

worth shs. 1,320,000/=, household property, including an accumulator, clothes, shoes and a solar plate, all valued at shs. 2,777,000/=, and or immediately before or after the said robbery they used a deadly weapon, to wit an axe on the said Eria Kyobe, thus causing his death.

- 5 The learned trial Judge found A1, A2, A3 and A4 guilty and convicted them of robbery and murder. She acquitted A5 on both counts. She sentenced the appellants to life imprisonment.

The background facts as found by the learned trial judge were the following: On August 8, 2003 at Ziiba- Busitwe village in Mukono district,
10 the appellants murdered one Eria Kyobe and robbed properties valued at 2,777,000= . On that day, the deceased and his family went outside to ease themselves and while there, a group of men attacked them. Nanyonga Robinah, wife of the deceased (PW2) saw them first and alerted the deceased and their son and then she ran into the house
15 leaving the door open. The thieves caught her and the deceased and hit the deceased on the head and the neck. The deceased called her and she opened the bedroom door. The thugs grabbed her and raped her. They caught the deceased and hit him on the head and the neck. They asked for money and their 5 year old son showed them its whereabouts.
20 They also stole a solar plate, a motorcycle and an accumulator, tied PW2 onto the bed and left. She managed to untie herself and call for help from neighbours who came to their rescue and took the deceased to hospital where he died after 2 days. The police worked together and arrested the appellants. Following their arrest, A1 and A2 made
25 confession statements which they retracted.

The appellants' grounds of appeal were that;

1. The Learned trial Judge erred in law and fact to convict the Appellants for the offences in absence of evidence proving the essential ingredients of the offences of Murder and Robbery.
- 30 2. The Learned Judge grossly erred in law and fact when she acted and relied on evidence of confessions by the 1st and 2nd appellants to convict the appellants.

3. The Learned Judge erred in law and fact by relying on evidence of the confessions by 1st and 2nd appellants that were improbable and insufficient to convict and sentence the appellants.
4. The Learned Judge erred in law and fact by rejecting the defence of alibi by the appellants and as a result came to a wrong decision.
5. The Learned Judge erred in law and fact when she failed to judiciously evaluate evidence of both the prosecution and the defence hence reached the wrong conclusion.
6. The Learned Judge erred in law and fact when she relied on the prosecution evidence in disregard of the defence evidence and as a result came to a wrong conclusion.
7. The Learned Judge erred in law when she sentenced the appellants to life imprisonment which is deemed to be harsh and excessive in the circumstances of the case.

They prayed that we allow this appeal and set aside the conviction and sentence.

Ms.Tusimire Anita appeared for the Appellants on state brief and Mr.Anguza Lino, Senior state Attorney, for the Respondent.

Counsel for the appellants' arguments

Counsel for the appellant argued grounds 1, 5 and 6 together, grounds 2 and 3 together and grounds 4 and 7 together. We shall resolve the grounds in the order in which counsel argued them.

Counsel argued that although the trial court observed that there was no other evidence on record to implicate A3 and A4 apart from the confessions of A1 and A2, the trial Judge went on to convict the appellants on the evidence of A1 and A2 and from the confession of the first appellant which led to the implication of A3 and A4. Counsel also argued that PW1 only managed to identify A4 as a neighbour and not one of the assailants. PW1 was not able to identify anyone as the events took place at midnight and she testified that while she was raped, a cloth was covered on her face so she could not identify anyone.

Counsel also argued that PW1 identified 3 people at the scene of the crime. In the confession of A1 and A2, they implicate A3 and A4. The confession was later retracted by both A1 and A2. She argued that A4 should not have been found to be part of the appellants because firstly
5 they were only 3 people as stated by PW1 and secondly, she did not identify PW4 to have been at the scene but only picked him out because he was a neighbour for a long time. Counsel concluded that the participation of the appellants especially A4 in this particular case was in doubt and that A5 had been acquitted by the trial court because A1 and
10 A2 in their charge and caution statements exonerated A5 and based on that the trial Judge acquitted A5 and A6.

Counsel argued grounds 2 and 3 jointly. Grounds 2 and 3 relate to the confessions made by A1 and A2 which the court relied on to convict A3 and A4 and acquit A5. According to Counsel, the testimony of the officer
15 who took the charge and caution statement clearly established that A1 was promised that if he told what he knew about the case he would be set free. This was a promise for some reward in which case, this confession by A1 was not voluntarily made. PW4 testified to that effect at page 21 of the record.

20 Ground 4, relates to the defence of alibi as raised by the appellants. Counsel argued that rejection of the appellants' defence by the trial court based on the identification by PW1 was not proper in the circumstances. Also, reliance by the trial judge on the confession by A1 was not proper in the circumstances. It was thus wrong for the trial
25 court to have rejected the defence of alibi.

Lastly, counsel argued that the sentence of life imprisonment was harsh and excessive in the circumstances, given the fact that there was no proof beyond reasonable doubt that the appellants had committed the offences of murder and robbery.

30 **Counsel for the Respondents' arguments**

Counsel for the respondent opposed the appeal and supported both the conviction and the sentence of each of the appellants by the learned

trial judge. Counsel argued the grounds in the manner and order in which counsel for the appellants argued them.

Counsel argued that whereas it is true that there was no other evidence on record that implicated A3 and A4 apart from the confession
5 statements in the paragraphs, the learned trial Judge considered other corroborating evidence, particularly relating to A1 and A2, which was the recovery of exhibit P10 (the axe) and exhibit P9 (the hoe) that were used in hacking the deceased to death in the process of the robbery. Counsel referred to the evidence of PW5; detective Constable Okello
10 Santos, that as he interrogated A1, he revealed that he participated in the commission of this offence after mentioning the names of A2, A3 and A4. A1 led PW5 to the place near the home of A3, where the instruments or the tools used to commit the offence were hidden. PW5 accordingly recovered these exhibits. Counsel submitted that this is
15 credible corroboration to the charge and caution statement of both A1 and A2.

Counsel submitted that the learned trial Judge admitted the charge and caution statements after conducting a trial within a trial on each of them and she was satisfied at the end that the charge and caution statements
20 were properly obtained.

Concerning ground 4, counsel argued that it is true the learned trial Judge did not consider the defence of alibi raised by the accused persons. In each of their defences, each of the persons stated that on
25 the night when the offence took place they were in their respective houses. However, Counsel pointed out that it is trite that a first appellate court is entitled to re-appraise the evidence on record and subject it to a fresh scrutiny. He prayed that Court particularly take into account the charge and caution statements of A1 and A2 as well as the evidence of PW5 and PW2 in which case their claims of alibi ought to fail.

30 **Resolution of the grounds of appeal**

Before we resolve the grounds of appeal, we recall the duty of a first appellate court, which is to reconsider the entire evidence on record and subject it to a fresh and exhaustive scrutiny and make its own

conclusion, bearing in mind that it did not have the opportunity to hear or see the witnesses and should make due allowance in that regard (see ***Pandya v. R [1957] EA 336; Ongom and Another v. Francis Binega Donge, SCCA No. 10 of 1987; Kifamunte Henry Vs Uganda SCCA No. 10 of 1997.***

Rule 30 of the Court of Appeals Rules also in essence reflects the same principle. It provides;

30. Power to reappraise evidence and to take additional evidence.

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may_

(a) Reappraise the evidence and draw inferences of fact; and

(b)...

It is an agreed fact that the death of the deceased occurred and that it was unlawful, given the injuries that he sustained on his body. The only questions for this court to determine, based on the grounds of appeal are; whether the learned trial judge erred in relying on the charge and caution statements of A1 and A2 to convict the appellants; whether the learned trial judge erred in failing to take into account the alibi of the appellants; and depending on the answers; whether the sentence was manifestly excessive.

The learned trial Judge found that the confessions of A1 and A2 were voluntarily made and based her conviction on them. She also convicted A3 and A4 based on the same confession.⁵

The law regarding such confessions has been laid down by various authorities. ***Anyangu v R [1968] EA 239*** the East African court laid down the principle that;

A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is being tried.

In the case of ***Njuguna s/o Kimani and 3 others v. R (1954)21 EACA 316***, the East African Court of Appeal lays down the ingredients of a voluntary confession and observes that:

Court can convict on a retracted or repudiated or both retracted and repudiated confession alone if it is satisfied after considering all material points and the surrounding circumstances of the case that the confession cannot but be true.

5 In the case of **Tuwamoi v. Uganda**, [1967] E.A. 84, the then East African Court of Appeal stated;

A trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all circumstances of the case that the
10 **confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering all the material points**
15 **and surrounding circumstances that the confession cannot but be true.**

From the above principles, a court should only rely on a repudiated confession after very careful consideration that; the confession is true, given all the surrounding circumstances; and that it is corroborated in material particulars by independent evidence.

20 A1 and A2 claim to have made their confessions on a promise of being set free. The learned trial Judge considered that the confessions of A1 and A2 had important details about the murder and robbery that could not be ignored. A1 informed PW5 that he is the one who hid the tools somewhere near the scene. He described the weapons used as an axe
25 and a hoe. He led PW5 to the place where these exhibits as described by A1 were recovered. They were exhibited in court as prosecution exhibits P7 and P10. A1 listed the properties stolen from the deceased and implicated all the other accused. The exhibits were recovered in the neighbourhood of the home of A4.

30 Also according to the post mortem report, the deceased had external injuries which included marked bruises and wounds on head, arms and chest. He sustained internal injuries including severe cerebral damage and damage to the chest organ. The cause of death was due to severe head injury and major organ damage. The deceased's wife, PW2, who
35 was the first person to see the deceased after he had been cut stated

that he had a deep gash wound at the back of his neck. PW3, a brother to the deceased described the wounds he saw on the deceased's body as deep wounds on the head and ribs.

5 The evidence of the recovery of the exhibits and the nature of the wounds sustained by the deceased corroborate A1's statement that they used an axe in the robbery. As the learned trial judge noted, it is not possible for one who did not participate in the commission of the crimes to narrate details on the manner in which the injuries were inflicted and also lead PW5 to the place where the exhibits were recovered. There
10 was no evidence to indicate that PW5, who recorded the charge and caution statement provided any of the appellants any reward.

It is our considered opinion that the learned trial judge rightly admitted into evidence A1's confession, and that the confession was true. It was sufficient on its own to implicate A1 in the commission of murder and
15 robbery, and though retracted, it was corroborated in material particulars as shown above.

We also note the PW6, Inspector Otim Bernard, did not make any promise to A1, and properly cautioned him on the implications of making the statement.

20 On the confession of A2, he was arrested with the motorcycle that had been stolen during the robbery. He also narrated important details about the murder/robbery, particularly about how the deceased came to be attacked. In the statement, he stated that A2 attacked the deceased with an axe while A1 followed the wife of the deceased into the house.
25 That while in the house, A1 heard an alarm from A2 for help. They joined A2 to finish off the deceased. These are details that could not be ignored, given that he and A1 implicate each other in the murder and robbery. The robbery and murder took place on August 8, 2003. A2 was arrested on August 22, 2003. Although there was a time lag between
30 the commission of the offence and his arrest, his confession rules out the fact that he may have been a receiver of stolen property. In our view, the learned trial Judge closely examined the above jurisprudence relating to confessions and rightly applied it. The trial within a trial also

revealed that there was no merit in A2's assertion that he made the statement on promise of release.

As regards A3 and A4, the only evidence that implicates them are the confessions of A1 and A2. Both are implicated in the planning of the robbery of the deceased together with A3 and A4. In the case of ***Anyangu v R (supra)*** held that;

If a statement amounts to a confession and it implicates the co-accused, it may in a joint trial be taken into consideration against the co-accused. It is however evidence of the weakest kind and can only be used as lending assurance of other evidence against the co-accused.

The confessions of A1 and A2 are therefore evidence of the weakest kind and are not sufficient, in and of themselves, to implicate A3 and A4. In fact, there is no independent evidence implicating them. They should therefore not have been convicted of the offences with which they were charged. We therefore overturn their conviction and sentence and acquit and release them forthwith.

Regarding the defence of alibi, the law is that an accused person who raises a defence of alibi does not have the burden of proving it. (See ***Sekitoleko v Uganda [1967] EA 531***. The mode of evaluation of evidence in cases where the accused raises an alibi in his defence was laid down by the Supreme Court in the case of ***Moses Bogere and Another v Uganda SCCA No. 1 of 1997*** thus:-

"Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but adduces evidence showing that the accused person was elsewhere at the material time it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted."

The learned trial judge made an oblique reference to the alibis of A1 and A2 in these terms at page 19 of her judgment;

The story that A1 told in his defence was therefore fabricated to throw doubt on his confession in the charge and caution statement, which was the only piece of evidence that squarely place him at the scene of crime. On the basis of the evidence discussed above, I find that the confession

that A1 made was indeed a true confession, and that he participated in the crimes for which he was indicted.

While the learned trial judge did not specifically mention the word 'alibi', nevertheless we consider that she considered A1's defence and dismissed it as a fabrication. We agree with the finding of the learned trial Judge that the confession was true, and as such the alibi could not stand.

Regarding A2, the learned trial judge at page 20 of her judgment stated;

I find that A2's confession had important details about the murder/robbery that could not be ignored. No other person but a participant in the crime could have given fine details such as the fact that the deceased squeezed A2's testicles which led him to cry out attracting A1 and A3 to his rescue. Further, only a participant could have given the details about the role of each of the accused in executing the crime. It was also not possible for one who had not participated to narrate details about the manner in which injuries were inflicted on the deceased.

Turning to his defence, A2 stated that on the 22/08/03 he was at his work at Napier Market when he was arrested in a swoop against vendors...when weighed against the evidence of PW5 and PW6, both police officers who stated that he was arrested by VCCU and handed over to Lugazi Police Station, the story that A2 told court appears to be full of lies that he fabricated for the occasion of his defence....

Like she did with the defence of A1, the learned trial judge took into account A2's defence, which was an alibi, and dismissed it as a fabrication. She considered prosecution evidence against the alibi and noted that the alibi was false. Furthermore, she gave reasons why she considered the defence a fabrication. For the above reasons, we do not consider that she erred and accordingly uphold the convictions of A1 and A2 of murder and robbery.

Concerning the sentence, the learned trial Judge sentenced all appellants to life imprisonment. This being an appellate court, it is important for us to consider the conditions under which an appellate court can interfere with a sentence of a trial court.

The principles upon which an appellate court should interfere with a sentence were considered by the Supreme Court in the case of ***Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995***. The Supreme Court referred to ***R vs Haviland (1983) 5 Cr. App. R(s) 109*** and held that:

An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice.

The Supreme Court reiterated the same principle in the case ***Kiwalabye Bernard Vs Uganda Supreme Court Criminal Appeal No. 143 of 2001***

In our view the trial judge exercised her discretion correctly and gave reasons for her sentence, after taking into account both aggravating and mitigating circumstances. We find no reason to interfere with the sentence imposed by the trial Judge given that the appellants were convicted of two capital offences and as such uphold the sentence for A1 and A2.

Conclusion

A3 and A4 are acquitted for lack of evidence and set free forthwith. Their appeal accordingly succeeds. The appeal for A1 and A2 is accordingly dismissed. We confirm the conviction and sentence by the lower court in respect of A1, Kintu Bakali and A2, Sabwe John. We so order.

Dated this ^{20th} day of ^{February}.....2015

Signed by



5 **HON. MR JUSTICE RICHARD BUTEERA, JA**



HON. LADY. JUSTICE SOLOMY BALUNGI BOSSA, JA

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HON. MR JUSTICE GEOFFREY KIRYABWIRE, JA