

MATTHEWS KALALUKA MATE, CHARLES MWALA MBUMWAE AND CHRISTOPHER MWALA v THE PEOPLE (1996) S.J.

SUPREME COURT
NGULUBE ,C.J., SAKALA AND CHIRWA, JJ.S.
7TH MAY AND 9TH JULY, 1996.
S.C.Z. JUDGMENT NO. 11 OF 1996

Flynote

Criminal procedure - Evidence - Statements by accused - Voluntariness attacked - Trial within a trial required.

Headnote

In an appeal by a number of appellants from their convictions for aggravated robbery, the Court held that it was time to repeat the advice that a trial-within-a-trial was only held to determine the issue of voluntariness. An allegation that no statement was made despite beatings does not raise the issue of voluntariness but raises a question of credibility as one of the general issues. In the instant case the trial Court had neglected to hold a trial-within-a-trial in respect of allegations that the accused's signature to statements were procured by force. This had amounted to a misdirection but the Court was satisfied that on the basis of the rest of the evidence the appellants' guilt had been sufficiently established.
Appeal dismissed.

Held:

(i) **An allegation that no statement was made despite beatings does not raise the issue of voluntariness, but raises a question of credibility as one of the general issues.**

Cases referred to:

- 1. Zeka Chinyama and Others v The People (1977) Z.R. 426**
- 2. Tapisha v The People (1973) Z.R. 222**

For the Appellants: In person

For the Respondent: W.Wangwor, Principal State Advocate

Judgment

NGULUBE, C.J.: delivered the judgment of the court.

The appellants were tried and convicted on a charge of aggravated robbery, contrary to Section 294(1) of the Penal Code. The particulars of the offence were to the effect that on 20th December, 1992, at Sesheke, they robbed PW2 of the items listed in the charge. The evidence established quite conclusively that an aggravated robbery took place. PWs 1 and 2 were walking towards Katima Mulilo at about 20 hours when five men accosted them and demanded they be given some property. In the brief struggle, PW1 was injured with a home made knife. The men made off with the victims' skipper and two pairs of long trousers. The only issue for determination was the identity of the perpetrators.

The evidence from the prosecution was that the next morning, PWs 1 and 2 found the appellant Mate and another man in a shop and in possession of the skipper taken in the robbery. The finding of the skipper in Mate's possession was confirmed by PW3, a saleslady in the shop. The prosecution evidence was that, when questioned about the skipper by PWs 1 and 2, the first appellant and his companion fled. The complainants reported the matter to the Police in the person of PW5. When PW5 and the complainants followed the direction taken by the first appellant and his companion, they found them in a canoe. Mate and his friend refused to heed the call by PW5 but instead paddled across into Namibia. As it turned out, PW5 had recognised Mate. Investigations led to the apprehension of all the appellants. The Police recorded disputed sworn and caution statements which were admitted after a composite trial - within a trial. The investigating officers recovered from the appellant Charles Mbumwae a pair of long trousers which was taken during the robbery and which the Police retrieved from him. The pair of trousers had been hidden in a chimney, and Mbumwae personally retrieved it and gave it to the Police. The Police also recovered a home made knife with the help of the appellant Christopher Mwala and which was believed to have been wielded during the robbery.

A major ground taken up by all the appellants concerned the admission of sworn and caution statements recorded by the Police which they alleged to have been involuntary. The statements were, strictly speaking, not confessions as such. While each placed himself at the scene, each made a statement exculpatory of himself but inculpatory of one or more of the co-appellants. To that extent, each statement was evidence against the maker of it. The objections to the admission of the statements were based on allegations of physical torture. In evidence during the trial within a trial, Mate and Christopher Mwala alleged that they were beaten to force them to sign statements prepared by the Police whose contents they did not know. Mbumwae alleged in evidence that he never made any statement at all. It seems to us that it is time to repeat the advice that we gave *Zeka Chinyama and Others v The People* (1). We draw attention to the dangers of "rolled up" objections and our remarks in *Tapisha v The People* (2) to the effect that a trial within a trial is only held to determine the issue of voluntariness. An allegation that no statement was made despite beatings does not raise the issue of voluntariness, but raises a question of credibility as one of the general issues. Mbumwae's statement fell to be considered in this light and the learned trial judge correctly determined the issue. The admission of his statement cannot be faulted.

With regard to the statements of the appellants Mate and Christopher, the learned trial judge treated as a general issue an allegation that the signatures were procured by force and appended to statements not made by the accused. The learned judge made no findings and criticised the defence for causing an unnecessary trial within a trial. This was a misdirection. Indeed, the question of a forced signature was a key issue in *Tapisha* where the accused alleged that he made no statement but was forced to sign one prepared by the Police. We held to the effect that where any question arises as to the voluntariness of a statement or any part of it - including the signature - then, because voluntariness is as a matter of law a condition precedent to the admissibility of the statement, this issue must be decided as a preliminary one by means of a trial within a trial. Because of the attitude adopted by the learned Judge, he did not deal with all the allegations which had a bearing on voluntariness and he made no findings. It is impossible for us to resolve issues of credibility from a mere record. We uphold the ground by these two appellants.

There was no merit in the other grounds which were roving and exploratory. It only remains to consider if, despite the misdirection noted, the learned trial judge would have convicted. The answer is in the affirmative. As Mr. Wangwor pointed out, the evidence was that the first appellant had the stolen skipper and fled when confronted while the third appellant had the pair of long trousers hidden in the chimney. We have no difficulty in applying the proviso to s.15 of Cap.52. With regard to the second appellant, his statement implicating the co-accused

was evidence against him. He led to the recovery of the knife used.

From the foregoing, it is clear that the appeals cannot succeed and they are dismissed.

Appeals dismissed.
