

UGANDA / JUDGMENT

Rex v Luhende (Criminal Appeal No. 172 of 1948) [1948] EACA 42 (1 January 1948)

[1948] EACA 42

COURT

East African Court of Appeal

BEFORE

Blood J, Edwards CJ, Nihill P

CASE / FILE NUMBER

Criminal Appeal No. 172 of 1948

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL, C. J. (Kenya), EDWARDS, C. J. (Uganda), and LLOYD-BLOOD, J. (Tanganyika)

REX. Respondent (Original Prosecutor)

NYUNGINDO s/o LUHENDE. Appellant (Original Accused)

Criminal Appeal No. 172 of 1948

(Appeal from decision of H. M. High Court of Tanganyika)

Criminal Law—Murder—Evidence—Uncorroborated retracted confession— Voluntary extra-judicial statement of Appellant to Magistrate—Improper questions by Magistrate eliciting incriminating replies—Effect on voluntary nature of statement.

The appellant was convicted of murder. The principal evidence against him was an extra-judicial statement to a Magistrate which he retracted at the trial. The trial Judge found that notwithstanding the absence of corroboration, the appellant's statement with regard to the actual killing of the deceased could not be but true and convicted him.

However, whilst the appellant's statement to the Magistrate was voluntary, the Magistrate put questions to him eliciting replies of a highly incriminating character.

Held (25-10-48).—(1) That whilst (following *R. v. Gae* and another, 12 E. A. C. A. 82) corroboration of a retracted confession is not essential, and if the Court is fully satisfied that the confession can not be but true, there is no reason in law why it should not act upon it, in the present case, in view of the improper questions put to the appellant by the Magistrate when taking the extra-judicial statement, it could not be held that the whole statement was made voluntarily.

- (2) That in recording a voluntary confession a Magistrate may put an occasional question to the prisoner in order to keep the narrative clear, but incriminating questions are highly improper. (Vide rule 7 of Judges rules, Archbold, 30th Edition 398).

That although the Magistrate gave the appellant a proper warning before recording the statement, his subsequent questioning nullified this and completely destroyed the voluntary nature of the statement.

R. v. Kinguru s/o Kabutui, 2 E. A. C. A. 60 distinguished.

Appeal allowed.

Appellant absent, unrepresented.

Sir James Henry, Crown Counsel (Tanganyika), for the Crown.

JUDGMENT (delivered by LLOYD-BLOOD, J.).—The appellant was convicted by the High Court of Tanganyika of the murder of a man named Singu s/o Kayele, whose charred body was found last April in a burned out hut in the village of Domani in the Maswa District.

Eight accused in all were originally committed for trial in connexion with this affair but the first of these, Kisusi s/o Ntemi, died before the trial commenced and the other six were acquitted at the close of the prosecution case under section 278 (1) of the Criminal Procedure Code.

The case for the prosecution was that the deceased was enticed away by one of the accused to an unoccupied hut and there set upon and slain by Kisusi and his co-accused, the hut being later set on fire.

\$\epsilon\$ The principal evidence against the appellant consisted of an extra-judicial statement made by him to an Administrative Officer and Magistrate at Maswa on the 14th October, 1947, after the preliminary inquiry in the District Court had commenced.

At the trial the appellant giving evidence on oath retracted this statement and gave as his explanation for having made it the fact that he had been beaten by the police when they were escorting him to and from the District Court while the preliminary inquiry was in progress. He further stated that the details contained in the statement were dictated to him by two police officers whom he named.

The learned trial Judge was, however, unable to accept this explanation of the appellant and in his judgment he gave his reasons as follows: -

"It is, in my opinion, inconceivable that a native of the accused's low standard of intelligence could possibly learn and repeat word for word a detailed statement told to him by two other natives and to suggest that he did so under threats makes it even more inconceivable. The details of this confession could only have been recalled to mind, in my opinion, by a person who was present and both saw and heard that which is related".

The learned trial Judge then, after considering the judgment of this Court in *R. v. Gae Maimba and Bambai Daa*, 12 E. A. C. A. 82, came to the conclusion that notwithstanding the absence of any evidence to corroborate the appellant's statement with regard to the actual killing of the deceased, the appellant's account could not but be true and there was no reason why it should not be accepted and acted upon.

The learned trial Judge further found that the evidence of some of the Crown witnesses did furnish corroboration for certain other incidents mentioned by the appellant in his statement.

No fault can be found with these conclusions of the learned trial Judge; but an examination of the appellant's extra-judicial statement reveals that, after it had been taken down by the Magistrate at Maswa, the latter put several questions to the appellant and that these questions elicited from the appellant replies of a highly incriminating character.

The fact that these questions were put to the appellant at the close of what was alleged to be a purely voluntary statement appears to have been overlooked not only by the learned trial Judge but also by both Counsel engaged in the case.

We have no doubt that, had the Judge's attention been drawn to this matter, he could not have expressed himself in his judgment as being satisfied that the whole of the statement was made voluntarily.

At the most, the first part of the statement amounted to an admission that the appellant, with others, formed a common intention to entice the deceased to an empty 'hut either for the purpose of taxing him with having committed misconduct with Kisusi's wife, or, perhaps, for the purpose of giving the deceased a beating. In this part of his statement the appellant said that his role was to keep watch and give warning if any one approached and he said nothing from which it could be inferred that the probable consequence of the plan was that the deceased would meet his death.

By his questions to the appellant the Magistrate however succeeded in eliciting from him that he knew Kisusi's intention was to kill the deceased.

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In questioning the accused in this manner the Magistrate ignored the instructions at p. 75 of the Handbook for Magistrates by the late Sir Alison Russell, 2nd Ed., where it is laid down that in recording a voluntary confession. a Magistrate is not entitled to examine a prisoner, though he may put an occasional question in order to keep the narrative clear and that incriminating questions are highly improper. (*Vide* rule 7 of the Judges Rules, Archbold, 30th Ed. 398.)

Our attention has been invited to the case of Rex v. Kinguru \$s/o\$ Kabuti, 2 E. A. C. A. 60, in which this Court held that where a prisoner is questioned by a Magistrate without any warning the confession cannot be held to be voluntary and the appeal was accordingly allowed.

In the present case the Magistrate gave the appellant the proper warning: before commencing to record the statement but we find that the questioning which occurred later nullified this and completely destroyed the voluntary nature of the statement.

We consider that the prosecution failed to discharge the onus which lay upon it of proving that the extra-judicial statement in this case was, in its entirety, a voluntary one and that it should therefore have been rejected and as there was no other evidence in the case upon which the appellant could have been safely convicted, we allow this appeal and quash the conviction and set aside the sentence. The appellant will be set at liberty forthwith.

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