

CTHE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSIONS CASE NO. 0818 OF 2020

UGANDA.....PROSECUTOR

VERSUS

1.SSEBUGWAWO ISMA

2.SSEKATAWA GODFREY.....ACCUSED

Ruling in a trial within a trial

Before Hon Lady Justice Rosette Comfort Kania

Background

Ssebugwawo Isma and Ssekatawa Godfrey (accused persons) are indicted with the offence of Aggravated Trafficking contrary to Section 3(1) (a) and (5) (c) of the Prevention of Trafficking in Persons Act 2019. It is alleged that on the 17th day of February 2020 at Lusaka zone, Makindye division in Kampala District, the accused persons received or harboured Katandi Jessy and by means of abduction or the abuse of power or of a position of vulnerability, or force for the purpose of exploitation by removing a body part to wit the hand to the said Katandi Jessy for the purpose of human sacrifice. The prosecution in this case is led by Senior State Attorney Wanamama Mics Isaiah while the defence is led by Elepu Joachim (counsel on private brief) assisted by Mutuuta Martin (counsel on state brief).

In the course of this trial, the defence objected to the admission into evidence of a charge and caution statement allegedly recorded by Detective Inspector Namugenyi Juliet (PW5) in respect of the Ssebugwawo Isma (A1). The gist of the objection was that the A1 neither signed nor made the statement. Court ordered the prison authorities to furnish court with sample signatures of A1 to aid court in determining whether the signature on the confession was that of A1.

In cases where as, in the instant case, a confession has been repudiated, it is important for court to examine the confession before arriving at the decision on whether or not to admit the confession in evidence. The determination of whether or not to admit a confession is achieved through a trial within a trial to determine whether the confession was made voluntarily. Consequently, court directed that a trial within a trial be conducted to determine the admissibility of the charge and caution statement. It is important to note that a trial within a trial in our criminal justice system is an enquiry into the manner in which a statement by an accused person in respect to the case before the court was recorded. The Supreme Court in the case of *Amos Binuge & ors v. Uganda, Criminal Appeal No. 23 of 1989*, held that;



"It is trite that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial within a trial. The purpose of a trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted."

A trial within a trial seeks to determine the voluntariness of that statement, in the case of **Gimba- v- FRN (2021) LPELR 53263 (CA)**, one of the major arguments canvassed before the court of Appeal was on the issue of whether the trial court ought to have conducted a trial- within- a trial to test for the voluntariness or otherwise of the confessional statement of the accused person.

The above arguments are therefore the basis of the trial within a trial in respect of which this ruling was written.

Brief facts

In support of its case in the trial within a trial, the prosecution called one witness, Detective Inspector (DI) Namugenyi Juliet (PW1 in the trial within a trial) the officer who allegedly administered the charge and caution to A1. The DI testified that on the 19th day of March 2020 at around 16:00hrs while at the office in Katwe Police Station, Detective Constable (DC) Tenywa Ronald the investigating officer requested that she records a caution statement of A1. A1 was brought to her in the operations office, next to the counter, where she introduced herself to him in Luganda their mother tongue. She testified that she closed the door and remained in the room with only A1 with whom she continued to interact in Luganda since both she and A1 were baganda. She informed court that she observed A1's body, he looked okay physically and did not raise any complaint. The DI further informed court that she then recorded A1's particulars, read the charges against him and asked whether he had understood them and he responded that he had understood. She then invited him to sign on it and she counter signed and cautioned him and the charge was attempted murder (which was later amended to aggravated trafficking in persons.) The DI told court that the wording of the caution was, 'you do not need to say anything but whatever you say shall be put in writing and may be used in evidence.' After establishing that A1 had understood the caution, she invited him to sign on the caution, counter signed on it and asked him whether he wished to say anything against the charge and he said that he had something to say, whereupon, A1 narrated his story which she put in writing.

On cross-examination, the witness stated that she could not differentiate the two accused persons, but that she remembers A1's name as the name of the person from whom she took a charge and caution statement. She further said that she knows all the procedures of obtaining a charge and caution statement, she stated that she did not lock the door she shut it. The DI further stated that A1 did not look like someone who was in pain because when a person is in pain it shows on his countenance. But from looking at A1, he looked to be in okay and not in pain.

A1 who is now DW1 in the trial within a trial denied having recorded a charge and caution statement. He denied knowing the DI and added that he had never seen her before. He stated that he was arrested by men wearing heavy jackets akin to those worn by boda-boda riders, while he was coming from the mosque at about 8:00pm. He stated that although the men did not have guns, they had handcuffs with which they



proceeded to handcuff him and took him to Mpererwe Police Station. He informed court that he recalls one of them being called Baraza. A1 added that at Mpererwe he was seriously beaten at Mpererwe Police Station, then a light skinned man at the counter whose name he did not remember, told him to confess to the crime. They asked him what could save him but they had not told him the offence and they asked him whether he had a plot of land. A1 further stated that, they took away the money that he had on him amounting to Ugx.80,000/= (eighty thousand shillings only) and his identification documents in his wallet. A1 added that, from Mpererwe Police Station, he was taken to Katwe Police Station where he was taken to the Officer in Charge's (OC's) office. A1 stated that while at the OC's office Mr. Baraza was ordered to switch off the light, the door was locked, he was placed in the corner, the OC got a helmet pressed the part which fits the head against his face and put a pistol to his head saying, "we have your children." That while the pistol was still on his head, the OC asked him to admit to the offence of cutting off a child's hand. A1 stated that the OC then asked him whether he had money and a plot of land and told him that if he did not confess, he would be imprisoned. Thereafter it is alleged that A1 was handed over to Mr. Baraza who took him to room 14, where A1 heard statements are recorded. That Mr. Baraza told him to admit to the offence of cutting off a child's hand and that he asked him for money or to give him a plot. The A1 further told court that Mr. Baraza took him up to room 14 where he heard that they record statements from. It is further alleged that Mr. Baraza repeated his demand for money or a plot of land. He added that he saw money, which he later established was Ugx. 300,000 (three hundred thousand Uganda shillings) exchanging hands between Mr. Baraza and someone whose face he did not see. The witness added that Mr. Baraza said that if he did not give him (Baraza money or a plot of land) he was going to be imprisoned. Thereafter, Mr. Baraza allegedly took him to another room where the DW1 was beaten by the other prisoners on the orders of a one afande Watono. DW1 concluded by informing court that in the morning, a plain clothes officer took him to Room 14 and he was interrogated about the crime of cutting off a child's hand upon which he told the police that he did not know anything about.

Following his testimony, his advocate led evidence to the effect that, A1 was arrested in Mpererwe as opposed to where he used to reside because, on 17th February 2020, he had gone to town and that while in town he received information that a child with a missing hand had been found in a drum in his shop, fearing mob justice, he decided to flee to Mpererwe. A1 informed court that on the day the victim was found in his shop, he did not go to work but that he went from home straight to town. He explained that he had received an order from a lady in South Sudan and that as was his practice whenever he finished an order of that nature, he needed to prepare some "paperwork" (the witness used the word "paperwork"), to enable the consignment go through "customs" (the witness used the word "customs"). He added that on that day when he went to town, he had to wait for orders of some "customized" boxes (the witness used the word "customized") he had given to be made. He added that he had never seen PW1 and that he was hearing the word charge and caution for the very first time. He further stated that the signature on the document was not his signature. He informed court that the signature on his national ID is his signature which he uses and it is not the signature on the charge and caution statement. He added that he did not know any witchdoctor called Ssentongo Richard neither does he know his co-accused. He further submitted that he did not know Katandi Jesse, the victim.



3

proceeded to handcuff him and took him to Mpererwe Police Station. He informed court that he recalls one of them being called Baraza. A1 added that at Mpererwe he was seriously beaten at Mpererwe Police Station, then a light skinned man at the counter whose name he did not remember, told him to confess to the crime. They asked him what could save him but they had not told him the offence and they asked him whether he had a plot of land. A1 further stated that, they took away the money that he had on him amounting to Ugx.80,000/= (eighty thousand shillings only) and his identification documents in his wallet. A1 added that, from Mpererwe Police Station, he was taken to Katwe Police Station where he was taken to the Officer in Charge's (OC's) office. A1 stated that while at the OC's office Mr. Baraza was ordered to switch off the light, the door was locked, he was placed in the corner, the OC got a helmet pressed the part which fits the head against his face and put a pistol to his head saying, "we have your children." That while the pistol was still on his head, the OC asked him to admit to the offence of cutting off a child's hand. A1 stated that the OC then asked him whether he had money and a plot of land and told him that if he did not confess, he would be imprisoned. Thereafter it is alleged that A1 was handed over to Mr. Baraza who took him to room 14, where A1 heard statements are recorded. That Mr. Baraza told him to admit to the offence of cutting off a child's hand and that he asked him for money or to give him a plot. The A1 further told court that Mr. Baraza took him up to room 14 where he heard that they record statements from. It is further alleged that Mr. Baraza repeated his demand for money or a plot of land. He added that he saw money, which he later established was Ugx. 300,000 (three hundred thousand Uganda shillings) exchanging hands between Mr. Baraza and someone whose face he did not see. The witness added that Mr. Baraza said that if he did not give him (Baraza money or a plot of land) he was going to be imprisoned. Thereafter, Mr. Baraza allegedly took him to another room where the DW1 was beaten by the other prisoners on the orders of a one afande Watono. DW1 concluded by informing court that in the morning, a plain clothes officer took him to Room 14 and he was interrogated about the crime of cutting off a child's hand upon which he told the police that he did not know anything about.

Following his testimony, his advocate led evidence to the effect that, A1 was arrested in Mpererwe as opposed to where he used to reside because, on 17th February 2020, he had gone to town and that while in town he received information that a child with a missing hand had been found in a drum in his shop, fearing mob justice, he decided to flee to Mpererwe. A1 informed court that on the day the victim was found in his shop, he did not go to work but that he went from home straight to town. He explained that he had received an order from a lady in South Sudan and that as was his practice whenever he finished an order of that nature, he needed to prepare some "paperwork" (the witness used the word "paperwork"), to enable the consignment go through "customs" (the witness used the word "customs"). He added that on that day when he went to town, he had to wait for orders of some "customized" boxes (the witness used the word "customized") he had given to be made. He added that he had never seen PW1 and that he was hearing the word charge and caution for the very first time. He further stated that the signature on the document was not his signature. He informed court that the signature on his national ID is his signature which he uses and it is not the signature on the charge and caution statement. He added that he did not know any witchdoctor called Ssentongo Richard neither does he know his co-accused. He further submitted that he did not know Katandi Jesse, the victim.



3

On cross examination A1 stated that he did not have his national identity card as it got lost from police. He added that he didn't know Ochwo Godrey and that he did not remember the day he was arrested. He stated that he was not educated. He said he had no visible injuries but he suffered pain due to the severe beating he was subjected to while at Mpererwe Police Station. He said he did not complain to Detective Inspector Namugenyi Juliet of having been tortured by the police that arrested him, during the charge and caution statement recording since the marks were on the thighs which she could not see as he was sitting down. He added that the slaps and helmet pressed on his face did not leave any marks.

On re-examination, the A1 stated that, the little English he speaks he learnt informally but he is not educated. He also repeated that he was caned, seriously beaten but he could not report the matter to the very people who beat him.

Since upon looking at the signature on the charge and caution statement the A1 asserted that, that was not his signature, prosecution prayed that a sample signature of the A1 be obtained and kept on record, including a sample of the A1 handwriting (A1 wrote his name "Ssebugwawo isma" and that a sample of documents on which the A1 had signed be obtained from prisons and put on the court record.

Issues

- (a) Whether the A1 made the charge and caution statement
- (b) Whether the charge and caution statement was properly recorded.

The law.

The law governing confessions in Uganda is the Constitution of the Republic of Uganda 1995; the Evidence Act (Cap 6); and case law.

Article 28 (1) of the Constitution of the Republic of Uganda 1995 as amended provides that;

" in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair , speedy and public hearing before an independent and impartial court or tribunal established by law" (emphasis mine)

The Evidence Act

In respect of a confession made to a police officer, Section 23 (1) (a) of the Evidence Act provides as follows:

" No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of a police officer of or above the rank of assistant inspector.

In respect of the circumstances surrounding the making of a confession, Sections 24 and 25 of the Evidence Act provide as follows respectively;



4

"A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the A1 and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made."

"If such confession as is referred to in Section 24 is made after the impression caused by any such violence, force, threat, inducement or promise has, in the opinion of the court, been fully removed, it is relevant."

Determination.

(a) Whether the A1 made the confession

It is trite that confessions attributable to accused persons shall not be used in evidence against them unless it has been proven that the confession was voluntarily made by such accused persons. In the instant case A1, Ssebugwawo Isma denied not only the signature on the charge and caution statement, he also denied having made the statement altogether. When an accused person repudiates a confession as in this case, it is the duty of court to interrogate the confession with the aim of arriving at the determination of whether or not the confession was properly obtained.

A confession that is repudiated is a serious matter. In addressing the gravity of a repudiated confession, the Court of Appeal in the case of **Matovu Musa Kassim v. Uganda, Criminal Appeal No. 27 of 2002** reiterating the law governing retracted and repudiated confessions as succinctly stated in **Tuwamoi v. Uganda [1967] EA**, pointed out that: "A trial Court should accept any confession which has been retracted or repudiated with caution and must before finding a conviction on such a confession be fully satisfied in all circumstances of that case that the confession is true." It therefore follows that, where a confession has been retracted or repudiated, court has the responsibility of inquiring into to circumstances under which the alleged confession was made with the aim of arriving at the determination of whether or not the confession was properly obtained.

In the case of **Abasi Kanyike v Uganda SCCA NO. 23 of 1989**, court held that the voluntariness of a confession can be analysed at the trial and it must be left to the court to entirely form its own opinion as to whether an inducement, threat, or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature.

In this case, there is a confession allegedly made by the A1, however A1 denies not only the signature on the document, but he denies having made the confession at all and denies ever having been in the same room with DI or even having ever seen her. In determining whether or not the signature on the document was appended by the A1, this court needs to establish whether there are similarities between the signature on the charge and caution statement and the handwriting of the A1.

A1 provided samples of his signature in court and a sample of the A1's handwriting in which he wrote his name "Ssebugwawo Isma." Court obtained a record of A1's financial transactions duly signed by the A1 from the prison authorities, both of which are on record. I have studied the signatures on both the charge and caution statement in issue, the sample signatures and the record of financial transactions.



I note that the sample signature matches A1's signature on the record of financial transactions furnished by the prisons authorities. I also note that on the charge and caution statement, the signature is the handwritten name "Ssebugwawo Isma." The sample of A1's handwriting in which he wrote the name "Ssebugwawo Isma" after his sample signatures in court, is in a childish scrawl, reminiscent of what a child learning to write or a person who has not had the benefit of formal education would produce. This is in a bid to support the assertion of A1 that he is uneducated and the little English he knows he learnt informally, just as people learn other languages.

Permit me to spend some time on my assessment of the education or lack thereof of A1. Although A1 asserted that he is uneducated and the English he knows he learnt just like people learn languages, while recording his testimony during the hearing of the trial within a trial, I noted the following; that as the hearing progressed he was promptly answering with precision, the questions of the prosecution which were asked in English, without waiting for the translation from the court clerk. I made note of this in my recording of the proceedings and I asked the translator through a note I passed him to stop translating for A1 in order to gauge whether he would answer prosecution's questions accurately. Indeed, following the note to the translator to stop translating, which he did, A1 answered all prosecution's questions accurately without the need for translation. A1 was also able to answer the questions of his advocate during re-examination with mathematical precision, even without the benefit of translation.

In addition, A1 also testified that when he had orders like the one which required him to export his art pieces outside Uganda, as was the case when he had to export an order to South Sudan, he would do the necessary paperwork to enable the consignment go through customs, he did not say he would get someone to do the paperwork for him. He also used the word "customized" in relation to the boxes he ordered in order to pack his art pieces in readiness for to transport the art pieces to South Sudan. A person who is not educated and learnt the English informally, cannot be in position to personally prepare the requisite paperwork for cross-border sale of goods transaction. Moreover, words like "customize" are not words that can be picked up informally on the streets of Uganda. Therefore, I found that the A1 was not truthful when he told court that he was uneducated and he learnt the little English he understands informally.

On comparing the name "Ssebugwawo Isma" on the charge and caution statement against the sample provided by the A1 when he was asked to write his name, I note that in writing the name "Ssebugwawo Isma" when requested to in court, A1 went to great lengths to mimic the handwriting of an illiterate or semi-illiterate person. That notwithstanding, there is a resemblance in the letter "a" which was written like a "9" and "w" which had a loop like appearance in the middle of the letter for both the sample written in court and those on the charge and caution statement. Therefore, it is my considered view that, A1's assertion that he is not educated and that he learnt the English he knows informally, coupled with the childlike scrawl in which he wrote his name when requested to by court, are moves shrouded in deliberate untruthfulness, calculated to distance himself from the charge and caution statement.

Consequently, I find that, the name "Ssebugwawo Isma" written on the charge and caution statement was written by A1. Consequently, I find that, A1 made the charge and caution statement.



6

(b) Whether the charge and caution statement was properly made.

Article 28 (1) of the Constitution of the Republic of Uganda 1995 as amended provides that; "in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law" (emphasis mine). Reference to "fair" in the Constitution dictates that in the instant case, this court is obliged to inquire into whether the charge and caution statement was properly made.

In respect of a confession made to a police officer, Section 23 (1) (a) of the Evidence Act provides as follows: "No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of a police officer of or above the rank of assistant inspector." In the instant case, the confession was allegedly made in the presence of Detective Inspector Namugenyi Juliet, in compliance with the dictates of Section 23 (1) (a) of the Evidence Act.

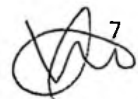
In respect of the circumstances surrounding the making of a confession, Sections 24 and 25 of the Evidence Act provides as follows respectively;

"A confession made by an A1 is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the A1 and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an un true confession to be made."

"If such confession as is referred to in Section 24 is made after the impression caused by any such violence, force, threat, inducement or promise has, in the opinion of the court, been fully removed, it is relevant."

It is therefore vital that this court establishes whether the confession was made voluntarily or whether violence, force threat, inducement or promise of any sort whatsoever was extended to the A1. In the case of *Matovu Musa Kassim v. Uganda*, *Supra* which reiterated the law governing retracted and repudiated confessions as succinctly stated in *Tuwamoi v. Uganda* [1967] EA that: "A trial Court should accept any confession which has been retracted or repudiated with caution....." In the instant case, Court heard that A1 had been severely beaten both at Mpererwe Police Station when he was first arrested and later also at Katwe Police Station. However as it emerged during cross examination, despite the fact that he was allegedly severely beaten by the arresting officers and also by the officers and inmates at Katwe Police, he had no visible signs of torture and did not report the same to the police authorities. Indeed, the DI indicated that her interaction with A1 during the charge and caution was pleasant and he did not appear uncomfortable or in pain, neither did he complain of pain. During cross examination A1 stated that, the severe injuries were only on his thighs and that DI, whom he had earlier denied ever seeing before, could not see the severe injuries on his thighs because he was sitting down when the charge and caution statement was being recorded. On re-examination, he stated that the injuries were there but they were minor and he repeated that he did not know the DI.

I wish to draw court's attention to Police Form 24, which the accused agreed to during the preliminary hearing. PF 24 in respect of the A1 indicates no injuries, A1 had the opportunity to object to admission of



this document during the preliminary hearing. PF24 indicates that upon examination of the A1, there were no contusions, abrasions, incised wounds, punctured wounds, lacerations or other type of injury found on the person of A1. The preliminary hearing was the perfect opportunity for him, during his interaction with his advocate before signing the memorandum of agreed matters, to reject the findings on that document and say that it had been obtained through torture and therefore what was appearing on the document was not true. After all, the threat he submitted existed at Katwe Police Station that prevented him from reporting the torture to "the same people who beat me" was no longer operative in court, the temple of justice.

Regarding the language of the charge and caution statement, the DI testified that she spoke Luganda to the A1 which they both understood. The DI appeared a truthful and credible witness with no inconsistencies in her testimony to point at any form of untruthfulness. In addition, the DI told court that it was just her and A1 in the room where the charge and caution statement was recorded. She added that the door was closed when she was interacting with the A1. Having found that A1 had a working knowledge of the English language, it is my firm belief that he read the statement, understood it and voluntarily appended his name. A1 cannot therefore distance himself from his confession.

I therefore find that the charge and caution statement was made by the A1 voluntarily and that the statutory guidance in respect of making a charge and caution statement set out in sections 23 to 25 of the Evidence Act was followed meticulously. The reasons for my findings will be incorporated in the judgment.

Having found that the charge and caution statement was voluntarily and properly made, I admit it in evidence as Pt 4.



Rosette Comfort Kania

Judge

2nd February 2024