

UGANDA / JUDGMENT

# Baukunda v Rex ('Criminal 'Appeal'No. 18 of1951) [1951] EACA 160 (1 January 1951)

[1951] EACA 160

## COURT

East African Court of Appeal

## BEFORE

Lockhart-Smith, Ag. VP, Nihill P, Thacker, Ag. C.J

## CASE / FILE NUMBER

'Criminal 'Appeal'No. 18 of1951

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## GOURT OF APPEAL FOR EASTERN AFRICA

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Before 'Sin Banchay Nittill, 'President, 'Lockwart-Smith, 'Ag. 'Vice-President, and THACKER, Ag. C. J. (Kenya)

'CHIMILO'S'O'BAUKUNDA, Appellani<sup>1</sup>(Original Accused)

REX, Respondent (Original Prosecutor)

**'Criminal Appeal No. 18 of 1951**

(Appeal from decision of H. M. High Court of Tanganyika—Abernethy, A(J))

Criminal Jaw-Defective Information whether Ifatal-Batra Hiddicial Statement-Confession—Necessity to record accused's exact words.

The appellant was convicted of murdering his sister-in-law by the High Court of Tanganyika. He was unrepresented at his trial. In the information the particulars of the offence alleged that the appellant unlawfully killed his sister-in-law instead of alleging he murdered her. The Court considered whether the defective information was fatal to the validity of the trial.

The appellant made an extra-judicial statement before a Magistrate who wrote: "The prisoner ... is brought before me... to have his confession recorded".

At the preliminary inquiry the committing Magistrate noted that "Accused states he wishes to reserve his defence and does not wish to make any statement at present whether on oath or not. Accused states he has no witnesses to bring on his behalf".

Held (27-4-51).—(1) The defective information had not occasioned a failure of justice. But the responsibility for the correctness of the indictment lies upon counsel for the prosecution and not upon the Court. His responsibility is even greater if he drafted and signed the information.

(2) The use of the word "confession" was improper.

(3) In complying with the requirements of section 223, Tanganyika Criminal Procedure Code, the exact words of the accused must be recorded.

Appeal dismissed.

Cases referred to: R. v. Smith and Others, 34 Cr. App. R. 168; R. v. Wilhald s/o Tibanyendela, XV E. A. C. A. 111; R. v. Gae s/o Maimba and Another, XII E. A. C. A. 82; R. v. Mukesi s/o Kihura, 8 E. A. C. A. 48.

Appellant not present, unrepresented.

Southworth, Crown Counsel (Tanganyika), for respondent.

JUDGMENT.—This is an appeal from the conviction of the appellant by the High Court of Tanganyika of the murder of his sister-in-law.

The appellant was not represented by counsel at his trial, and his Memorandum of Appeal has been prepared without legal advice.

The first point which falls for consideration arises from the wording of the information upon which the appellant was tried.

The Statement of Offence specified the crime of murder contrary to section 196 of the Penal Code. That section provides that: "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder". The circumstances which, if proved in evidence, establish "malice aforethought" are set out in section 200.

The particulars of offence, however, alleged that the appellant "unlawfully" killed" his sister-in-law.

Section 138 (a) (iv) of the Criminal Procedure Code provides that the forms set out in the Second Schedule to the Code or forms conforming thereto as nearly as may shall be used in cases to which they are applicable. Form No. 1 in the Second Schedule provides a precedent for any information for murder, and in the particulars of offence the allegation is that A. B. \*murdered\* J. S. The words "unlawfully killed", used in the information in the present case, are apt for an information for manslaughter (see Form No. 2 in the same Schedule) but not for one for murder. Both forms are, of course, merely reproductions of the forms of indictment respectively in use in England in cases of murder and manslaughter. (See Archbold's Criminal Pleading Evidence and Practice, 32nd edition, at pages 929 and 930\$ .)

The allegation of murder in an information imports an allegation of malice aforethought by virtue of the use of that expression in section 196 of the Penal Code as read with section 200 of the same. Section 135 of the Criminal Procedure Code requires that every information shall contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged, and there can be no doubt, in our opinion, that the failure to allege, in the information in the present case, that the appellant murdered his sister-in-law, was in breach of section 135 and renders the information defective.

The question therefore arises as to whether this defect is fatal to the validity of the trial, and ought to lead to the quashing of the conviction, or at least to an order for a new trial.

Mr. Southworth, for the Crown, points out that the statement of offence in the information specifies the offence of murder contrary to section 196 of the Penal Code. The appellant was served with a notice of trial with a copy of the information attached, and the Magistrate who served the notice certified that he had explained the nature of the information to the appellant. The information was again read over and explained to him when arraigned and required to plead. If the appellant had referred to section 196, he could have had no doubt that he was to be tried for the murder of his sister-in-law, and he had, in fact, been committed for trial on a charge of murder correctly framed, and read over and explained to him, by the committing Magistrate.

Mr. Southworth further submits that even if the appellant had been legally represented at his trial, and his counsel had challenged the information, such a course could only have resulted in an order by the Court, under section 260 of the Criminal Procedure Code, for the amendment of the information.

The appellant did not, therefore, suffer any prejudice by reason of the error. Even supposing he had, as a result of the error, been under the misapprehension that he was being tried for manslaughter, he had pleaded not guilty and would presumably, *a fortiori*, have pleaded not guilty if he had understood that he was being tried for murder.

The learned trial Judge, perhaps rather unfortunately, stated in his judgment that he had no doubt in his mind that the accused did *unlawfully* kill the deceased, but he went on to find, as Mr. Southworth points out, that malice must be implied. The evidence, Mr. Southworth submits, clearly establishes that the learned Judge was justified in this latter finding.

We do not consider that the error in the information has in fact occasioned a failure of justice in this case, and, relying upon section 346 of the Criminal Procedure Code, we do not, therefore, propose to quash the appellant's conviction, or order a new trial, on account of that error. We would express the hope, however, that an error of this nature will not be made again. In England an indictment is normally drawn up and signed by the proper officer of the Court, and in cases of difficulty is revised by counsel retained for the purpose. It is not drawn and signed, as was the information in the present case, by prosecuting counsel. Nevertheless, the Court of Criminal Appeal has said: "We think it desirable to point out that the responsibility for the correctness of an indictment lies in every case upon counsel for the prosecution, and not upon the Court. No

counsel should open a criminal case without having satisfied himself upon that point". (Smith and Others, 34 Cr. App. R. 168 at page 183.) The responsibility of counsel for the prosecution is even greater when he himself has drafted and signed the information.

The appellant made an extra-judicial statement before a Magistrate, and we regret to observe that the Magistrate, in the notes he made before recording the statement, has written: "The prisoner... is brought before me... to have his confession recorded".

**In Wilbald s/o Tibandenyela, XV E. A. C. A. 111, this Court said, at page 117: —**

"We feel we must draw attention to an error on the part of the Third Class Magistrate who took the extra-judicial statements when he recorded in the case of this appellant and of the then accused Thomas s/o Kemala that he was satisfied that the 'confession' the person who was before him was about to make was a voluntary one. The Magistrate had no right to assume that the statement would amount to a confession in the event his assumption was proved to be wrong as both the statements were exculpatory in character. Perhaps this was a slip on the part of this Magistrate because in the case of the accused Martin bin Rwebogora we note that he correctly used the word 'statement'. We mention the matter, however, not because the wrong use of the word 'confession' has in this case caused any actual prejudice to the appellant, but because its use indicates a confusion of thought in the mind of the Magistrate. This is by no means the first time this Court has noted the improper use of the word 'confession' by Magistrates when taking extrajudicial statements."

Equally in the present case, the Third Class Magistrate who recorded the appellant's statement should not have assumed that the statement which the appellant desired to make would prove to be a "confession".

**The appellant's extra-judicial statement was in fact as follows: —**

"I have nothing much I want to say except that I agree it was I who killed the woman with my own hand. Please be lenient. I was ill at the time I have nothing more to say."

At the preliminary inquiry the committing Magistrate made the following \$note:\$

"Accused addressed in terms of section 223 Criminal Procedure Code.

Accused states he wishes to reserve his defence, and does not wish to make any statement at present, whether on oath or not. Accused states he has no witnesses to bring on his behalf."

We would point out that this procedure was not a proper compliance with the requirements of section 223. The *\*ipsissima verba\** of the accused must be recorded, read over to him, attested, and signed by him if he is willing, even if they amount to no more than a statement that he wishes to reserve his defence or to say nothing. Anything which the accused says at this stage of a preliminary inquiry can only be given in evidence at his trial if it has been recorded in accordance with the provisions of section 223, and it is obvious that it may be

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important to prove at the trial that the accused has put forward no defence at the inquiry; for example, as where an accused person, who has made a full admission of his guilt in an extra-judicial statement, states that he wishes to say nothing at the preliminary inquiry, but alleges for the first time at his trial that the admission was induced by improper conduct on the part of the Police.

At his trial the appellant made an unsworn statement in the following terms:—

"I ask permission to go home because at that time I was sick. I had no senses. That is all I have to say."

This statement is capable of the interpretation that the appellant intended to convey that he did not know what he was doing at the time of the crime, and, indeed, had no recollection of the killing of Ndaje, which he could not, therefore, admit.

In dealing in his judgment with the appellant's statements, the learned trial Judge observed: "The accused has admitted killing Ndaje, but says he remembers nothing about it and that at that time he had lost his senses."

It is true that "there is no rule of law or practice which makes corroboration of a retracted confession essential" (headnote to *Gae s/o Maimba and Another*, XII E. A. C. A. 82). It is also true that "an accused person cannot be said to have retracted a confession freely and voluntarily made merely by making an unsworn statement without referring in any way to his earlier statement confessing his guilt" (headnote to *\*Mukesi s/o Kihura\**, VIII E. A. C. A. 48). We think, however, that it would have been better if the learned trial Judge had shown clearly in this part of his judgment that he had appreciated that the appellant's unsworn statement at his trial may have amounted to an implied retraction of his extra-judicial statement, and that if he had, in the circumstances of this case, expressly directed himself as to the corroboration to be found in the evidence of the appellant's extra-judicial admission of the killing.

There was, in fact, ample corroboration. As the learned Judge himself points out earlier in his judgment, there is evidence that the dying woman told her husband and the appellant's mother that the appellant had speared her. The appellant admitted that he had speared the woman to Kilolo (P. W. 3). A spear, stained with what appeared to be blood, and identified as belonging to the appellant was found close to where Ndaje was lying. The appellant himself was nowhere to be found.

The notes of the learned trial Judge's summing up to the assessors show that he did direct his mind to the issue of corroboration, there was in fact corroboration, and, although we think that the judgment might have been better expressed in dealing with this issue, we are not prepared to hold that there was a material misdirection occasioning a miscarriage of justice.

We are in entire agreement with the learned Judge in finding that the appellant failed to establish a defence of insanity in the legal sense. We would observe, however, that none of the prosecution witnesses could suggest any reason for the murder, which appears to have been entirely without motive, and that there was rather more evidence at the preliminary inquiry of mental disturbance on the part of the appellant in the days preceding the murder than was given at his trial. No doubt these aspects of the case will be fully considered in the proper quarter.

In his Memorandum of Appeal the appellant has claimed that he was absent bathing at the time of the murder, which was committed by some other person unknown. We reject this claim as a palpable fabrication.

The appeal is dismissed.

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