

IN THE COURT OF APPEAL OF TANZANIA
AT MBILI

CORAM: MUSTAFA, AG. C.J. ; MAKAME, J.A. AND OMAR, J.A.

CRIMINAL APPEAL NO. 24 OF 1986

1. NICOLAUS KIMOVELA)
2. EDWIN LLOYD MIELWA)..... APPELLANTS

Versus

THE REPUBLIC RESPONDENT
(Appeal from the conviction and sentence of The High Court of Tanzania at Iringa) (J.A. Mrosso, J.) dated 7th April, 1986

in

Criminal Sessions Case No. 63 of 1982

JUDGEMENT OF THE COURT

MAKAME, J.A.

The two appellants NICOLAUS KIMOVELA and EDWIN MIELWA were sentenced to death by the High Court sitting at Iringa, (Mrosso, J), following their conviction for the murder of a man called THOBIAS MSEMWA, a purchasing clerk for the Tanganyika Pyrethrum Board, stationed at Magoda in Njombe District. In the appeal before us the first appellant was represented by Mr. Mwakasungula while the second appellant was represented by Mr. Mwakingwe. Mr. Mwakasungula agreed to represent the first appellant at very short notice and we wish to express our appreciation for Mr. Mwakasungula's valour. Mr. Kapinga, learned State Attorney, appeared for the respondent Republic.

The sole basis for the appellants' conviction was an extra-judicial statement the second appellant, Mielwa, made to a Justice of the Peace, PW13 MBSGAR LUGONGO. This extra-judicial statement was retracted, and Mr. Mwakingwe's main complaint is that it should not have been relied upon to found the convictions because it was not really corroborated by other independent evidence. Mr. Mwakasungula's submission was that, in any event, his client should not have been convicted, in view of section 33(2) of the Evidence Act, 1967. Section 33 of the Evidence Act provides:

(1) When two or more persons are being tried jointly and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons

the Court may take that confession into consideration against that other person.

(2) Notwithstanding sub-section (1) a conviction of an accused person shall not be based solely on a confession by a co-accused.

(3)

On his part Mr. Kapinga, on behalf of the Republic, declined to support the convictions. He submitted that, after all, the extra judicial statement was not a confession but rather an exculpatory statement by the second appellant.

We wish to say at the outset that we are unable to uphold the trial Court's decision. While we are satisfied that the second appellant did make the statement, we are of the considered view that it does not amount to the second appellant confessing to murder. At the most, the second appellant agreed to participating in the theft of money, but there is no indication for example that the second appellant knew the theft would be in the form of a robbery where resistance would have to be overcome with violence if need be. It would appear that the second appellant agreed to participate in the theft of money, per se, but there is no evidence that he knew that the first appellant was armed with a tyre lever for the purpose. In the extra judicial statement the second appellant was saying in effect that he did not participate in the murder; so he was not confessing to the offence charged. There was no confession to rely on.

For the sake of argument, if the second appellant was confessing to murder, he retracted the confession at the trial and, as the learned trial judge appreciated, such a confession would require corroboration. The learned trial judge found such corroboration in the following pieces of circumstantial evidence, details which were in the extra judicial statements as well as the appellants' evidence in Court and in some cases testified to also by PW4 VENANT NGINI and DW3 THOMAS KIDINGA. Such pieces of evidence include:-

1. The fact that the first appellant was in Magoda village and in the Deceased's company on the material day,

2. The fact that the second appellant borrowed a bicycle from PW4 and returned it at about 11pm,

3. The fact that Appellant I said he would steal money intended for the purchase of pyrethrum and such money was stolen,

4. The fact that the appellant said he had arranged for DW3, the watchman, to stay away from the office he was supposed to guard and DW3 did stay away.

With due respect, while it is correct that circumstantial evidence can provide corroboration, in the instant case we do not think that the alleged confession to murder was corroborated by the circumstances set out.

We are of the view that there was no ~~reliable~~ evidence on which to convict the two appellants. Consequently, we allow the appeal, quash the convictions, and set aside the sentence imposed. If the appellants are not otherwise lawfully in custody they should forthwith be released.

Before we end we wish to mention two matters, for the guidance of the Courts below. The first one is, in a trial within trial, it is the practice to number witnesses differently from the numbering in the main trial. So that in the present case, for example, in the trial within trial Cpl. STEVEN would be PW1, and not PW12, and the Justice of the Peace would be PW2 and not PW13. In the instant case if this procedure was followed there would not be the confusion there is in the record, of having PW12 twice etc. A trial within trial is different from the main trial.

The second thing is, according to the record (Page 21), the Justice of the Peace told the second appellant that he, the Justice of the Peace, was "a person who could take down a statement of a person who admitted his guilt". This was clearly wrong. It is not the business of a Justice of the Peace to take down confessions. He has to take down accused persons' statements, even if they do not admit guilt, provided that they are voluntary. It is obvious that to tell an accused person that a Justice of the

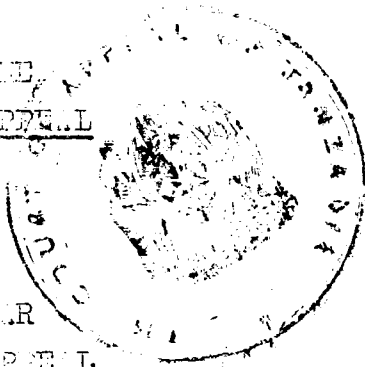
Peace only records the statements of persons who admit guilt would tend to strengthen claims, including unfounded ones, that extra judicial statements were other than voluntary.

DATED at NBOYI this 4th day of May, 1987.


A. MUSTAFA
AG. CHIEF JUSTICE

L.M. MAKINE
JUSTICE OF APPEAL

A.M.M. OMAR
JUSTICE OF APPEAL



I certify that this is a true copy of the original.


(J.H. Msoffe)
DEPUTY REGISTRAR