THE REPULIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.96 OF 1999

CORAM: HON. MR. JUSTICE C.M. KATO, JA.
HON. MR. JUSTICE G.M. OKELLO, JA.
HON. MR. JUSTICE J.P. BERKO, JA.

BABYEBUZA SWAIBU ……..APPELLANT

VERSUS

UGANDA ……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Uganda Holden at Masindi before Hon. Justice E. Mwangushya, dated the 12th day of August 1999 in Criminal Session Case No. 608 of 1999)

JUDGMENT OF THE COURT.

The appeal arose from a conviction and a sentence of death for murder passed against the appellant by the High Court on 12th August 1999.

The prosecution case was that the appellant lived with his wife, Edisa Bakyehanikera, and his son, Juma Tugumisirize, PWI, in his home at Galiboleka village in Kibale District. Following a settlement of a domestic quarrel between the appellant and his wife in which the appellant accused PWI of siding with his mother, PWI was sent away from the home and given another Kibanja. Two weeks after PW1 had been sent away he returned to check on his mother, but did not find her at home. He inquired from his father, the appellant, the whereabouts of his mother. The appellant told him that the mother had gone to Toro. He went back to his Kibanja and waited for two days, but his mother did not return. He therefore travelled to Toro and was told that his mother had not been there. He came back and told the appellant that his mother had not been to Toro. The appellant told PW1 not to disturb him as the deceased was his wife. As PWI was returning to his Kibanja through the family's banana plantation, he saw a freshly dug pit latrine

covered with grass and soil with a lot of flies flying around it. PWI went near the pit and saw the feet of a human being protruding from the pit. He ran and informed the appellant about what he had found. The appellant abused him and told PWI not to disturb him. PWI went and reported to the Chairman LC1.

The following day the Chairman LCI together with the appellant and others went to PW1. They proceeded to the pit latrine, but could not find anything in the pit latrine. They, however, found some pieces of rotten flesh about. The Chairman and LCII and his executive started to investigate. The appellant was alleged to have admitted to them that he had killed his wife and agreed to lead them to where the body was. The appellant led them to a swamp and showed them a sack and told them that the body was in the sack. The LC officials told the people to keep to vigil. The officials returned home.

The following day the LC officials came with the police and a doctor. The sack was opened. They found in the sack a dead body which was swollen around the stomach with the rest of the body shrunk. PWI identified the body as that of his mother. The doctor examined the body. He found signs of internal haemorrhage on the neck and chest wall. He said the probable cause of death was strangulation as evidenced from the haemorrhage in the neck tissues and chest. Thereafter the police ordered the body to be buried. The appellant was arrested and later charged.

At the trial, the appellant said that he went with the deceased to dig in their banana plantation. There was a pit latrine that was not being used. As they were digging he saw a snake and in the process of trying to avoid it he collided with his wife who fell head-on in the pit latrine and knocked her head against the stones and sticks in the pit. He held her hand and pulled her out. He found that she was bleeding from the nose. Within few minutes the neck and chest were swollen. He got a bicycle to take her to the hospital but she died on the way after vomiting clotted blood. He tied his jacket around her waist and placed her on a polythene bag by the side of the road. He feared that his son, PWI, would kill him and so he fled to the Lakeside. He went and reported to the Chairman LC and requested to be taken to the police. The Chairman refused to take action unless he saw what he, the appellant, was talking about. He took the Chairman and others to the

pit where the wife got injured and died. He was handed over to the police. The defence of the appellant, as we see it, is that he did not kill his wife, but that her death was accidental.

The learned trial judge in a well considered judgment accepted the prosecution evidence. He rejected the accident theory as ridiculous and convicted the appellant. The conviction is challenged on three grounds, namely that:

(i) The learned trial judge erred in law and fact in admitting an alleged confession of the appellant.

(ii) The learned trial judge erred in law and fact when he failed to properly evaluate the evidence adduced at the trial and

(iii) The learned trial judge erred in law and fact in rejecting the appellant's defence which ought to have raised reasonable doubt.

Ground one was argued separately; grounds two and three were argued together. Learned counsel for the appellant, Mr. Kunya's particular quarrel in ground one was with the alleged confession made by the appellant to PW3 Nabukalu Teddy. To him the confession was inadmissible as it was made to LC officials. The admission contravened the provisions of Section 24(1) of the Evidence Act which provides:

"24(1) No confession made by any person whilst he is in the custody of a police officer shall be proved against any such person unless it be made in the immediate presence of,
(a) a police officer of or above the rank of Assistant Inspector; or
(b) a Magistrate."

The evidence on record shows that PW3 was Secretary LC 11 in 1995 when the appellant was alleged to have confessed to him. PW3 received a letter from the Chairman LC I of Galiboleka area reporting the disappearance of the wife of the appellant and requesting for assistance. PW3 proceeded to the appellant's home and found that he was under arrest and tied. A lot of people had gathered in the house. At that time PW3 was with the Chairman LC 11, the Vice Chairman and the Secretary for Defence. They interrogated the appellant. They told him that he was likely to be tortured if the police came. Then the appellant, who was shaking said that he would tell

them what happened. The LC executives assured him that he would be protected from the angry villagers. It was then that he allegedly confessed that he killed her because he was tired of the misunderstanding that existed between them.

Clearly his confession is inadmissible. When the appellant made the alleged confession he was in the custody of the LC officials. Therefore its admission breached Section 24 of the Evidence Act. See **Tumuhairwe Moses v Uganda Criminal Appeal No. 17 of 1999 Supreme Court (unreported) and No. 7770 PC Kikwemba v Uganda Criminal Appeal No. 16/91 (unreported)** M/s. Lwanga, the learned Principal State Attorney, rightly conceded the point.

The alleged confession was also inadmissible on the ground that it was induced as a result of a threat that if he failed to tell the LC officials what he knew about the case he would be tortured if the police came. So he made the alleged confession out of fear. Therefore it cannot be said to be voluntary.

On the other hand, as it was rightly pointed out by M/s. Lwanga, apart from the alleged confession, there are pieces of circumstantial evidence on record on which conviction could be sustained. The learned trial judge referred to at least seven pieces of circumstantial evidence. We need only to refer to just a few of the prominent ones to show that the judge was right in the findings he made.

There is evidence on record that deceased and the appellant had had domestic quarrels the last of which was resolved in deceased's favour. The appellant was not happy when the LCs told him to leave the banana and coffee plantation and give it to the wife. PWI's evidence shows that the appellant wanted to get rid of the deceased. The second important piece of evidence was the deliberate lie told by the appellant about the whereabouts of the deceased when PWI inquired about her. He told PWI that the deceased had gone to Toro when he knew she was dead. There was also the attempts he made to conceal the body of the deceased and the lies he told the LC officials about where the body was. These pieces of circumstantial evidence are so strong and damaging that Mr. Kunya felt unable to challenge them.

In addition to the above, there was the concocted defence put up by the appellant at the trial. His defence was that the deceased's death was accidental. He said he collided with her when he was

running away from a snake. The wife fell in a pit latrine and knocked her head against stones and sticks in the latrine. That theory was exploded by the medical evidence that all the skull bones were intact and that the deceased was strangled. That clearly negatived accidental death. It also proves that there was an intention to kill, as strangulation is a deliberate act.

We have not been able to find any evidence of provocation on the record or other circumstances that would reduce the offence to manslaughter as prayed for by Mr. Kunya.

We find that the inculpatory facts in this case are incompatible with the innocence of the appellant and are incapable of explanation upon any other reasonable hypothesis than that of guilt. See **Simoni Musoke v R (1958) E.A. 715, Teper v R [1952] 2 All ER. 447**. In our view he was properly convicted. Accordingly the appeal is dismissed.

Dated at Kampala this 15th day of November 2000.

C.M. Kato
Justice of Appeal.

G.M. Okello
Justice of Appeal.

J.P. Berko
Justice of Appeal.