defended, he pleaded not guilty, and in his examination by the Town Magistrate denied the charge.

The Sessions Judge's record after the close of the evidence is in the following terms:—

p. 34, l. 25.

CHARGE TO JURY.

5

1. This is a question of fact to be decided as reasonable men.
2. The verdict must be found without reference to black or white, solely on the evidence.
3. If the story of the prosecution is true, the verdict 10 must be "guilty of murder".
4. If story is not believed, or there is any doubt, the verdict must be "acquittal."
5. Consider if the allegation of the defence is true that the story of the prosecution is concocted. 15
6. Consider the demeanour of the witnesses and how their allegations are corroborated by independent facts.
7. Were the watoto told their story?
8. The evidence of the Goanese steward is negative.
9. Groves' evidence may be honest, he may not have 20 seen the gun.
10. Much evidence to show accused was under the influence of liquor.
11. The spot was identified by the watoto independently of any bearings given by witnesses. 25
12. The facts to be found are to be found on the evidence only without bias.

13. Gibson was arrested with accused and his evidence as to the facts that happened on the night in question may have been vague owing to the influence of liquor.

VERDICT OF JURY.

5 Jury retired to consider verdict 3.40 p.m. Return 4 p.m.

All agreed verdict :—That accused caused the death of the M'Kikuyu Mcharnia, but that he was not responsible for his actions owing to the influence of liquor.

This is a verdict of “Guilty of Murder.”

10 Accused states it is perfectly untrue, owing to his having no firearms of any description.

SENTENCE OF COURT.

Sentence of Court :—Death by hanging.

From the said order and sentence, the Appellant appealed to His p. 35, l. 30.
 15 Britannic Majesty's Court of Appeal for East Africa, and on the 7th March, 1905, the said Court dismissed the Appeal. The said Court p. 37.
 was of opinion that under the circumstances of the case there was no misdirection and no obligation on the Sessions Judge to explain the law to the jury, as the facts which might have reduced the offence to
 20 culpable homicide not amounting to murder, or to the doing of a rash and negligent act within the meaning of Section 304A of the Indian Penal Code were not put in issue by the Appellant. The said Court recorded that the other grounds of appeal were not argued.

25 The first of the said grounds urges that under Section 274 of the Code of Criminal Procedure, the jury ought to have consisted of nine and not five persons.

The sentence of death on the Appellant was commuted to one of penal servitude for life by the High Commissioner of the East African

Protectorate, on a memorial presented to him by the members of the jury who tried the Appellant, alleging that they, by their verdict, intended to find the Appellant "guilty only of culpable homicide," not amounting to murder, in the sense in which those terms are used in English law, and were of opinion that the death of the native, 5 though due to the hand of the condemned man, was not a premeditated crime.

Having regard to certain questions of law raised in the present appeal, it is advisable to shortly refer to the Orders in Council dealing with Courts of Criminal Jurisdiction in East Africa. By the East 10 Africa Order in Council, 1897, Section 7, Her late Majesty established in the East Africa Protectorate a Court styled "Her Majesty's Court for East Africa," referred to in the said Order as the Protectorate Court, to be presided over by an officer styled "Her Majesty's 15 Judicial Officer for the East Africa Protectorate." By Section 11 of the said Order, the Indian Penal Code, the Indian Evidence Act (I. of 1872), the Indian Oaths Act (X. of 1873), and the Indian Code of Criminal Procedure (Act X. of 1882), except Chapter 33, were made applicable to the East Africa Protectorate. By Section 14 of 20 the said Order, the Judicial Officer was deemed to be and have the powers of Sessions Judge, and the full Court for Zanzibar was deemed to be the High Court.

The next Order in Council was made on the 7th December, 1899. Section 4 provided as follows :—

"Subject to the other provisions of the Principal 25 Order, the Code of Criminal Procedure and the other enactments relating to the administration of criminal justice in India for the time being applied to the Protectorate shall have effect as if the Protectorate were a Province of India. The full Court for Zanzibar shall be deemed to be the High 30 Court, and the powers both of the Governor General in Council and of the Local Government under those enactments shall be exercisable, subject to any directions of the Secretary of State, by the Commissioner. Until other

provision is made in exercise of the powers conferred by the Criminal Procedure Code, the Protectorate Court shall be the Sessions Court and the Protectorate Judge shall be the Sessions Judge."

5 On the 19th February, 1901, the High Commissioner for East Africa appointed Robert William Hamilton, Esquire, to exercise the powers of an additional Sessions Judge under the Indian Criminal Procedure Code (Act V. of 1898).

The East Africa Order in Council, 1902, was made on the 11th
 10 August of that year. Section 15 provided for the establishment of a Court of Record styled "His Majesty's High Court of East Africa," with full jurisdiction, civil and criminal, over all persons and over all matters in East Africa, such civil and criminal jurisdiction to be exercised in conformity with the Civil Procedure, Criminal Procedure
 15 and Penal Codes of India. Further provision was made by Section 18 for the establishment of courts subordinate to the High Court; and by warrant dated the 11th August, 1902, His Majesty appointed Robert William Hamilton, Esquire, to be one of the judges of the said High Court.

20 The Code of Criminal Procedure (Act V. of 1898) provides by Section 267 that all trials before a High Court shall be by jury, and Section 274 (1) provides that the jury shall consist of nine persons.

Section 268 provides that all trials before a Court of Session shall be either by jury, or with the aid of assessors. Section 269 gives the
 25 local government power to determine what offences shall be tried by a jury and Section 274 (2) the power to fix the number of jurors in a trial by the Court of Session. These powers have not been exercised by the local government of East Africa.

The Appellant was tried by the said R. W. Hamilton, Esq., a
 30 judge of the High Court purporting to act as a Sessions Court and a jury of five persons, and he submits that the said trial was not legal,

inasmuch as if it be regarded as a trial by the High Court, it was imperative that the jury should consist of nine persons, and if it be regarded as a trial by the Court of Session, he could not be tried by a jury of five persons in the absence of the necessary orders by the local government, *and still be tried by persons*

The Appellant humbly submits that the said judgment of His Majesty's Court of Appeal for East Africa, dated the 7th March 1905, and the said conviction and sentence, dated the 1st February 1905, ought to be set aside, and the Appellant ought to be acquitted or a new trial ordered for, among other, the following ¹⁹

REASONS.

1. Because the Appellant has been found guilty of murder on the construction placed by the presiding judge on a verdict of jury, the said verdict not in fact being a verdict of guilty of murder. ¹⁵
2. Because the trial of your petitioner by a jury of five persons is illegal under the laws in force in East Africa.
3. Because many of the witnesses were not examined either on oath or affirmation as required by the ²⁰ Indian Oaths Act.

LESLIE DE GRUYTHER.

*and it was
said that
the jury
was
not
legal*

In the Privy Council.

No. 69 of 1905.

ON APPEAL FROM EASTERN AFRICA.

BETWEEN

MAX HERMAN WEHNER ... *Appellant*

AND

THE KING *Respondent.*

Case for the Appellant.

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