**Uganda v Kalema and another**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 17 June 1974

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**Case Number:** 99/1974 (37/75)

**Before:** Saied J

**Sourced by:** LawAfrica

*[1] Evidence – Extra-judicial statement – Whether voluntary – Policeman* 15 *minutes with magistrate*

*beforehand and policeman used as interpreter – Statement not proved to be voluntary – Evidence Act, s.*

24 (*U.*)*.*

**JUDGMENT**

**Saied J:** The defence has taken objection to the admissibility of the extra-judicial statements made by the two accused persons before a magistrate Grade II on the ground that they were not made voluntarily.

The two accused were arrested in Byakabanda and taken to Rakai Saza Headquarters via the

Gombolola. On 3 December 1973 detective station Sgt. Nteziryayo collected them from the Saza

Headquarters and took them to Kalisizo Police Station. It is not denied that both had some minor injuries.

The accused persons were interviewed, separately, by detective assistant inspector Mayende. He questioned them for almost half an hour and decided to take them before the local magistrate. He took with him also detective corporal Nzayirwa to act as interpreter for the magistrate.

Mayende testified that he first went into the magistrate’s chambers with his police file containing the first information report and some statements of witnesses. He said that he handed the file to the magistrate. Realising what this meant, he hastily added that the magistrate returned it to him after looking at the first information report only. The assistant inspector said that he was with the magistrate for almost 15 minutes. Explaining what he did during that period of time, he said:

“During those 15 minutes I was with the magistrate I was telling him the story which I had gathered from the investigating officer who had returned after visiting the scene.”

The magistrate’s version was vastly different. He said that Mayende was with him for about three minutes, or the time it would have taken him to tell him that the accused person were suspected to have committed murder, and wanted to say something. The account of what Mayende is alleged to have told the magistrate as stated by corporal Nzayirwa was again different. According to this witness Mayende told the magistrate that the accused persons wished to make confessions.

However, after charging and cautioning the accused in Lunyankole through Cpl. Nzayirwa, the magistrate recorded, from each accused separately, their statements in English at the simultaneous oral translation of the interpreter. Those English statements were read over and interpreted to the accused, each of whom thumb-marked his after acknowledging that it was correctly recorded. The interpreter did not countersign one statement but did the other. Mayende countersigned both, as the magistrate did.

The main objection taken to these statements is that they were obtained through the use of force and threats made while being escorted to the magistrate’s chambers.

Let me say at once that I was not impressed by the accused in their allegations of actual violence used against them by either of the policemen concerned in this exercise. One spoke of whipping and lashing, the other of a fractured leg. The allegations of physical violence were specifically denied.

This is not, however, the end of the matter. The fact remains that Mayende interrogated both of them for about 30 minutes. It may be argued that he may have wanted to know if the accused had anything to say. To that I suppose there could be no objection but each case must depend on its own peculiar circumstances. Here, on his own admission, Mayende spent about 15 minutes with the magistrate to whom, according to the police interpreter, he said *inter alia* that the accused wanted to confess. This cannot be ignored. The policeman surely had no business whatsoever to stay with the magistrate for all that time and tell him the “story” which he had gathered from the investigating officer. The intention of s.

24 (2) of the Evidence Act is that the accused appears before a completely impartial person who knows nothing about the background of the case. Magistrates ought to be on their guard to see that the entire purpose of the exercise is not defeated by such “backdoor” practices. As has been said by Law, Ag. V.-P. in *Zubairi Buye v. Uganda* E.A.Cr.A. 163 of 1973:

“No sanctity attaches to a statement made to a magistrate, and if an accused person claims that such a statement was not voluntary, that issue must be tried. Even a statement to a magistrate might be the result of an improper inducement, threat or promise, whether extended by the magistrate, or earlier by some other person the effect of such inducement, threat or promise not having ceased to operate.”

The very fact, though it was denied by the magistrate, that Mayende was with the magistrate for some considerable time telling him about what the investigation had disclosed, was very disturbing. To this must be added the presence of a policeman who acted as interpreter. Defence counsel has rightly

criticised this procedure of the police officer coming with one from the station. I am aware of the old decision of the Court of Appeal in *R. v. Okitui Edeke*, (1941) 8 E.A.C.A. 40 that a statement made to a magistrate with the assistance of a policeman as interpreter, the statement may “probably be admissible on the ground that it was made not to the policeman but through him to the magistrate”. Prosecuting counsel hinted at the difficulties of procuring a proper interpreter in the districts, but no evidence was adduced to show firstly that there were such difficulties in Kalisizo, and secondly what attempts, if any, were made to get one. The circumstances were such that the presence of Nzayirwa in the chambers of the magistrate was not providential; he had been taken there for that particular purpose. This raises the big question: *why*? It introduces a considerable element of suspicion about the entire activities of Mayende who, the circumstances so indicate to me, was following a particular, set pattern throughout. The half hour or so he spent interrogating the two accused persons assumes greater critical proportions in this light and, in view of his subsequent conduct, I cannot help feeling quite uneasy about what he might have told them. It may well be that he threatened both of them as is maintained by them without using actual force, and installed his corporal in the magistrate’s chamber in the guise of an interpreter. I can do no better than to quote from the judgment of the Court of Appeal in *Rwaruturu v. Uganda* E.A.Cr.A. 117 of 1973 (unreported):

“The new law is intended to ensure that all confessions relied on are truly voluntary. The best way to ensure this is by the prisoner being alone with the magistrate, except for the interpreter, where one is needed. If a police officer was present there is always the danger that it might be alleged that his presence operated as a continuing reminder of an earlier threat. This would defeat the purpose of the new legislation.”

I respectfully agree and, for the reasons I have endeavoured to give, the presence of the police corporal in the chambers of the magistrate for use as interpreter was intentional, and done with the sole purpose of extracting statements from the accused persons. Courts are zealous to safeguard against the old malpractices in this sphere finding their way unobtrusively into the new law and will come down heavily in favour of the accused wherever their suspicion about the intentions of the police and the propriety of their action is aroused.

I hold that both those statements are not voluntary and as such are inadmissible in evidence.

*Order accordingly.*

For the prosecution:

*P Mpungu*

For the accused:

*G Kawanga* (instructed by *Kasule & Kawanga*, Kampala)