

UGANDA / JUDGMENT

Hamidi v Reginam (Criminal Appeal No. 24 of 1956) [1950] EACA 487 (1 January 1950)

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COURT

East African Court of Appeal

BEFORE

Bacon, JA, Edmonds J, Sinclair, VP

CASE / FILE NUMBER

Criminal Appeal No. 24 of 1956

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H. M. COURT OF APPEAL FOR EASTERN AFRICA

Before Sinclair (Vice-President), Bacon, Justice of Appeal and Edmonds, J. (Kenya)

AKUTENDASANA D/O HAMIDI, Appellant (Original Accused) v.**REGINAM, Respondent****Criminal Appeal No. 24 of 1956**

(Appeal from the decision of H. M. High Court of Tanganyika, Law, Ag, J.)

Procedure—Extra-judicial statement made to district commissioner in charge of police—Indian Evidence Act, 1872, sections 24, 25 and 26.

The principal evidence against the appellant was a statement made by her to the district commissioner who was also the officer-in-charge of the police in his district. The appellant was an elderly African woman. She had been sent for by the district commissioner and was escorted to his office by a police corporal. She made a statement which was clearly a confession of arson, but, to questions put to her by the district commissioner, she gave answers which converted the statement into a confession of murder.

Held (12-3-56).—The district commissioner having sent for the appellant and then having interrogated her as he did could not be said to have divested himself of his authority as a police officer and to have acted, or to have conveyed to the appellant the impression that he was acting, solely as a magistrate and the statement was therefore inadmissible under section 25 of the Indian Evidence Act, 1872.

Appeal allowed.

Cases referred to: R. v. Tirugurwa bin Byantimba, (1942) 10 E. A. C. A. 44; Kinyori s/o Karuditu v. R., Cr. App. No. 551 of 1955 (supra p. 480); R. v. Surumbu s/o Singana and others, (1940) 7 E. A. C. A. 55; R. v. Fabiano Kinene s/o Mukye and others, (1941) 8 E. A. C. A. 96; R. v. Knight, (1905) 20 Cox 711; R. v. Wibald s/o Tibanyendela, (1948) 15 E. A. C. A. 111.

Appellant in person.

Halliwell for respondent.

JUDGMENT (prepared by Bacon, J. A.).—This was an appeal against conviction by the High Court of Tanganyika for murder. The learned trial Judge having granted a certificate under section \$344(1)(b)\$ of the Criminal Procedure Code, all questions relating to the issue were open to this Court. We allowed the appeal and set aside the conviction and sentence. We now give our reasons for so doing.

The case for the Crown was that during the night of 10th/11th September, 1955, the appellant deliberately set fire to a hut situated about 200 paces from her own hut when, as she knew, it was occupied by a number of boys during the ceremony of their initiation and that the deceased was thereby burnt to death.

It was proved beyond doubt that the hut was destroyed by fire during that night, that the deceased had been in it when the fire occurred and that his charred body was found among the ashes. The issue as to the appellant's guilt was thus reduced to two questions: did she deliberately set the hut alight, and secondly, if so, did she do so in such circumstances that she was guilty of murdering the deceased or alternatively of manslaughter as a result of his death or, in the further alternative, of neither? The answer to that second question depended

upon considerations of mixed law and fact relating to her knowledge or to her belief or to her reckless indifference concerning the presence of one or more human beings in the hut at the material time.

The learned trial Judge described the appellant in his judgment as "an old white-haired African woman, a simple and uneducated member of a somewhat primitive tribe". He also found that no motive had been established, though of course appreciating that motive was not a necessary element of either murder or manslaughter. Perusal of the record shows that both the description "simple and uneducated" and the finding of no motive appear to be amply justified. No question of insanity or unfitness to plead is recorded as having been raised at the trial, except that the learned Judge mentioned "possible insanity" when summing up to the assessors, presumably as a matter of precaution even in the absence of any evidence supporting the suggestion, and indeed despite the appellant's own contention in the witness-box that she was "not mad" but "perfectly all right".

It should also be noted in passing that the learned Judge told the assessors that there was "no question of manslaughter", and that he made no mention of that question throughout his judgment. That exclusion of the possibility of the appellant having been proved guilty of the lesser offence was based on the learned Judge's reliance on an alleged extra-judicial statement by the appellant which was admitted in evidence and on his finding that he had "no doubt that it was generally known, and that the accused knew, that the circumcision initiates were sleeping in that particular hut." We think, however, that, since at the best it could only be sought to justify the attribution of such knowledge to the appellant as an inference from slender evidence, it was incumbent upon the learned Judge to put to the assessors the alternative of a mere reckless indifference, without either knowledge or grounds for belief, on the appellant's part. For arson involving homicide, in such circumstances as were accepted at the trial as proved, does not necessarily amount to murder: *R. v. Tirugurwa bin Byantimba*, (1942) 10 E. A. C. A 44. However, on the view which we take of other aspects of the case that omission is not a matter upon which we base our decision.

We now pass to the first main question which arose on the appeal, namely that of the admissibility of an extra-judicial statement in writing made by the appellant and admitted in evidence. The importance of this issue may be gathered at once from the following passage in the early part of the judgment: "The case against the accused," said the learned Judge, "is based substantially on her own confession which she is alleged to have made to a magistrate on 4th October, 1955". That observation was undoubtedly correct: the so-called "confession" was, if admissible, the only solid ground on which the Crown case stood.

The facts relevant to this issue were as follows. The appellant was arrested on or about 15th September, 1955, a few days after the fire, and on 17th she was charged with murder. Thenceforward she was in custody in the remand prison at Newala. The district commissioner at Newala is a magistrate of the first class and is also, by virtue of his office, in charge of the police in his district. In September and October, 1955, there was only one district officer; he was in Newala during some of the time when the appellant was on remand. Police duties were delegated to the district officer, but in his absence were performed by the district commissioner. The police corporal who had charged the appellant consulted the district commissioner from time to time while he (the former) was recording various witnesses' statements.

On 4th October the district commissioner sent for the appellant. It appears from the police corporal's evidence that, so far as he knew, "she had not asked to see a magistrate". The corporal further testified that the district commissioner sent him a message that "if the appellant wanted to see him she should be sent",

but that he (the corporal) told the appellant "that the district commissioner wanted to see her", and that she was then escorted to the district commissioner's office. The district commissioner, on the other hand, while agreeing that he had sent for the appellant, said that he had done so because he had heard from the district officer that she wished to see him. The learned Judge accepted this latter version of how the appellant came to be taken before the commissioner, but made no mention of the corporal's evidence to the effect that he had ordered the appellant to go

to the commissioner's office.

As the learned Judge found, there was "no doubt at all that the magistrate, in his dual capacity as district commissioner and officer-in-charge of police at Newala, had a certain amount to do with the investigation into the case". The appellant was neither ill-treated, nor prompted by the corporal to make a statement, nor forced to say anything; she further testified that she looked on the district commissioner as "district commissioner and nothing else"; and she agreed that he had told her that he was a magistrate and had cautioned her. The commissioner then recorded the appellant's statement. In so far as it was dictated it clearly amounted to a confession of arson and probably to one of manslaughter, or possibly to one of murder. It is not, however, necessary to determine its full effect. When the appellant had dictated her statement the commissioner evidently thought it inconclusive, for he then asked her two supplementary questions—and we stress the word "supplementary", as the questions plainly were—the answers to either or both of which might have been, and the answer to one of which was, highly incriminating as regards the charge; for what had previously been said by the appellant was thereby converted into a clear confession of murder. Thus, although it may be argued that during the first phase of the interview the commissioner was acting solely in his capacity as a magistrate, during the second he plainly exceeded his duty as such.

At the preliminary inquiry the appellant retracted the whole statement, saying that she had only made it because of heart trouble. It may be added that, when testifying on the general issue towards the end of the trial, she denied having said to the district commissioner that she set fire to the hut at all, contending that she had been made to thumbprint a statement which did not represent what she had said—in other words, she repudiated the very essence of the statement attributed to her.

When the issue arose the procedure was erroneous inasmuch as, before the assessors withdrew, they were permitted to hear a great deal of evidence as to the making of a statement by the appellant and as to how it came to be made, whereas they should have been left in ignorance of the whole matter unless and until the statement were admitted by the learned Judge. Other procedural errors may have occurred, though it is not clear from the record whether that was so. We have recently dealt in detail with this topic in *Kinyori s/o Karuditu v. R.*, Cr. App. No. 551 of 1955, to which we again call attention. Our conclusion in the instant appeal is not, however, based on any such procedural error but on more substantial grounds.

The learned trial Judge excluded the two questions and answers constituting the latter part of the appellant's extra-judicial statement, but admitted the remainder in evidence. The memorandum of appeal raised four objections to his decision, contending that the entire statement was inadmissible under section 24, or alternatively section 25, or in the further alternative section 26 of the Indian Evidence Act, and that in any event it was not open to the Judge to split the statement into two parts and admit the first while rejecting the second as involuntary.

As regards section 24 of the Act, which renders "irrelevant in a criminal proceeding" a confession the making of which was "caused by any inducement, threat or promise having reference to the charge" we do not think that it is of any assistance to this appellant; it was only after the trial of the issue of admissibility that she alleged for the first time that the police corporal had maltreated her at the police station within a day or two of her arrest, and in cross-examination even this tardy complaint was shown to be of very doubtful worth. During the trial of the issue itself the appellant testified that the only threats made against her were after she had made her extra-judicial statement.

Section 25 provides that "no confession made to a police officer shall be proved as against a person accused of any offence". The question is whether in all the circumstances to which we have referred the district commissioner should be regarded as divested, for present purposes, of his functions as the officer in charge of police at Newala and as acting solely in his capacity as a magistrate when he recorded the statement concerned. In answering this question we must have regard particularly to the fact that he had sent for the appellant and that the police corporal who had summoned her to be escorted from the prison to his (the district commissioner's) office had given her no choice in the matter, but had simply "told her that the commissioner wanted to see her". Moreover, under cross-examination both during the trial of the issue of admissibility and when testifying on the general issue, the appellant never referred to the commissioner as "the magistrate" but always as "the district commissioner". The only passage in which she went beyond that (at p. 19 of the record) was when she said she never thought of him as a police officer, but "just looked on him as the district commissioner. He told me", she said, "he was a magistrate. To me he was the district commissioner and nothing else. I don't think he is a policeman, I only know him as a D. C." With all that background, we think that the only proper conclusion to be drawn is that, from the point of view of this "old woman, a simple and uneducated member of a somewhat primitive tribe", she was ordered from the prison where she was detained on a charge of murder to go before the district commissioner whom she knew as the senior Government officer in the district, she was taken to him by the police and she was then invited to make a statement which, on her making it, was by means of interrogation converted from a confession of arson into a confession of murder.

The district commissioner having sent for the appellant and then having interrogated her as he did, he cannot in our view be said to have divested himself of his authority as a police officer and to have acted, or to have conveyed to the appellant the impression that he was acting solely as a magistrate. The instant case is indistinguishable in principle from *SR\$. \$v\$. Surumbu \$s/o\$ Singana and others*, (1940) 7 E. A. C. A. 55, where a district officer directed one of the police who had suspects in custody to bring them to him one by one and then invited each to speak. This Court observed that "it was as an investigating officer rather than as magistrate that (the district officer) was acting on this occasion, for it is no part of the duties of a magistrate to call suspects before him and ask them to account for their movements, while, on the other hand, this is just what a police officer investigating a crime would naturally do". It is true that there is a distinction on the facts, for in that case nobody told the suspects that the district officer was a magistrate. But in the instant case the district commissioner's announcement to the appellant that he was a

magistrate does not appear, in view of her evidence which we have quoted, to have made any impression on her mind.
Following the judgment in Surum'ou's case we can only say that, although a district commissioner and a magistrate who is also in charge of the police need not, in order to be regarded as functioning in his magisterial capacity for the purposes of the Indian Evidence Act, necessarily be sitting in Court, nevertheless, "the law being what it is, he must be careful to distinguish his functions so as to

make it plain, when he records the confession of a person in police custody, that he is not himself then taking part in the investigation of the offence". That is what we think this district commissioner failed to do.

Accordingly there was an infringement of section 25 when the first part of the appellant's extra-judicial statement was admitted in evidence against her after she had been charged, for even that first part alone certainly amounted to at least a confession of arson and it is immaterial that that was a lesser offence since the prohibition in the section is not in practice construed as being confined to a confession of the offence actually charged.

We need not dwell on the position under section 26. Suffice it to say that this provision also was infringed, for on its true construction the magistrate therein designated must be acting entirely independently of any police functions and of the investigation of the case, and the person in custody must know that that is so. Those conditions were not here fulfilled.

The remaining ground of appeal as regards this issue is that there was a failure to comply with the necessary procedure (as set out for guidance in the Handbook for Magistrates) when the district commissioner interrogated the appellant, and that the learned trial Judge was accordingly wrong in admitting as voluntary even that part of the statement which preceded the interrogation. This court dealt with the general principle in *R. v. Fabiano Kinene s/o Mukye and others*, (1941) 8 E. A. C. A. 96, at p. 99 in these words: "... We would stress the desirability and indeed the necessity of the utmost care being used in taking these confessions to ensure . . . that the accused should not be asked leading questions or cross-examined on what he says. The statement is supposed to be one voluntarily made in his own words by the accused person after he has been charged and cautioned. If there is any suspicion that any element of coercion or persuasion or inducement has been present at its making it may render the confession inadmissible".

We reaffirm those observations in toto. But the particular point which arose in the instant case did not arise in *R. v. Fabiano Kinene*, namely as to the consequence of a supplementary and vital question put to the accused after he has voluntarily said all that he had intended to say. On account of our views on the points raised under the Indian Evidence Act it is now unnecessary to decide this further ground of appeal. Had the matter been *res integra* it would, we think, have been forcibly arguable that the earlier part of the statement, which was voluntarily made, should be regarded as unaffected by the subsequent involuntary admissions, and that the learned Judge would therefore have been right in admitting the former, apart from the effect of sections 25 and 26 of the Indian Evidence Act. But we are at present bound by the

decision of this Court in *R. v. Nyungindo*, (1948) 15 E. A. C. A., 132 where on exactly similar facts it was held "that the prosecution failed to discharge the onus which lay upon it of proving that the extra-judicial statement was, in its entirety, a voluntary one and that it should therefore have been rejected", since the magistrate's proper warning given before the commencement of the statement was nullified by the later questioning which "completely destroyed the voluntary nature of the statement", that is to say of the statement as a whole.

Incidentally we do not think that the ruling in *R. v. Knight*, (1905) 20 Cox 711, referred to by the learned trial judge in his ruling, is of any assistance, for two reasons: first, the case was not concerned with a voluntary statement to an independent or disinterested person but with a long interrogation of the suspect by an investigating official empowered to institute a prosecution whom the Court therefore treated as though he were a policeman inquiring as to an alleged offence; and secondly, there was in that case no objection as to the admission of the suspect's answers up to a certain point, which alone would have justified the decision to split them into two portions and to admit the earlier one.

A further point relating to the appellant's statement remains to be noted. The district commissioner recorded in the document, before hearing what the appellant had to say, that he was satisfied that "the confession she makes is a voluntary confession". This was no doubt a mere slip, but in the circumstances the word "confession" was an unfortunate anticipation of the outcome. After this Court's observations in *R. v. Wilbald s/o Tibanyendela*, (1948) 15 E. A. C. A. 111, magistrates should be diligent to avoid this error which, on the face of it, suggests conscious or unconscious bias.

What, then, is left after excluding the extra-judicial statement? We cannot attribute any weight to the evidence of the appellant's grand-daughter whom the trial Judge rejected as entirely unreliable. Again, a baseless accusation by the appellant against a person whom nobody would be likely to regard as guilty should be treated as of little or no significance in this instance. Evidence as to some pieces torn from a *kaniki* which might well be important in conjunction with the inadmissible statement becomes of no importance at all when considered without it. And there is really nothing else which may be prayed in aid. So far from there being any evidence that the appellant even set fire to the hut at all, there only remain her oft-repeated denials. In short, there is plainly no justification for upholding a conviction of murder or for substituting one of manslaughter. We were thus obliged to allow the appeal.

In conclusion we call attention to a point of practice. The copies of the extrajudicial statement and of the appellant's deposition at the preliminary inquiry (which latter was also partly excluded by the learned trial Judge) should have shown the original text with the passages held inadmissible deleted in red. This time-saving device should always be adopted—and, we may add, the same applies to any amendment of an information or charge, and, in civil proceedings, of a pleading or other document of record.

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