

## R. v. MUTUFIKE AND MANDYATA.

## TWO CRIMINAL REVIEW CASES OF 1938.

*Northern Rhodesia Crown Lands and Native Reserves (Tanganyika District) Order in Council, 1929, Article 3 (6)—natives resident outside a native reserve not to be permitted to so remain after certain period—natives so remaining in contravention of Article 3 (6)—conviction for disobedience under Penal Code section 107—conviction quashed on review—Article 3 (6) held to be directory only.*

The facts appear from the judgment hereunder.

The Order in Council in question will be found at pp. 22 *et seq.* of Appendix 5 to the Laws.

**Francis, C.J.:** The proceedings and convictions in these two cases have been sent in for review "as the charges laid are rather unusual".

The charges, proceedings and convictions in both cases are of the same nature, and thus for the purpose of this order Case No. 47 will be discussed.

The charge against the accused is "the wilful disobedience of a Statute Law of the Territory to wit the Northern Rhodesia Crown Lands and Native Reserves (Tanganyika District) Order in Council, 1929, by remaining on land outside a native reserve after having received instructions to remove therefrom".

Evidence was led to show that some years ago the accused (a head-man) with his people had been warned to go into the native reserve. On the 24th October, the District Commissioner found that the accused had built a hut on land (the ownership of which was not specified) beyond the boundary of the native reserve across the Luchundi River. Incidentally the name of this reserve is not given.

The accused neither cross-examined nor made any statement.

Upon these facts the Magistrate convicted the accused of an offence under Penal Code, section 107 (Disobedience of Statutory Duty), and incorporated the following words in his judgment:

"Section 107 of the Penal Code lays down the punishment. The statute concerns the public and the disobedience obviously concerns the public. The section of the code is slightly ambiguous but whichever way it is read the offence is covered."

I agree that the proceedings are unusual, and for this reason endorse fully the action of the Magistrate in sending the case up for review; but at the same time it is for consideration whether the administration, before embarking on such a prosecution, should not have obtained legal advice.

Article 3 (6) of the Order in Council cited in the charge provides, *inter alia*, that except under the conditions therein prescribed, no new native village shall be erected on any land not within a native reserve, and no native shall be permitted to remain on any land outside a native reserve.

In a criminal statute it must be quite certain that the offence charged is within the letter of the law. The provision in question is of a directory nature and no more than an instruction conveyed to and required to be observed by the Governor; in no sense can it be construed as a penal law. The invocation of Penal Code, section 107, does not assist. In any event it is very doubtful whether a trespass on privately owned land is a question of concern to the public within the meaning of the phrase in section 107.

There are other unsatisfactory features about the proceedings into which it is not necessary for me to enter.

The record has been seen by the Solicitor-General who intimates that he is unable to support the conviction in either case.

The convictions in Cases 47 and 48 are hereby quashed and the accused persons are to be released by telegraphic instruction.