THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM HON. MR. JUSTICE S. G. ENGWAU, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.
HON. LADY JUSTICE C. K. BYAMUGISHA, JA.

CRIMINAL APPEAL NO. 32 OF 2001

1. LUBEGA JOHN BOSCO]:::::::::::::::::::: APPELLANTS
2. MUGERWA GRIVANSIO]

VERSUS

UGANDA:: RESPONDENT

[An appeal from the judgment of the High Court of Uganda at Masaka (Okumu-Wengi, J.) dated 15/12/199 in Criminal Session Case No. 323 of 1997]

JUDGMENT OF THE COURT:

Lubega John Bosco and Mugerwa Girivansio hereinafter referred to as the first and the second appellants and one Kyaluzi Augustin were indicted on three counts. Counts I and II were for murder contrary, to sections 188 and 189 of the Penal Code Act and count III was for robbery with aggravation, contrary to sections 285 and 288 (2) of the Penal Code Act. Kyaluzi Augustin was acquitted on all the counts.

The first and the second appellants were convicted as charged and sentenced to death on the three counts. The sentence of death on counts I and III were suspended. The two appellants have appealed to this court against the convictions.

The following were specified as per particulars of offence. In the first count they were charged with the murder of Tereza Nakawesi and in the second count they were charged with the murder of Robert Ssemugenyi. The third count charged them with

the robbery of shillings 100,000/- and 3 sacks of coffee from Tereza Nakawesi. It was alleged that at the time of the said robbery a deadly weapon, to wit, a panga was used on the said Tereza Nakawesi. All the offences were committed on or about the 15th day of October, 1996 at Bunyuma village, Kyanamukaaka sub-county in Masaka District.

The prosecution case as accepted by the learned trial judge was that Tereza Nakawesi, the victim in Count I, was an old woman who lived at Kyanamukaaka village. She lived in her house with two grandsons, namely; Robert Ssemugenyi, the victim in Count II and Vicent Katumba, PW1. During the night of 15th October 1996, the appellants and Kyaruzi broke into her house. They found her and her two grandsons sleeping. They demanded for money that she gave to them. They assaulted her and strangled her to death. The assailants also assaulted Robert Ssemugenyi and cut him to death. They strangled PW1 whom they left for dead but in fact was still alive. As the appellants were flashing their torches inside the house, PW1 saw and recognised the second appellant whom he knew before as he was a neighbour. The assailants took from the house dry coffee which was in the bags. After sometime they left the house. PW1 was then lying down on the floor together with the two dead bodies of his relatives.

In the early morning of the following day at around 6.00 a.m. PW1 made an alarm and went to the home of Emmanuel Lubowa, PW2. PW1 informed PW2 what had happened at their home the previous night. PW1 and PW2 made more alarms, which were answered by many other people, among whom was Peter Sebalongo, PW3. The matter was reported to the police. Dr. Sekitoleko Jimmy performed postmotem examinations on the two bodies at the scene of crime. This evidence was agreed upon by the prosecution and defence. The doctor found that superficially Nakawesi's arms and legs were twisted. The cause of death was strangulation. Robert Ssemugenyi's body had cut wounds on the left side of the face, and bruises around the abdomen. The cause of death was head injury. PW1 was medically examined by the same doctor. He found bruises around his neck. He concluded that there was attempted murder by strangulation. The police at the police station arrested Kyaluzi where he had gone to see the appellants. The second appellant was arrested by the police on the following day while he was together with other villagers mourning the death of the deceased. The first appellant was arrested about a week later.

Both appellants made extra judicial statements in which each one of them implicated himself as well as his co-appellant. Charles Yetise, Magistrate Grade II, and PW5 recorded the extra judicial statement from the first appellant on 24-10-96. Charles Lutalo Bossa, who testified as PW4, recorded the second appellant's extra judicial statement on 25-10-96. The statements were admitted in evidence as exhibit P5 and P4 without objection from the defence.

Approximately two weeks after his arrest the second appellant while in police custody told No.17399 DET CPL Nampingo, PW6 that he together with others had participated in the robbery and murder of Tereza Nakawesi. The second appellant led PW6 to the bush where they had hidden the sacks of coffee. The coffee sacks were produced at the trial as exhibits.

In their defences both appellants and their co-accused denied participation in the offence. The two appellants alleged that the extra judicial statements had been obtained from them through torture.

The learned trial judge believed the prosecution case, rejected the defences of the two appellants and convicted them on all the counts and sentenced them to death. He found that the prosecution had failed to prove the charges against Kyaluzi and acquitted him.

Dissatisfied with the learned trial judge's decision, they have appealed to this court. Each one of the appellants filed a memorandum of appeal. The memorandum of appeal for the first appellant contained the following grounds:

1. **The learned trial judge erred in law and fact when he convicted the appellants on the basis of inconsistent evidence of a single identifying witness in circumstances that made identification difficult.**
2. **The learned trial judge misdirected his mind when he failed to apply the correct principle of law and procedure as to the admissibility of extra judicial statements**.

3. **The learned trial judge erred in law when he allowed or caused the amendment of the Indictment at the end of his judgment contrary to the provisions of law and the procedure as set out in seciton 48 and 49 of the T.I.D. which was prejudicial and thereby occasioning injustice.**

4. **For appellant No.1 the learned trial judge erred in law when he failed to take into account the fact that at the time the appellant committed the offence, he was under 18 years of age and therefore not liable to the death sentence by virtue of section 104 of the T.I.D. 1971"**

The memorandum of appeal for the second appellant contained two grounds namely:

"1, That the learned trial judge erred in relying on insufficient and unreliable evidence regarding the identification of the appellant.

2. **The evidence of the prosecution was mainly based on suspicion and was so contradictory as to render it unreliable."**

When the appeal came up for hearing Mr. Andrew Bashaija, learned counsel for the appellant, abandoned all the grounds of appeal for the first appellant. He only argued the fourth ground which was an appeal against sentence. Mr. Anthony Ahimbisibwe, learned counsel for the second appellant, argued the two grounds of appeal separately. In this appeal we shall first deal with the appeal for the second appellant. We shall handle the grounds in the order his counsel followed.

On ground 1 Mr. Ahimbisibwe's complaint was that the learned trial judge was in error to convict the second appellant on the evidence of identification which was inconsistent and unreliable.

Counsel submitted that the evidence of identification was from a single identifying witness, PW1. PW1 was woken up from sleep at around 2.00 a.m. He was frightened. He testified that he was able to recognize the second appellant from the light of the torch which he (the 2nd appellant) was flashing in the room. Counsel argued that with such light the witness could not have seen and recognised the

appellant because the appellant was flashing the light away from himself. In counsel's view, the circumstances were not favourable for correct identification. The learned trial judge should have scrutinised PW1's evidence with care and looked for corroboration of the same before basing the conviction of the appellant on it.

Mr. Harrison Ahimbisibwe, learned State Attorney, disagreed. He contended that the evidenee of identification was sufficient and reliable. PW1 knew the second appellant before. He argued that PW1 was the last to be attacked in the house and the bedroom was small. He was, therefore, near enough to see what was going on during the attack of his relatives. He was also able to recognise the second appellant by voice.

In his judgment the learned trial judge directed himself to the law on identification by a single identifying witness. Relying on the principles in **Abdalla Bin Wendo v Republic [1953] 20 EACA 166** he stated that the evidence must be tested with greatest care especially when conditions for correct identification are difficult. He noted that in the instant case,, the conditions for correct identification were difficult. However, he found that PW1 was able to recognise the second appellant because of the following reasons. PW1 knew the second appellant before the incident. There was torch light and the appellant stayed in the room for a long time.

The learned trial judge warned himself as he has done to the assessors of the dangers of convicting on the evidence of PW1 without corroboration. He found corroboration of his evidence in the fact that after his arrest the second appellant led the police and PW3 to the place where the stolen coffee had been kept. He found further corroboration in the evidence of the extra judicial statement which was made by the second appellant.

We observe that according to the evidence on record PW1 admits that he was frightened at the time of the attack. The only light in the room was from the torch which he alleges was being flashed by the second appellant. Besides PW1 testified that he only saw the second appellant in the room. However PW2 testified that PW1 told him that the attackers were more than one. PW1 testified thus: -

"We were sleeping when I suddenly saw a man had entered. He was grabbing my grandmother's legs. I do not know how the person had entered.

I saw only one person."

Commenting on PW1's evidence on this point the learned trial judge said that PW1's testimony to the effect that he saw one person does not indicate that he was confused because of the brutal attack on him. This was merely a matter of perception. With due respect, we do not agree with the learned trial judge's conclusion on this point. We note that PW1 further testified that he did not tell the people who had answered the alarm who the attacker was out of fear that he would come back for him. The learned trial judge did not comment on this point. On our part, we find it rather strange that PW1 did not reveal the name of his attacker in the morning to people who had answered the alarm. We wonder how the assailant could have come back for him in broad day light when there were other people around.

We are of the considered view that the circumstances were not favourable for correct identification. The above, coupled with the unexplainable gaps in his evidence we are not convinced that PW1 saw and recognised the second appellant. The benefit of doubt should be give to the second appellant. Ground 1, therefore, succeeds.

On ground 2 counsel for the second appellant contented that the evidence of the prosecution was contradictory and was based on suspicions.

Learned counsel submitted that the prosecution evidence was unreliable and contradictory. The arrest of the second appellant was based on suspicion. He argued that the extra judicial statement of the second appellant was involuntary. The learned trial judge was wrong to admit it in evidence without first determining whether it was voluntarily made or not.

In reply the learned State Attorney conceded that the extra judicial statement should not have been allowed in evidence by the learned trial judge without holding a trial within a trial. He submitted that there was nevertheless, sufficient evidence to warrant

the conviction of the second appellant. The second appellant was the one who led PW6 to the scene where the stolen coffee was found.

The law is now settled that in cases where the accused pleads not guilty he is entitled to a full trial of all the facts in issue. If incriminating or prejudicial evidence is tendered and is not challenged by counsel the court should not allow it in evidence without ascertaining from the accused person that he or she is aware of the consequences of the reception of such evidence. **See <u>Kawooya Joseph v Uganda Criminal Appeal No. 50 of 1999 Supreme Court</u>** (unreported). **<u>Chandria Omaria v Uganda Criminal Appeal No. 23 of 2001 Supreme C</u>**<u>ourt</u> (unreported)

With due respect, the learned trial judge was wrong to admit in evidence the extra judicial statement without ascertaining from the second appellant whether he knew the consequences of admitting such evidence. The statement was inadmissible evidence. It cannot, therefore, form a basis of his conviction.

The learned trial judge based conviction of the second appellant on the coffee exhibit PI and P2. It is necessary to examine the law and the evidence in issue. Section 29 of the Evidence Act provides:-

> "**29. Notwithstanding section 23 and 24, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved**."

In the instant appeal the evidence regarding the discovery of the coffee in the bush is that PW6 was instructed by his superior officer to go with the second appellant to show them where the coffee was hidden. PW6 testified that he contacted the Local Council authorities of Bunyama village. The L.C.s mobilised some residents. They searched the bush and recovered 3 sacks containing dry coffee. The witness recorded a statement from the owner of the land who stated that he does not keep his dry coffee in the bush, He suspected that coffee to have been stolen coffee. PW1's testimony is that he was together with the police from Masaka. The second appellant took them to

the place where the grass had been cut. The coffee was recovered from the bush next the forest. It is important to note that PW1 does not say that it was the second appellant who showed them the coffee. PW3 testified that about two weeks later, after the murder of the deceased, he was called by the O/C Kyesige Police Post. They proceeded to the bush where they found police officers from Masaka. He saw dry coffee sacks in the kibanja of Gabdieri. The police requested him to get some people to help them to carry the coffee. The same witness further testified that the police did not go to his home first before proceeding to the bush. The second appellant denied leading the police to the bush where the coffee was. He stated that he remained at the path and the police went to the bush where they recovered the coffee.

In his judgement the learned trial judge stated that the stolen coffee was discovered when the second appellant led the police and Peter Sabalongo the V/Chairman of the area L.C. (PW3) to the exact spot where the coffee had been kept.

However, according to the evidence on record, PW3 was called later by the police after the coffee had been recovered. With due respect the learned trial judge was, therefore, wrong to hold as he did that the second appellant led the police to the sport where the coffee was. The finding is not supported by evidence. We would like to note that the coffee could have been put in the bush by anybody else other than the second appellant. The coffee found was like any other coffee and did not have distinguishing marks. In the premises the coffee and the part of statement allegedly leading to the discovery of the same were inadmissible in evidence.

We appreciate counsel's submission that the arrest of the second appellant was based on suspicion. Indeed the evidence on record shows that the youth of Bunyuma village were suspected and arrested. According to PW2's evidence he was arrested and detained at Masaka Police Station. He was released without any charge having been preferred against him. A boy called Lwasa was arrested and Duniya was also arrested. PW3, Peter Sebalongo, who was the Vice LC 1 Chairman of the village, testified that they went to the homes of all youths because they suspected them to have committed the offence. He stated in cross examination as follows.

"We searched the houses of youths as we were of the view that it had to be the youths of the area involved. **By then these were also youths. The olders persons in the village were not suspected as** we **had our work as cultivators/fishmongers. They were all busy in their daily work. Mugerwa was a shopkeeper but he was among the youths. Even Bosco, but he just does (leja-leja) and jobs as casual labour**

……..……..

…… I gave the LDU's the picture that it was the youths' responsibility for this incident."

Ground 2 has merit and succeeds.

We now turn to the appeal of the first appellant. Counsel for the appellant dropped all grounds of appeal he had filed and only argued ground 4, which was an appeal against sentence. The first appellant was convicted of capital offence. We are duty bound as a first appellate court, to re-evaluate the evidence as a whole, which was adduced against the first appellant and came to our own conclusion. See – **Moses Bogere and Another vs Uganda Supreme Court Criminal Appeal No.1 of 1997** (unreported) **and Rule 29 of the Court of Appeal Rules, Direction 1996**.

The first appellant was not identified at the scene of crime. The learned trial judge convicted him on the basis of his extra judicial statement and the fact of discovery of the coffee exhibit P1 and P2. As we have already stated, the extra judicial statement was admitted without following the proper procedure. It is, therefore, no evidence against him. The coffee and the statement leading to its discovery were also improperly admitted in evidence. As we have indicated earlier in this judgment the first appellant like the second appellant was arrested on suspicion because he was a youth.

In the result, we find that there was no evidence to warrant conviction of the first appellant. There is no need to consider the appeal on sentence.

In the result, the appeals of both appellants are allowed and the convictions on all counts are quashed. The sentences are set aside.

The appellants are to be set free forthwith unless they are otherwise lawfully held.

Dated at Kampala this10th day of June 2004.

S.G. Engwau

JUSTICE OF APPEAL

C.N.B. Kitumba

JUSTICE OF APPEAL

C.K. Byamugisha

JUSTICE OF APPEAL