

MASASILA s/o MTOBA v. REPUBLIC

[HIGH COURT OF TANZANIA AT MWANZA (Katiti, J.)]

CRIMINAL APPEAL 314 OF 1978

Evidence — Confession — Statement made to Ward Secretary who was exercising powers of a police officer — Whether statement admissible — S. 27 Evidence Act (T).

Evidence — Confession — Statement admitted and acted upon by trial magistrate — Accused alleges statement was made under torture — Accused not given opportunity to raise objections to the admissibility of the statement — S. 29 Evidence Act (T).

The accused was charged and convicted of arson on the basis of his own confession which he had made to a Ward Secretary. The accused claimed that the confession was made involuntarily since he had been beaten up and tortured before he made the confession to the Ward Secretary. The trial magistrate admitted the statement without inquiring into the circumstances under which it was made and without giving the accused an opportunity to challenge the admissibility of the statement.

Held: (i) a confession made to a person who is not a Police Officer, but who at the time the confession is made to him, is performing the function of a Police Officer is not admissible;

(ii) where the admissibility of a confession comes about in the magistrate's courts, in which a trial within a trial is not applicable, the magistrate should take up the matter and inquire into the circumstances leading up to the taking of the statement;

(iii) however, in the present case, the above does not seem in the final analysis, to help the appellant, for on record the appellant made more than three confessions to different people and at different times before he finally came to the Ward Secretary.

Appeal dismissed.

Cases referred to:

1) *Mohamed Ali and Another v. R.* (1956) 29 K.L.R. 166

- 2) *R. v. Igungu s/o Tungu* [1943] E.A.C.A. 111
- 3) *Omari s/o Musa Mususa v. R.* [1968] H.C.D. n. 99
- 4) *Simon v. R.* [1970] H.C.D. no. 335

30 June 1979. KATITI, J.: Before Kwimba District Court, was Masasila Mtoba, accused of arson c/s 329(a) of the Penal Code. The trial ended in the conviction of the accused, who earned a sentence of imprisonment of three years, subject to confirmation, by the High Court. Accompanying the sentence, was an order, that the accused compensate the complainant by paying him shs. 2,676/-. Aggrieved the accused is appealing to this court. I shall reduce the appellant's complaints into two main grounds — mainly that PW.1, PW.2, PW.3, PW.6 and P.W.8 gave evidence that deserved no credit, and secondly, that, the letter tendered as his confession was inadmissible, because he gave it under threats, torture and violent beating, to avoid further torture.

The facts that stand immutably obvious and well founded, are that the appellant had previous to 17/7/1977, enjoyed a concubinage association with Anastazia d/o Machelewa. This association was however suffering erosion, and the said Anastazia Machelewa made an amorous alliance with one Malimi Mbuga, who was staying in the house of PW.8 Paulo Sostenes. For the fulfilment of duties demanded by love or sexual emotions, Malimi Mbuga and Anastazia Machelewa, used this very house. The abandoned appellant, knew about their activities, and even had occasion, when he met her there, to react violently, but occasioning no indictable harm. The evidence generally shows, the appellant, was not prepared to forget Anastazia, nor swallow his pride, on seeing her flirt with other men.

On 17/7/1977 PW.8 — Paulo Sostenes's house, was burnt to ashes. This was the very house, that had been turned into a sexual theatre by Anastazia and Malimi Mbuga. Immediately, the appellant was the one suspected and hence his arrest; and subsequent prosecution. On the evidence of PW.1, PW.4, PW.5 and PW.8, to whom the appellant individually confessed to have burnt down the house, because it was a harbouring quarter to Anastazia, and Exhibit A, a written confession made to, and before PW.7 a Ward Secretary, the trial court was convinced, the prosecution had proved its case beyond reasonable doubt, and hence the conviction.

It is at this juncture, that the appellant's complaints are typically relevant. The appellant, complained that Exhibit A, a confession alleged to have been made by him, before a Ward Secretary is inadmissible, as he had been beaten up and tortured. This complaint was also raised in the defence, obviously to no avail. Let us therefore look into the confession's admissibility. The trial magistrate admitted the said written confession, without preliminaries, as though it was a straight affair. I think, where the admissibility of a confession comes about, in the Magistrate's courts, where a trial within a trial is not strictly applicable, the magistrate should take up the matter, and inquire into the circumstances leading up to the taking of the statement, in much more details, and ask the accused, whether he plans to challenge the admissibility of the statement. If the accused does not challenge its admissibility, then the magistrate determines the question of admissibility on the

evidence as presented — see *Mohamed Ali and Another v. R.* (1956) 29 K.L.R. 166. In this case, the above statement was admitted in evidence and read without first asking the accused whether he intended to object to its admissibility. Such a procedure, if accepted as proper, forces the accused to introduce allegations of ill-treatment and torture after the statement has been admitted, and the accused is thereby forced to give evidence in support of such allegations in his defence, thereby attracting a danger of being cross-examined on the general issue. It is therefore necessary that the prosecution show that a statement or confession by the accused was voluntarily made easily enough, and the court must satisfy itself on that issue before admitting the statement by making sufficient inquiries from the accused. It is obvious therefore, that the statement was improperly admitted, as the accused was not made a party to the procedure before its admissibility.

The trial magistrate was however, minded to apply the provisions of section 29 of the Evidence Act, in admitting the statement made before the Ward Secretary. Unfortunately, the learned magistrate, went no further than reproducing the section, so that it is difficult to assess the trial magistrate's application of the same. But if I read the learned magistrate's mind he was minded to apply the section, because the appellant made allegations, that the confession before the Ward Secretary was so made because of torture, urging therefore, its rejection. It is a view that I nurse willingly, that the importation of section 29 of the Evidence Act, is not without merit if, the section is properly applied. Indeed section 29 of the Evidence Act, 1967, has introduced a new dimension in the admissibility of confessions. That is, in addition to the test of voluntariness, the test of whether or not, the inducement or torture, was likely to affect the truth of the confession has been introduced, so that, if despite torture or undue influence, the truth content of the confession is not affected, mere allegations of torture will not render, the confession automatically inadmissible. But as the provisions under section 29 applies procedurally, for the admissibility of such confession, two tests must be carried out, first the court has to satisfy itself that the confession was voluntary, in which case admissibility of the same causes no problem, secondly, if there are allegations of torture, the same court has to be satisfied that despite or notwithstanding the torture, the truth of the confession was not affected. With the above, we obviously reach the conclusion, in this case that there was an improper admission of the confession, as the trial magistrate did not direct himself properly on the same.

But, even by casting the nets wider, the evidence does still provoke another legal argument. The appellant does or did allege that he was beaten up before he made the confession to the Ward Secretary. The Ward Secretary is evidenced to be a person to whom the appellant was surrendered. The said Ward Secretary rearrested the appellant, before the appellant was surrendered to the Police. A Ward Secretary is a Government and Party functionary, who practically is deeply involved in the maintenance of law and order in the Ward, and the arresting of alleged offenders, before the police is involved is in practice, even to the most ignorant villager or peasant, the duty of the Ward Secretary. For such a function therefore, the Ward Secretary behaves like a Police Officer, although he/she is not

a member of the regular police force as such. True as this seems to be, the question should have been whether a confession made to such a functionary is admissible. It has been considered many a time, whether persons exercising powers similar to those of police officers, are to be treated as Police Officers when confessions are made to them. The issue was examined in *R. v. Igungu s/o Tungu* (1943) E.A.C.A. 111, in which the Court of Appeal, held that the expression Police Officer was not to be narrowly interpreted, or confined to members of the regular police force thereby laying down a rule of law therefore, that a confession made to a person who is not a Police Officer, but who at the time the confession is made to him, is performing the function of a Police Officer is not admissible. It does seem that this has withstood the test of time, as such confession before an arresting messenger in *Omari s/o Musa Mususa v. R.* [1968] H.C.D. n. 99, was on similar ground held inadmissible, by this court, under the provisions of section 27 of the Evidence Act, 1967. The Court of Appeal confirmed this and stood on their holding in the case of *Igungu s/o Tungu* (supra) in recent case of *Simon v. R.* [1970] H.C.D. no. 335. From the above, it is safe therefore, to hold that a confession to an arresting Ward Secretary who is then performing the duty of a police officer, is inadmissible under the provisions of section 27. It follows, that if the learned Magistrate had considered the role the Ward Secretary was playing, the application of the provisions of section 29 of the Evidence Act 1967, would have been unnecessary.

The above does not seem in the final analysis to help the appellant, for on record, the appellant made more than three confessions to different people, and at different times, before he finally came to the Ward Secretary. The appellant's grandfather reports thus:-

On 17/7/1977, during the night, I was at home, while asleep, the accused knocked the door of my house and stating his name. I woke up and when I had gone out of the house, the accused stated he had set fire to the house of one Raphael Majutula. The accused narrated that he was afraid. The reason for burning the house, the accused stated, that was due to the fact that his wife had been hidden in that house.

On the way to the CCM's Office, the same appellant is reported by PW.5 Kikuyu Ramadhan, to have said the following and I quote:-

On the way to the CCM's Office, the accused stopped and stated that he had in fact set fire to the house because it was a rest house of his wife.

While the above testimonies were given in the hearing and understanding of the appellant, at no time did the said appellant suggest that the said testimonies, that are obviously confessions, were extracted by any torture or undue influence. The appellant did not even make a venture, suggesting any involuntariness in making the same, not even throw in suggestions, imputing untruthfulness in the same. Again, that the same should be said and be repeated to different people and at different occasions, the same being about what had actually happened only

recently can only confirm the truth thereof. And as at no time, the appellant has denied, repudiated or retracted them, and considering the circumstances of the case, and it being clear that indeed the house arsoned had been used by his concubine in entertaining other men, a situation that the appellant was not prepared to face and surrender his pride, the conclusion that this arson was committed by the appellant, was safe and inevitable. It follows, that the conviction was deserved, and as there is nothing manifestly excessive in the sentence, the appeal is dismissed and the sentence and any order that follows thereon are confirmed.

Appeal dismissed.
