

UGANDA / JUDGMENT

Mbago v Rex (Cr. App. 9/1929.)

[1929] EACA 136 (1 January 1929)

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COURT

East African Court of Appeal

BEFORE

Griffin C.J. (Uganda),, Muir Mackenzie, J.
(Tanganyika), Sheridan, Actg. C.J. (Kenya)

CASE / FILE NUMBER

Cr. App. 9/1929.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before SIR CHARLES GRIFFIN, C. J. (Uganda); SHERIDAN, Actg. U. J. (Kenya), and MUIR MACKENZIE, J. (Tanganyika).

WANDA S/O MBAGO **$\mathbf{R}$ EX.****Cr. App. 9/1929.**

in evidence. Criminal **Procedure** Confession—tender of Ordinance (Uganda), section 136 (3) —questions to an accused person.

Held: -That where, after having made a confession, the accused pleads not guilty, the prosecution ought not to tender the confession at the commencement of the case, but ought to call all other evidence first, in order that the Court may be able to judge from the

surrounding circumstances whether the confession to prove that the confession if possible, and not after the confession which may subsequently be found to be inadmissible.

Also held that the person to whom an admission is made should be called to prove it. It ought not to be proved only by witnesses who were present and heard it made.

Also held that in Uganda a chief is not a police officer for the purposes of Section 136 (3) of the Criminal Procedure Ordinance.

Baerlein for appellant.

Solicitor-General (Uganda) for Crown.

JUDGMENT.—In this case the appellant appeals from his conviction of murder and sentence of death passed by Mr. Justice Guthrie-Smith at Jinja on the 17th January last.

The grounds of appeal set out were eight in number and can be conveniently dealt with as follows:—

Grounds 1 and 2 were (1) That the learned Judge erred in holding that the statement made to Capt. Roberts could be given in evidence; (2) The learned Judge erred in not holding that the said statement was inadmissible there being no evidence that it was voluntary and true.

The evidence given by Capt. Roberts was as follows:—"At 7.20 p.m. on December 12th the accused was brought in by P. C. 4028 charged with murder. I said "Do you know me" -He said." Yes" and gave my name-I told him he was to be charged with murder of Kiwereza and cautioned him and explained what caution meant—He replied "I will tell you." Learned counsel then objected to the evidence and the learned trial Judge overruled the objection. Evidence was then given that accused said he had killed his wife. In support of the objection the case of *R. V. Ikojot v. Angulu* in Vol. 2, Uganda L. R., p. 261, was cited and has been again referred to in the argument before this Court. That case is an authority for saying that where a confession has been taken in the prescribed manner and the accused subsequently pleads not guilty, the truth and voluntariness of the confession are denied by implication; and the Court, before it acts upon the confession, should enquire into all the material circumstances of the confession and satisfy itself fully that it was true and voluntary.

In this case the appellant after the confession to Capt. Roberts, pleads not guilty; and though on the evidence of Capt. Roberts alone there was nothing before the Court to lead the learned trial Judge to suppose that the confession was, inadmissible we are of opinion that the prosecution ought not to have tendered the confession at that stage of the case but ought to have called all other evidence first in order that the Court should be able to judge from the surrounding circumstances whether it was in fact true and voluntary. In all such cases we consider that the evidence should be called to lead up to the confession where possible rather than be called after the confession which may possibly be found to be inadmissible subsequently.

In the present case evidence of a detective was subsequently called—Martini Mukasa. He states: "He (the accused) was taken to Iganga Police Station-I saw him there and spoke to him many times in about two days. I spoke to him on this murder perhaps five times in all; sometimes two hours or more. I told him he would be charged with killing his wife. I said he was not compelled to say anything. I asked him many questions after that in the office. He was hand-cuffed throughout." That evidence we consider is sufficient to create an atmosphere of suspicion with regard to any subsequent statement made by the accused; and though the detective protests that he offered no inducement threat or promise to the accused to make his statement to Capt. Roberts, we think that the circumstances are such that the learned trial Judge ought not to have been satisfied as to its voluntary nature and therefore should have excluded it.

With regard to grounds 3 and 4—That the learned Judge erred in admitting statements made to the chief which were not proved to be voluntary and true, we can find no reason from the evidence to hold that any statement which was made to the chief was not made voluntarily or was untrue, but we consider that it should have been deposed to by the chief himself, and not only by those witnesses who were present at the time and heard it made.

With regard to grounds 5 and 6—That the accused should have been warned before being allowed to make his statement to the chief. The argument is based on section 136(3) of the Criminal Procedure Ordinance which excludes any confession or admission by the accused to the police after it has been decided to arrest him except in answer to the question whether or not he wishes to say anything in answer to the charge.

From the evidence it seems that the accused had been informed by the chief that he was arrested for killing his wife. The chief then asked him: "Where is the spear with which you killed your wife" and the accused then produced the spear which is an exhibit in the case and said "This is the spear with which. I killed my wife."

If the chief is to be held to be a policeman that statement would appear to be inadmissible under section 106(3) of the Criminal Procedure Ordinance; but we consider that this section, which in effect embodies the English law on this subject, was not intended to be given the wide construction which has been applied to the section governing statements made to the police under Indian law where "police" has been held to cover many persons in authority not members of an organized force; but that section 25 of the Indian Evidence Act having been excluded from the Laws of Uganda and the English law included, the construction should be the same as that used in England, where the application is confined to police of a recognized and organized police force as defined in various acts, vide Stroud's Judicial Dictionary, 2nd Edition, 1501.

Lastly it was contended that there was not sufficient evidence on which to convict and that the verdict was against the weight of the evidence. With this contention we cannot agree. The two witnesses Eria Ntongo and Wabwiso have been attacked on the ground that their evidence shows discrepancies and the identification of the spear and the articles found near the deceased woman has been questioned, but though the identification of the kanzu and blanket is not very satisfactory we think that the spear has been identified beyond all question and that any difference between the witnesses as to where the accused produced it from, whether from inside his hut or out of his bundle cannot seriously affect the issue or the credibility of the witnesses as to the main facts. There is evidence to show that the accused and his wife had quarrelled because he thought she had given him leprosy. There is evidence that she had threatened to leave him because she feared to contract leprosy from him and that he threatened to kill her if she did. She did in fact leave him and some time after he left his home and was absent two days. The evidence indicates that during those two days the wife was killed by such a weapon as the spear produced. At the end of two days, when the accused returned to his home, he is asked by Eria Ntongo where he had been and he says

he had gone to kill his wife. Further when asked by Wabwiso if it is true that he had killed his wife he says that he has killed her.

$\mathbb{Z}^{\mathbb{N}}$ We cannot in the face of such plain and incontrovertible evidence hold otherwise than that, apart altogether from the statement to Capt. Roberts, the learned trial Judge was fully justified in coming to the conclusion at which he arrived; and we accordingly dismiss the appeal.

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