THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[CORAM: Kakuru, Egonda-Ntende & Obura, JJA]

CRIMINAL APPEAL NO. 231 OF 2010

1. **ORYEM FRANCIS**
2. **ONEK OLOYA MICHEAL:::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda (Remmy Kasule, J.), holden at Gulu High Court Criminal Session Case No. 0092 of 2003 delivered on 20/09/2010)

REASONS FOR JUDGMENT OF COURT

1) This is a first appeal. The appellants were indicted, tried and convicted by the High Court at Gulu on one count of murder, contrary to sections188 and 189 of the Penal Code Act. They were each sentenced to 45 years imprisonment without remission.

2) The prosecution case against the appellants was that on 28/07/2003 at Limo Medical Flats Sub Ward, Laroo Division, Gulu Municipality, Gulu District, at about 9.00 p.m the appellants shot at the deceased, Lakot Bicentina when she had gone for a short call outside her house. She made an alarm which was answered by her children PW2 Auma Grace and PW3 Ochola Francis together with a

neighbor PW4, Labol Joyce who found the deceased already shot on the left leg and bleeding profusely. They were both able to identify the 2nd appellant with the help of the light from the grass they had lit. He was dressed in a pair of white shorts, holding a gun. He ordered them to put out the light and leave but they refused to do so. Later other people gathered and the deceased was rushed to hospital but died on her way before reaching the hospital. Subsequently, the appellants were arrested and taken to police where they were indicted for the murder of the deceased.

3) At trial, the appellants denied the charges against them. The learned trial Judge accepted the prosecution evidence and rejected the appellants' defence and convicted them. Being dissatisfied with the learned trial Judge's decision, they appealed to this Court on 3 grounds namely:

> '(1) The Learned trial Judge erred in law and fact in admitting a charge and caution statement procured by the investigating officer.
>
> (2) The learned trial Judge erred in law and fact when he convicted the appellant on the evidence of a single identifying witness under unfavorable circumstances without corroboration thereby arriving at a wrong decision.
>
> (3) The learned trial Judge erred in law and fact when he sentenced the appellant to imprisonment for 45 years, which is manifestly harsh, unfair, unconscionable and excessive in the circumstances.'

4) At the hearing of the appeal, Mr. Geoffrey Boris Anyuru represented the appellant while Mr. Patrick Omia, Senior State Attorney from the Directorate of Public Prosecutions represented the respondent.

5) Counsel for the appellant informed court that the 2nd appellant, Onek Oloya Michael died on 14/2/2016 from Mulago Hospital. Leave was granted to proceed with the appeal by the 1st appellant only since the appeal by the 2nd appellant had abated under Rule 71 of the (Judicature Court of Appeal Rules) Directions.

6) The appellant's learned counsel submitted on ground 1that the trial Judge erred in law in admitting a charge and caution statement recorded by the investigating officer. He argued that section 24 of the Evidence Act bars court from taking a charge and caution statement procured involuntarily. He added that the appellant denied signing the charge and caution statement purportedly made by him whereupon a trial within a trial was conducted but the trial Judge admitted it despite it being challenged by the appellant. Counsel also argued that investigating officer, AIP Marino Ocaya is the one who requested for the postmortem to be carried out on the deceased's body and he is the same officer who recorded the charge and caution statement and also recorded the statement of Labol Joyce, PW4. Counsel contended that the officer knew the case prior to recording the charge and caution statement and this tallies with the appellant's evidence that the statement was already recorded when it was brought to him for signing. Counsel referred this court to the case of RA 48862CPL Ngobi Kato Galandi & Anor vs Uganda, C A Criminal Appeal No. 190 of 2003 (unreported) in

which this Court re-stated the position of the law that an investigating officer should not participate in recording the charge and caution statement. He argued that in the instant appeal, the charge and caution statement should not have been admitted in evidence and relied upon for reason that it was recorded by the investigating officer who was aware of the case prior to taking the said confession. In conclusion, counsel submitted that had the court not relied on the confession, it would not have convicted the appellant.

7) On ground 2, counsel submitted that the identification of the appellant by PW1 at page 15 was not supported by any other evidence. He argued that PW2 and PW3, who were children of the deceased, were the first to reach the scene of crime before PW1 and none of them ever mentioned seeing the appellant at the scene of crime. He prayed that this Court disregards that particular evidence.

8) Regarding ground 3, counsel submitted that in the event this Court upholds the conviction, the appellant contends that the sentence of 45 years without remission is harsh and manifestly excessive. He argued that no law allows imposition of a sentence without remission. He referred to section 47 of the Prisons Act which provides that the only area where remission can be lost by a prisoner is on punishment for the offense against prison discipline. Counsel also submitted that the court did not take into account the period of 8 years the appellant had spent on remand prior to his conviction and sentence. He proposed a period of 18-20 years and since the appellant had spent 15 years in prison, he prayed that this Court releases him forthwith.

9) In his reply learned counsel for the respondent conceded that the sentence was illegal in so far as it denied the appellant the right to remission. He further conceded that the charge and caution statement was inadmissible and should neither have been admitted nor relied upon by the trial Judge. Counsel also submitted that he could not support a conviction that was founded on an inadmissible charge and caution statement. He concluded that the sentence that was imposed following the conviction was illegal.

10) We heard and allowed the appeal on14/09/2017 but reserved our reasons for doing so, which we now proceed to give.

11) Regarding ground 1, we found that PW5 AIP Marino Ochaya, was the investigating officer in the case. In his testimony on page 31 of the court record, he informed court that he was in charge of squad 2 where he led a team of detectives. He further testified on page 33 that he knew about the case and it was his squad that handled it.

12) We note that the same officer, AIP Marino Ochaya PW5, recorded the charge and caution statement of the appellant. He stated thus;

> "I informed A2 of the charge, cautioned him and asked him whether he was willing to make a statement. He voluntarily told me he was willing to make a statement. I cautioned him that he need not say anything but if he does, then whatever he may say may be taken down and used as evidence. He accepted to make a statement. I recorded the statement in Luo, then I translated it into English."

13) Courts must be cautious before admitting a confession statement by an accused person. We refer to the Supreme Court decision in the case of Omaria Chandia vs Uganda, S C Criminal Appeal No.23 of 2001 (unreported). Whilst dealing with admission in evidence of a confession statement allegedly made by an accused person prior to his trial, the Supreme Court stated, inter alia, thus;

> "Because of the doctrine of presumption of innocence enshrined in Article 28(3) (a) of the Constitution where, in a criminal trial, an accused person has pleaded not guilty, the trial court must be cautious before admitting in evidence a confession statement allegedly made by an accused person prior to his trial."

14) We note that on page 128, last paragraph of the record of appeal the trial court considered the confession statement made by the appellant and admitted it in evidence as exhibit P2 (a) Luo version and P2 (b) English version.

15) It is clear that the learned trial Judge relied on that charge and caution statement to find the appellant guilty of murder. He stated:

> 'As regards the 2nd accused, this court having come to the conclusion, on the evidence before it, that he voluntarily made the confession statement that the confession is truthful, that it states correctly what happened and establishes his guilt as maker of the statement, court finds and holds that the prosecution has proved beyond reasonable doubt the case of murder as is laid out in the indictment against the second accused.'

16) In RA 780664 CPL Wasswa & Ninsiima Dan vs Uganda, Supreme Court Criminal Appeal No. 48 and 49 of 1997 (unreported) cited in RA 48862CPL Ngobi Kato Galandi & Anor vs Uganda (supra) a case relied upon by counsel for the appellant, the Supreme Court held that the investigating officer in a case should not participate in recording a charge and confession statement from the accused. In that case, a police constable who had participated in the investigation of the case acted as an interpreter for the officer who recorded the charge and caution statement. The confession statement was held to be inadmissible in evidence.

17) It is evident that the charge and caution statement admitted by the trial court was inadmissible in law and therefore the learned trial Judge should not have relied on it to convict the appellant.

18) For that reason we allowed the appeal; quashed the conviction; set aside the sentence and ordered the immediate release of the appellant. We were satisfied that the appellant had been wrongly convicted.

19) That was sufficient to dispose of the appeal and we would not have had to consider the other grounds of appeal. However, given the importance of the question raised in ground 3 we shall proceed to consider the same. The third ground of appeal was that:

> 'The learned trial judge erred in law when he failed to consider 8 years spent on remand and sentenced to the appellant to a term of imprisonment for 45 years without any remission.'

20) The learned trial judge sentenced the appellant to 45 years imprisonment without any remission. Is the High Court, or indeed any other court authorised to impose a term of imprisonment without remission?

21) The sentencing powers of the High Court are contained in section 2 of the Trial on Indictments Act. It states in part,

> '(1) The High Court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.'

22) The learned judge in the court below combined a sentence of imprisonment with a further order for no remission. It is this further order, 'without remission' which appears to us to have no basis in law. It is not authorised by any law. Remission is a matter that is governed by the Prisons Act, Chapter 304 of the laws of Uganda. It is a right conferred on persons sentenced to a term of imprisonment that exceeds one month.

23) Section 47 states,

> 'PART VII—REMISSION OF SENTENCES.
>
> **47. Remission of part of sentence of certain prisoners.**
>
> (1) Convicted criminal prisoners sentenced to imprisonment whether by one sentence or consecutive sentences for a period exceeding one month, may by industry and good conduct earn a remission of one-third of the remaining period of their sentence or sentences.

(2) For the purpose of giving effect to subsection (1), each prisoner on admission shall be credited with the full amount of remission to which he or she would be entitled at the end of his or her sentence or sentences if he or she lost or forfeited no such remission.

(3) A prisoner may lose remission as a result of its forfeiture as a punishment for an offence against prison discipline and shall not earn any remission in respect of any period—
(a) spent in a hospital through his or her own fault or while malingering: or
(b) while undergoing confinement as a punishment in a separate cell.

(4) The commissioner may recommend to the Advisory Committee on the Prerogative of Mercy established under article 121(1) of the Constitution that it should advise the President to grant a further remission on special grounds.

(5) The commissioner shall have power to restore forfeited remission in whole or in part.

(6) For the purpose of calculating remission of a sentence, Imprisonment for life shall be deemed to be twenty years imprisonment.'

24) As is evident from the foregoing provisions remission is a matter that is managed by the Prison Authorities in implementing sentences imposed by the courts of law. The circumstances in which remission may be lost or denied are spelt out. It is only in respect of offences against prison discipline that a convicted prisoner may lose

remission. And this is for Prison authorities to determine and not the courts imposing sentences.

25) Secondly the order 'without remission' raises potentially a constitutional issue. Article 23 (8) of the Constitution directs courts that sentence convicts to terms of imprisonment to deduct from the assessed term of imprisonment the period that a convict spent in pre trial custody. See Rwabugande Moses v Uganda, SC Criminal Appeal No. 25 of 2014 (unreported). The order, 'without remission' or 'for the rest of the natural life of the convict', in cases where a convict had spent time in pre trial custody, would be unconstitutional. It would run afoul of Article 23 (8) of the Constitution.

26) We are aware of course of the judgment of the Supreme Court in Susan Kigula and others v Attorney General, SC Constitutional Appeal No. 03 of 2006(unreported) in which it ordered that persons whose sentences of death had been confirmed by the Supreme Court and such sentence was not executed within 3 years of such confirmation it would be commuted to life imprisonment for life without remission. We do not take such dispositive order which had not been either the subject of the appeal or figured in argument by counsel to the parties to the appeal, during the hearing of that appeal, to mean that it is open to the High Court to impose a sentence of imprisonment with an additional order of 'without remission' in light of the fact that there is no legislative provision that authorises the High Court to impose a sentence beyond or in conflict with the clear provisions of an Act of Parliament or the Constitution. The High Court is only authorised to combine sentences which have been

provided for in the law. 'Without remission' is not an order authorised by any law we aware of. We would therefore have allowed ground no.3.

Signed, dated and delivered at Gulu this day of 2017

Kenneth Kakuru

Justice of Appeal

Fredrick Egonda-Ntende

Justice of Appeal

Hellen Obura

Justice of Appeal