

**TOWN CLERK, LIVINGSTONE MUNICIPALITY
v. SIKOLOPANI.**

CRIMINAL REVIEW CASE No. 181 OF 1941.

*Calling of witnesses by court—Criminal Procedure Code section 139—
accused cannot be convicted on evidence of witness called by court after
defence closed.*

In this case the accused was charged with being in possession of native beer. Only one witness was called for the prosecution and the accused then gave evidence denying that he had had any beer in his possession. The Court was apparently not satisfied and adjourned and the police were instructed by the Court to investigate the case further. At a later date the Court called three witnesses and as a result of their evidence the accused was found guilty of the offence. On review the High Court quashed the conviction on the ground that as the Court was not satisfied from the evidence adduced on behalf of the prosecution and the defence that the accused was guilty, the accused should have been found not guilty and discharged.

The Court has a right to call a witness not called by either the prosecution or the defence and without the consent of either if it is of the opinion that this course is necessary in the interests of justice, but in order that injustice should not be done to an accused, the calling of such a witness after the case for the defence should only be done in cases where something has arisen on the part of the accused *ex improviso* which no human ingenuity could foresee. (Archbold, *Criminal Pleading, Evidence and Practice*, 35th Edition, p. 585.)

Law, C.J.: In calling witnesses after the accused had given evidence, the Court purported to act under section 139 Criminal Procedure Code. It seems, however, that such evidence can only be called *ex improviso* (*R. v. Harris* (1927) 2 K.B. p. 587 and *D. Newark*, 1934, Vol. I, Eastern Africa Court of Appeal p. 162). Without that additional evidence it cannot be said that the Magistrate would have convicted the accused. In the circumstances, therefore, the accused was entitled to be acquitted. Accordingly the conviction for illegal possession of beer is quashed and the sentence set aside.