

CHRISTOPHORO KIMAMBO AND ANOTHER v. REPUBLIC
 [COURT OF APPEAL OF TANZANIA AT ARUSHA (Nyalali, C. J.,
 Mwakasendo and Makame, JJ. A.)]
 CRIMINAL APPEAL 51 OF 1982

Evidence — Confession — Confession to police officer — Admissibility in evidence — Effect of the 1980 amendment to S.27 of the Law of Evidence Act, 1967. Criminal law — Malice-aforethought — Brutal nature of the killing — Whether malice-aforethought proved.

The two appellants were convicted by the High Court of the murder of a girl who was found dead with signs of being raped and brutally manhandled. The High Court convicted the first appellant on the evidence of a caution statement he made to the police in 1979 after his arrest implicating himself and the second appellant, corroborated by other pieces of evidence — a visit he made to the deceased's home before her disappearance, a blood-stained pair of shorts he was wearing when he made a confession to P.W. 3 that he had raped a girl the previous night though not by the name of the deceased. The second appellant was convicted on the strength of the first appellant's caution statement to the police supported by the second appellant's visit to the deceased's home, together with a blood-stained belt recovered from him.

It was argued in the Court of Appeal whether the caution statement made to a police officer in 1979 was admissible in evidence as a confession in the light of the amendment to S.27 of the Law of Evidence Act, 1967, which became operative on 1st December, 1980. Counsel for the first appellant also argued that the trial court erred in not considering the defence of intoxication which if accepted would have the effect of negating malice-aforethought.

Held: (i) the effect of the 1980 amendment to S.27 of the Law of Evidence Act, 1967, was to make confessions voluntarily made to a police officer by an accused person admissible as evidence against that person;

(ii) the admissibility of a confession made by an accused person has to be determined with reference to the date when it was made;

(iii) the confession made by the appellant to a police officer in 1979 (i.e. before the 1980 amendment to S.27 of the Law of Evidence Act, 1967) was inadmissible in evidence, the amendment not having a retrospective effect;

(iv) the first appellant was properly convicted on the strength of his confession to P.W. 3 corroborated by ample evidence;

(v) the conviction of the second appellant was not based on sufficient evidence once the first appellant's confession to the police implicating him has been ruled inadmissible;

(vi) the brutal nature of the killing showed that the appellant had malice-aforethought.

1st appellant's appeal dismissed.

2nd appellant's appeal allowed.

No case referred to.

A.A. Shayo for the first appellant.

Z. Alli for the second appellant

M. P. Mtingele for the respondent.

5 September 1983. The Considered judgment of the Court was read by **NYALALI, C.J.**: The two appellants in this case namely, Christophoro Kimambo and Leonard Noel, hereinafter called the first appellant and the second appellant, respectively, were jointly charged with another person who was acquitted in the High Court at Moshi with the offence of murder contrary to Section 196 of the Penal Code. The appellants were convicted as charged and sentenced to suffer death by hanging. Aggrieved by the conviction and sentence they are appealing to this court. Mr. Shayo, learned advocate, appeared for the first appellant, whereas Mr. Zaffer Alli, learned advocate, appeared for the second appellant. The Republic was represented by Mr. Mtingele, learned State Attorney.

From the proceedings both in this court and in the court below, the following primary facts are either common ground or undisputed between the parties: On the 1st of January, 1978, there was a party at the home of one Eliumaria Mkiro (P.W.5) at Mbokomu in Moshi District. It is undisputed that among the residents of P.W.5's home was one Joyce d/o Christosia, who was P.W.5's sister-in-law.

It is common ground that both the appellants and the other person who was acquitted were residents of Mbokomu locality at the material time. It is undisputed that liquor was available at the party and that the first appellant and the other person who was acquitted was among those who visited P.W.5's home at the material time in the evening. Some time later, that is, early at night on the material day, P.W.5 became aware of the absence of his sister-in-law and he searched for her but in vain. The person who was acquitted was still present at P.W.5's home at the time of this search but the first appellant had already left.

Furthermore, it is common ground that the following morning, that is, on the morning of the 2nd January, 1978, P.W.3 (Estomee Luyana Meta) who was also a resident of Mbokomu, went to ask the first appellant and the other person who was acquitted, to assist him to cut down a tree in his shamba. Both of them complied. It is also undisputed that as the three of them were engaged in cutting down the tree P.W.5 noticed that the pair of shorts that the first appellant was wearing was soiled and blood-stained in front in the area of the flies. Upon being asked about this, the first appellant informed P.W.5 that he had raped a girl the previous night. He named the girl as being the daughter of one Enael Meta. On the same morning of the 2nd January, 1978, the dead body of P.W.5's sister-in-law was discovered in a banana grove near P.W.5's home. She had been raped and brutally manhandled. The police were informed and they visited the scene, collected the dead body and picked up a stick which was found in the vicinity of the dead body. Later, the appellants and the other person who was acquitted, were apprehended by the police on information received.

It is common ground that in the course of the investigations, the police took blood samples from the appellants and the other person who was acquitted as well as from the deceased. The police also seized the blood stained pair of shorts which the first appellant was wearing at the time of assisting P.W.3 to cut the tree men-

tioned earlier on. They also seized a belt of the second appellant together with his pair of trousers. All these things, that is, the blood samples, the blood stained pair of shorts seized from the first appellant, the belt and the pair of trousers of the second appellant, together with the stick picked up in the vicinity of the dead body were sent to the Government Chemist for chemical analysis and report.

Furthermore, it is undisputed that a post mortem examination was made on the dead body of the deceased and a report was prepared embodying the findings made on that examination. It is common ground that the first appellant made a caution statement to the police after his arrest apparently implicating himself and the second appellant.

From the proceedings in this court and the court below, the following primary and secondary facts are in dispute between the parties: The prosecution alleges that the first and second appellants were involved in the brutal raping and killing of the deceased and that the pair of shorts of the first appellant got soiled and blood-stained in the course of that raping and killing. The first appellant denies the allegations. He claims to have left P.W.5's home in peace and without seeing or talking to the deceased. The second appellant on his part puts forth an alibi asserting that on the material day he never visited P.W.5's home but spent the entire evening and night at his home.

The first point for consideration and decision in this case is whether both appellants or any one of them took part in raping and killing the deceased. The learned trial judge considered this point and stated in respect of the first appellant as follows:-

In considering the cautioned statement the first accused made to a police officer I am mindful of the contradictions in the statement which consists of denial of any involvement in the killing and what amounts to a confession to the killing. For this reason I will not act on the confession in so far as the first accused is concerned except where it is fully corroborated by other independent material evidence.

The learned trial judge went on state in another part of his judgment in respect of the first appellant:-

There is then the evidence by Estomee Luyona Meta (P.W.3) that the accused confessed to him on the early morning of 2nd January, 1978, that he had raped a girl but the accused mentioned the girl to be one Anael Meta's daughter. The accused admitted in his police statement to have made that statement to Estomee but at a later stage in the same statement he stated that the girl he participated in raping was the deceased Joyce Christosia. This confession is supported by the evidence contained in the Chemist's report to the effect that on examination of the accused's pair of shorts it was found to have the same blood group as that of the deceased. This corroborative evidence in my view irresistibly points to the accused to have been one of the people who raped the deceased.

There is then the first accused's police statement that the deceased was raped and her vagina was torn toward her rectum. This statement is corroborated by the findings of the doctor who examined the body and found the same tear on the deceased. Certainly, the accused could not have

had such a clear description of the tear unless he had seen the tear. When this fact is considered together with the accused's police statement that the deceased was killed and raped, and taking into account the other facts I have found established I have come to the firm conclusion that the prosecution has proved beyond reasonable doubt that the first accused took part in the rape and killing of the deceased.

With regard to the second appellant, the learned trial judge stated as follows:- As for the second accused, I have already found it established that he went to Elimusaria Mukiro's house in the company of the 1st accused around 7.30 p.m. and that the deceased was at the time still at the house. I have also found it established that he left the house with the first accused soon after and that about 1/2 an hour later the deceased could not be seen in the house. There is then the evidence that a blood stained leather belt was seized from his house and that on being chemically examined it was found to have human blood stains. Although the human blood group could not be determined by the Chief Chemist because of its insufficiency, the evidence to some extent corroborates the first accused's police statement that the second accused was one of those who participated in the rape and killing of the deceased with him. When this fact is considered together with the fact that the 2nd accused was in the company of the first accused just before the deceased's disappearance was discovered, and also the fact that he first accused confessed to raping and killing the deceased with the 2nd accused, the evidence irresistibly points to the 2nd accused to be one of those who raped and killed the deceased with the first accused. As the second accused offered no explanation at all as to how the human blood found its way to the leather belt found in his house I am left with no doubt at all that he was one of the deceased's killers.

It is apparent that the learned trial judge convicted the first appellant on the evidence of the caution statement which he made to the police, corroborated by other pieces of evidence, such as the visit by the first appellant to the deceased's home, the blood stained pair of shorts, the confession made by the first appellant to P.W.3 and the stick found in the vicinity of the deceased. It is also apparent that the learned trial judge convicted the second appellant on the strength of the caution statement made by the first appellant to the police, supported by the second appellant's visit to the deceased's home, together with the blood-stained belt.

It is not in dispute that the first appellant made the caution statement to the police in 1979 and that it amount to a confession made to a police officer. This court takes judicial notice of the fact that the law of evidence regarding admissibility of confessions made to police officers was amended with effect from 1st December, 1980. Prior to the amendment of Section 27 of the Law of Evidence Act, 1967, any confession made to a police officer was inadmissible as evidence against an accused person. The position was changed under the amendment which made confessions voluntarily made to a police officer by an accused person admissible as evidence against that person. The question now arises whether the confession made by the first appellant is admissible as evidence against him.

Mr. Mttingele, learned State Attorney, has submitted that the admissibility of a

confession made by an accused person is determined with reference to the date when the confession is tendered as evidence at the trial. In the present case the confession by the first appellant was tendered at the trial on the 16th September, 1982, that is, about two years after the amendment to Section 27 of the Evidence Act came into effect. According to Mr. Mtingele, therefore, the first appellant's confession was properly admitted under the amendment by the learned trial judge. With due respect to the learned State Attorney we do not think that he is correct on this point. We are of the considered view that the admissibility of a confession made by an accused person has to be determined with reference to the date when it was made. In the present case, as already mentioned, the confession was made in 1979, that is, slightly over a year before the amendment to s.27 came into effect. This means therefore that the confession cannot be admissible unless the amendment is retrospective or contains a specific provision allowing such a confession to be admitted at the trial of the first appellant. It is apparent that the amendment to s. 27 is not retrospective and does not contain any specific provision allowing for the admission of a confession such as this. With due respect to the learned trial judge, therefore, we find that he erred in admitting and acting on the confession of the first appellant. What then is the effect of excluding that confession?

We start with the second appellant. As noted earlier, he was convicted on the strength of the confession as corroborated by his visit to the deceased's home and the finding of human blood stains on the belt seized by the police from him. In the absence of the confession, we are left with the two pieces of evidence which, in our view, raise suspicion only but are quite insufficient to support the conviction against the second appellant. With regard to the visit, the second appellant was not the only person who visited the deceased's home on the material day and it cannot be said that every visitor was implicated with the death of the deceased. As to the blood on the belt, its group could not be ascertained by the Government Chemist and so it cannot be said that the blood stains originated from the deceased and no other person. Moreover, there was no evidence to suggest that the appellant was wearing a belt when he visited deceased's home. Mr. Mtingele's submission that the second appellant's failure to explain the blood stains on the belt as suggestive of guilt is baseless because, unlike the first appellant, he was not asked to explain the presence of the blood stains on his belt. Taking into account all these factors, we are satisfied that it is unsafe to sustain the conviction of the second appellant.

With regard to the first appellant, the position is different. The confession he made to the police was not the only confession made by him. He also confessed to P.W.3 when asked to explain the presence of dirt and blood stains on his pair of shorts. The fact that he named a different girl other than the deceased as a victim of his rape, makes no difference in our view. It might be a diversionary tactic on his part similar to the one he made to one of the police officers (P.W.1) when he told him, in the course of interrogation, that his pair of shorts got blood stained while he was slaughtering a goat.

The confession by the first appellant to P.W.3 is corroborated by ample evidence. There is the human blood stains found on the front of his pair of shorts. The analysis by the Government Chemist shows beyond doubt that the blood stains were of the same group as that of the deceased, that is, Group A which was

different from the blood group of the first appellant which is Group "B" Rh + ve. There is also the stick which was found in the vicinity of the dead body. The first appellant had taken it from the home of P.W.4 (Oforo Mapungai) the previous year. Furthermore, there is evidence to the effect that the first appellant had visited the deceased's home and the deceased disappeared from her home about the time of the departure of the first appellant. For slightly different reasons, therefore, we agree with the learned trial judge that the first appellant took part in the brutal raping and killing of the deceased.

The second point for consideration and decision is whether the first appellant had malice aforethought in killing the deceased. Mr. Shayo, learned advocate for the first appellant, has submitted that the learned trial judge erred in not considering intoxication as a defence available to the first appellant. Although it is correct that the learned trial judge did not specifically consider the defence of intoxication in his judgment, it is apparent that he directed the assessors on the point. That being the position, we are satisfied that the learned trial judge must have, by implication, considered the defence of intoxication in his judgment and, like the assessors, rejected it. On our part, we cannot say that the learned trial judge erred in rejecting such a defence. There is no cogent evidence to suggest that the first appellant could have been drunk at the time of killing the deceased. Taking into consideration the brutal nature of the killing of the deceased, a reasonable tribunal is bound to find, as we do, that the first appellant had malice aforethought in killing the deceased. He was therefore properly convicted for the offence charged.

In the final analysis, therefore, we allow the appeal of the second appellant, quash his conviction, set aside his sentence and direct that he be released from jail forthwith unless detained therein for some other lawful cause.

As to the first appellant, we dismiss his appeal in its entirety.

First appellant's appeal dismissed.

Second appellant's appeal allowed.