THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 115 OF 2016

(Coram: Egonda-Ntende, Bamugemereire & Madrama, JJA)

OWAMANI GORDON} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbarara in Criminal Session Case No 135 before Matovu, J delivered on 26th April, 2016)

JUDGMENT OF COURT

The Appellant had been charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. It was alleged that the appellant during the night of 28th September, 2011 at Keitanturegye training centre Kinoni sub- County in Kiruhura district murdered Mucunguzi Sam.

The appellant was tried, and convicted as charged. Being dissatisfied with the conviction and sentence, the appellant appealed to this court on 4 grounds of appeal namely:

1. That the learned trial judge erred in law and fact when he ruled that the charge and caution statement was voluntarily made and relied on it which occasioned a miscarriage of justice.

2. That the learned trial judge erred in law and fact when he relied on the evidence of PW3 (accomplish) to corroborate the repudiated and retracted charge and caution statement of the appellant which occasioned a miscarriage of justice.

3. The learned trial judge erred in law and fact when he ignored major contradictions in the prosecution evidence thereby reaching a wrong conclusion.

4. The trial judge erred in law and fact when he failed to properly evaluate the prosecution evidence to the required standard thereby occasioning a miscarriage of justice.

5. The learned trial judge erred in law and fact when he sentenced the appellant to 35 years and 6 months' imprisonment which sentence is harsh and manifestly excessive as to amount to a miscarriage of justice.

When the appeal came for hearing, learned counsel Mr. Turyahabwe Vincent appeared for the appellant on state brief while learned counsel Mr. Nkwasibwe Ivan, Resident State Attorney appeared for the respondent. The court was addressed in written submissions.

Grounds 1, 2, 3 and 4 of the appeal is against the conviction and therefore also against the sentence of the appellant for the offence of murder. In the premises, ground 5 should be considered an alternative ground and if any of the grounds 1, 2, 3 and 4 of the appeal succeed, there would be no need to consider ground 5 which is against sentence only.

Submissions of counsel on grounds 1, 2, 3 and 4 of the appeal.

Ground 1:

That the learned trial judge erred in law and fact when he ruled that the charge and caution statement was voluntarily made and relied on it which occasioned a miscarriage of justice.

The appellant's counsel submitted that during the trial within a trial, the appellant testified that he was tortured before signing the blank paper. In the ruling of the trial court, the trial judge held that this court does not trace any evidence of torture and accused prior to making his charge and caution statement. Further, the court considered the evidence of Detective assistant inspector of police Kamugisha Fred on the issue of the charge and caution statement and found that the witness was never tortured when his charge and caution statement was recorded.

Counsel submitted that the learned trial judge seems to have only relied on the evidence or testimony of TWT1 to conclude that the appellant was

not tortured. He submitted that there is no prosecution witness who will ever admit that they tortured a witness before recording a charge and caution statement. The other possible ways of proof of torture can be by circumstances before and after the recording of the extrajudicial statement. Counsel submitted that the first circumstance about the torture of the appellant was the medical report of the appellant which was admitted as exhibit P1. It showed that the appellant had multiple bruises on the back and the size was "L.I.F. region".

The appellant's counsel submitted that the evidence clearly showed that the appellant was tortured and that it was erroneous for the learned trial judge to base his findings on the testimony of one witness. Further, any evidence that is obtained after torture is inadmissible. Counsel relied on section 24 of the Evidence Act cap 6 and section 14 (1) of the **Prohibition and Prevention of Torture Act** which provides that any information, confession or admission obtained from a person by means of torture is inadmissible as evidence against that person in any proceedings. He prayed that this court should not sanction an illegality and ground one of the appeal ought to succeed.

In reply, the Respondent's counsel submitted that the Supreme Court addressed the issue of written and repudiated confessions in the **Mumbere Julius v Uganda; SCCA 15 of 2014** where it cited **Matovu Musa Kassim v Uganda; Criminal Appeal No 27 of 2002** the court reiterated the law on retracted and repudiated confessions as in **Tuwamoi v Uganda [1967] EA pages 84** at 88 that:

> *"a trial court should accept any confession which has been retracted 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."*

Counsel further submitted that where the evidence of an extrajudicial statement is challenged by the objecting counsel, the court would conduct a trial within a trial (see **Amos Binuge and others versus Uganda; Criminal Appeal Number 23 of 1989 (Court of Appeal)**. Counsel for the appellant informed the trial court that the appellant was made to sign a blank paper after torture. Thereafter the trial judge conducted a trial

within a trial to determine the voluntary nature of the charge and caution statement.

According to the trial within a trial witness number 1, the appellant voluntarily told him that on 28th September 2011, he left home while carrying a panga and went to the home of the deceased. He found the deceased in the kitchen cooking and demanded the letters from him for his phone. The deceased kept quiet and the accused got annoyed and cut his neck. The statement was read back to the appellant who said that he understood it and signed it. Further the learned trial judge gave reasons why he found the charge and caution statement to have been voluntarily made.

In the premises, the respondents counsel prayed that we find that the trial judge properly admitted the charge and caution statement because it was voluntarily made.

Ground 2:

The learned trial judge erred in law and in fact when he relied on the evidence of PW3 (Accomplice) corroborate a repudiated retracted caution statement of the appellant which occasioned a miscarriage of justice.

The appellant's counsel submitted that the testimony of PW5 Mr. Musinguzi Geoffrey which the learned trial judge found to corroborate the charge and caution statement of the appellant was not itself corroborated by any other independent evidence. PW5 was an accomplice witness. He testified that he was arrested with one Baguma Nyongole and spent 2 nights at Kinoni and 2 nights at Rusherere, he did not tell court what happened after his arrest. He testified that it was during the police parade that Baguma Nyongole confessed to have killed the deceased together with the appellant. The learned trial judge relied on this evidence.

The appellant's counsel further submitted that PW 5 was an accomplice witness because he was arrested in relation to the offence he was alleged to have committed with the appellant and another person called Baguma Nyongole. The appellant's counsel submitted that the evidence

of an accomplice must be corroborated by independent evidence. He relied on **Watete alias Wakhoka & 3 others v Uganda; [1998 – 2000] HCB 7** where the court held that it is unsafe to rely on accomplice evidence unless it is corroborated. That an appellate court will quash the conviction based on accomplice evidence if it is not corroborated and the trial court failed to warn itself of the danger of relying on uncorroborated evidence of an accomplice. Further in **Rwahinda John v Uganda Court of Appeal Criminal Appeal No 0113 of 2012**, the court after considering numerous precedents held that it is settled that corroboration is by means of independent evidence. Counsel further cited other authorities on the nature of an accomplice witness testimony which is unreliable and therefore needs corroboration.

Counsel pointed out that PW5 testified that one Nyongole Baguma testified confessed that he and the appellant murdered the deceased. However, this person was never produced to testify in court as to the confession. No police officer also testified about the confession at the identification parade. In effect the learned trial judge only relied on the evidence of PW5 to corroborate the charge and caution statement. However, the charge and caution statement was never voluntarily made. It was repudiated and was not corroborated. Counsel further submitted that evidence which requires corroboration cannot corroborate another evidence which also requires corroboration.

In the premises the appellant's counsel prayed that ground 2 of the appeal ought to succeed.

In reply, the Respondent's Counsel submitted that there is no statutory definition of who in law an accomplice is. In **Sgt Baluku Samuel and another v Uganda; SCCA No 21 of 2014**, the Supreme Court cited the case of **Mushikoma Watete alias Peter Wakhola and 3 others Criminal Appeal Number 10 of 2000 (AC)** for the proposition that in a criminal trial a witness is said to be an accomplice if he or she participated as a principal or an accessory in the commission of the offence which is the subject matter of the trial. In **Nasolo v Uganda; Criminal Appeal Number 14 of 2000 [2003] 1 EA 181, 189**, the court took a more liberal approach in defining what an accomplice witness is. They held that a witness is said to be an accomplice if, *inter alia*, he participated, as the principal or

accessory in the commission of the offence, the subject of the trial. This is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after the trial.

Counsel submitted that PW5 cannot be said to be an accomplice in respect of the offence of murder. According to his testimony, he was arrested as part of the police investigations into the murder of the deceased which allegation he denied. There is no evidence on record that he participated as a principal or accessory in the commission of the offence. Further he did not confess to the participation in the offence nor was he convicted of the offence either on his own plea of guilty or upon the court finding him guilty after trial.

In the premises the respondents counsel submitted that because the witness was not an accomplice, his testimony was admissible.

The appellants counsel further argued grounds 3 and 4 together.

Ground 3. The learned trial judge erred in law and fact when he ignored major contradictions in the prosecution evidence thereby reaching a wrong conclusion.

Ground 4. The trial judge erred in law and fact when it failed to properly evaluate the prosecution evidence to the required standard thereby occasioning a miscarriage of justice.

The appellant's counsel submitted that there was a contradiction as to the ownership of a cutlass which was alleged to have been used in the commission of the offence. He submitted that PW2 who also testified as the trial within a trial witness number 1 stated that the appellant confessed to him that the panga (cutlass) which was used in the commission of the offence was his. Further counsel submitted that PW4 testified that the panga in question belonged to Baguma Nyongole and that the wife of Baguma Nyongole said so. Similarly, PW5 also testified that the cutlass belonged to Baguma Nyongole. On the other hand, PW2 testified that the appellant moved with his panga. He submitted that this major contradiction in relation to the ownership of the murder weapon

should not be treated casually and that the contradiction ought to be resolved in favour of the appellant.

Further, the appellants counsel pointed out that the said Baguma Nyongole did not testify in court about the alleged confession. No other witness testified about the suspects parade. In total the evidence is lacking in placing the appellant at the scene of the crime. Besides a confession made by a witness about another person who is said to have committed the offence is not a confession at all. He relied on **Uganda v Milton Twikirize [1988 – 1990] HCB** for the proposition that the statement by the accused to the police was a confession to the charge of murder. The confession is the unequivocal admission by the accused of the commission of the offence with which the accused is charged. It must admit it in terms of the offence or at any rate substantially all the facts which constitute the offence.

Counsel submitted that the alleged confession referred to in the testimony of PW 5 was not a confession at all and ought not to be relied upon by the trial court because he was not the right person to have received the confession by Nyongole. The confession ought to have been made before a magistrate or a police officer above the rank of inspector of police in terms of section 23 of the Evidence Act.

He prayed that the appeal succeeds and the conviction and sentence be set aside.

In reply to submission on ground 3, the respondent's counsel submitted on the said contradictions and inconsistencies. He contended that the contradictions referred to by the appellant relate to the ownership of a panga that was allegedly used to murder the deceased. According to PW2, while testifying as the trial within a trial witness number 1, the appellant admitted ownership of the panga that he used to killed the deceased. PW4 stated that the panga in question belonged to one Baguma Nyongole. Baguma Nyongole was not part of the trial nor a witness to confirm if the said panga belonged to him or not. The appellant admitted ownership of the prosecution exhibit P2 (b). Counsel further prayed that if there were any contradictions in the evidence, they were

minor and did not go to the root of the case because there was no deliberate untruthfulness on the part of any witnesses.

In the premises after reference to authorities on contradictions, counsel prayed that this court finds that the trial court reached the correct decision after properly evaluating the evidence on record.

On ground 4 the Respondents counsel submitted that ground 4 offends rule 66 (2) of the Judicature (Court of Appeal Rules) Directions for failing to specify exactly the points of law or fact or mixed law and fact that the appellant contends were wrongly decided by the learned trial judge. The respondents counsel relied on the decision of the Court of Appeal in **Sseremba Dennis v Uganda; Criminal Appeal Number 480 of 2017** where the grounds of appeal was struck out because it offended rule 66 of the Judicature (Court of Appeal Rules) Directions. He prayed that ground 4 of the appeal is struck out accordingly.

Consideration of appeal

We have carefully considered the Appellant's appeal, the written submissions of Counsel and the applicable law and precedents.

This is a first appeal from the decision of the High Court acting in the exercise of its original jurisdiction and we have discretion in matters of factual controversy to reappraise the evidence contained in the printed record of proceedings by subjecting that evidence to fresh scrutiny and arriving at our own inferences on matters of fact. In reappraisal of evidence we cautioned ourselves on the shortcoming of an appellate court in not having the advantage of seeing and hearing the witnesses whose evidence is printed out as compared to the trial judge who had the advantage of seeing and hearing the witnesses testify. Except on justifiable grounds, we ought to defer to the conclusions of the judge on matters of credibility of witnesses whenever it is in issue (See **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123,** as well as **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**). The duty of this court in reappraisal of evidence is enabled by rule 30(1)(a) of the **Judicature (Court of Appeal Rules) Directions, S.I No. 13-10**, which provides that on appeal from the decision of the High Court in the

exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact.

As noted above, grounds 1, 2, 3 and 4 of the appeal relates to the issue of whether the conviction should stand. If any of those grounds succeed, there would be no need to consider ground 5 of the appeal which is on severity of sentence.

Ground 1: **The learned trial judge erred in law and fact when he ruled that the charge and caution statement was voluntarily made and relied on it which occasioned a miscarriage of justice**.

We have carefully considered the ground of appeal and as to the questions of fact, we have perused the record. The charge and caution statement is dated 7th October 2011. This is stated to have been retracted and repudiated or not made voluntarily on account of duress or inducement. The issue further leads to the 2nd ground of appeal which is that:

Ground 2: **The learned trial judge erred in law and fact when he relied on the evidence of PW 5 (accomplice) to corroborate a repudiated and retracted charge and caution statement of the appellant which occasioned a miscarriage of justice.**

Clearly grounds 1 and 2 of the appeal are interrelated. Thirdly ground 3 of the appeal relates to contradictions in the prosecution evidence which are also related to grounds 1 and 2 of the appeal. In other words, grounds 1, 2 and 3 of the appeal are interrelated. Ground 4 of the appeal was objected to by the respondent's counsel. Nonetheless, it is averred therein that the learned trial judge erred in law and fact when he failed to properly evaluate the prosecution evidence to the required standard thereby occasioning a miscarriage of justice. Obviously the question of evaluation of evidence is related to grounds 1, 2 and 3 of the appeal and ground 4 of the appeal is superfluous since it is the duty of this court to re-evaluate the evidence whenever there is factual controversy.

We have accordingly considered the rule 66 (2) of the Rules of this court which provides that:

(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided.

This is a first appeal, and the appellant was required to set up the points of law or fact or mixed law and fact which were wrongly decided. Ground 4 of the appeal is to the effect that:

> **The learned trial judge erred in law and fact when he failed to properly evaluate the prosecution evidence thereby reaching a wrong conclusion.**

There is no particular of the prosecution evidence which the learned trial judge failed to properly evaluate thereby reaching a wrong conclusion. What are the matters of law and fact that the trial judge failed to properly evaluate? Presumably these are the ones set out in grounds 1, 2 and 3 of the appeal. We accordingly accept the respondent's counsel submission that ground 4 of the appeal offends rule 66 (2) of the Rules of this court and we accordingly strike it out for offending rule 66 (2) of the Rules of this court.

With regard to ground 1 of the appeal, we found it relevant to consider the summing up to the assessors in the notice of the trial judge as follows:

> You heard evidence of PW2 Detective AIP Kamugisha Fred as to how he recorded a charge and caution statement from the accused on 7th October, 2011. It was in Runyankole language, a language the accused understood well.
>
> The accused confessed to have killed Mucunguzi Sam using a panga and he committed this offence in the presence of Baguma.
>
> PW3 Ganafa Richard was a fellow teacher with Mucunguzi Sam at Keitentaturagye primary school. He saw the body of Mucunguzi and it had a cut in the neck and was in the kitchen.
>
> Later on 4th October, 2011 schoolchildren who had gone to fetch firewood found a panga with blood stains in the bush they gave to him and he also gave it to the chairman LC1 Tumwine Nathan.

PW4 Tumwine Nathan was the chairman LC1 he received information about this case from the headmaster of Keitentarugye primary school Mr. Muhanguzi saw the body of the deceased in the kitchen with deep cuts in the neck. They reported in this case the police.

They got a clue as to how one of Baguma Nyongole had a quarrel with the deceased over a phone sale, the said Baguma was eventually arrested and taken to police. It was Baguma who revealed the accused person. The accused was arrested from garden of Baguma Nyongole and upon arrest the accused admitted having been with Baguma the previous day.

A panga was given to this witness by Ganafa Richard and Baguma's wife confirmed that indeed the panga was theirs and this panga was given to police.

PW5 Mucunguzi Geoffrey was from Kabuyanda Isingiro like the accused in the Keitentarugye in September 2011 where this witness had spent only 2 weeks. He was arrested as a suspect in this case together with Baguma Nyongole. While at Rusherere police station and the suspect's parade Baguma Nyongole was quizzed about this panga and when his wife was introduced and she confirmed that Baguma owned two (2) pangas, this is when Baguma Nyongole disclosed that he had killed Mucunguzi Sam with Owamani Gordon. That Baguma held Mucunguzi Sam while Owamani Gordon cut him and indeed Owamani Gordon was also present at this parade and he accepted having killed Mucunguzi Sam.

PW6 Detective AIP Muhumuza Sebastian recovered panga from chairman LC1 Keitentatugye Cell, he was Tumwine Nathan he identified the panga IDP1 we only omitted his exhibit slip exhibit P3 and the panga remained IDP1.

The accused in his defence denied commission of this offence he raised an alibi as he came to the area on 3rd October, 2011 and was arrested on 5th October 2011. By the time the offence allegedly took place on 28th September, 2011 he was still in Isingiro District.

The assessor's opinion was that the prosecution had not proved the case beyond reasonable doubt and advised the court to acquit the accused person. In his judgment, the learned trial judge found that no one saw the appellant commit the offence. He noted that the evidence of PW4 was that information circulating which was that one Baguma Nyongole had a quarrel with the deceased. Baguma became elusive and was subsequently arrested. Upon the arrest of Baguma, he denied commission of the offence but what led him down was the discovery of his panga which his wife acknowledged to be his. That is when he

admitted having participated in the killing of the deceased. Secondly there was evidence of PW8 Mucunguzi Geoffrey that he was present at the police station at the suspect's parade when Baguma admitted having killed the deceased together with the appellant. The appellant was also present at the suspect's parade. Particularly the learned trial judge noted as follows:

> This court is therefore not surprised that the accused person voluntarily made a charge and caution statement to PW2 Detective AIP Kamugisha Fred. In this charge and caution statement exhibit P2 the accused person confessed to have killed Mucunguzi Sam using a panga and handed this in the presence of Baguma and after the act threw the panga in the bush.
>
> The evidence of PW3 corroborates the contents of the charge and caution statement exhibit P2, as the panga comes out and the fact that the accused and Baguma participated in the commission of this crime.
>
> The accused in his defence raised an alibi and contended that he came to the area on 3rd October, 2011.
>
> However, the evidence of PW 5 who knew the accused as someone with whom they hailed from Isingiro district was that during the month of September, 2011 the accused was already resident of Keitanturagye village and he was therefore placed at the scene of crime.
>
> This court is therefore satisfied that the prosecution has proved beyond reasonable doubt that the accused person Owamani Gordon participated in the killing of Mucunguzi Sam on 28th September, 2011.
>
> I disagree with the joint opinion of the assessors. I hereby find Owamani Gordon guilty of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and I accordingly convict him.

Ground 1 of the appeal relates to the question of whether the charge and caution statement was voluntarily made. The appellant contends that it was not voluntarily made and that the statement had been induced by torture. Secondly, that the appellant had signed a blank piece of paper which was subsequently written on. At the trial, counsel for the accused indicated to court that he had a problem with the charge and caution statement because the appellant informed him that he had only signed paper without any writings and he was beaten before he signed. Thereafter the learned trial judge conducted a trial within a trial and

accepted the testimony of the trial within a trial prosecution witness number 1 Detective Assistant Inspector of Police Kamugisha Fred.

TWT1 testified that the appellant was brought to him on 7th October, 2011 at Rusherere police post to record the charge and caution statement. He was brought by detective Sgt Muhumuza. He interviewed the appellant when he was in plain clothes and explained to him his position as an Assistant inspector of police. He read the charge and caution statement to him in the local language which the appellant understood and he answered it in the affirmative. He invited the appellant to sign a charge and caution statement which was in the local language (Runyankore) which the appellant signed and he also countersigned. He cautioned him that whatever he said would be put in writing and used as evidence in court.

He further testified that the appellant voluntarily told him that on 28th September 2011 he left his home while carrying a panga and went to the home of the deceased. He found the deceased in the kitchen cooking and demanded the letters for his phone from him. The deceased kept quiet and the accused got annoyed and cut his neck.

The witness further testified that the appellant was brought to him when he was normal and was not complaining of any sickness. He translated the charge and caution statement into English. He was not armed and he did not use force or induce the accused. He further testified that the appellant informed him that he was a Mukiga. He did not see any injuries on the accused and it was not possible to get injuries in police cells. He stated in cross examination that by the time he recorded the statement, the appellant had no injuries. He further stated that if someone stated that after the recording of the charge and caution statement, the accused got injuries, he would be right. He could not explain whether Mr Muhumuza who brought the appellant had threatened him.

On the other hand, DWTT1, the appellant also testified that he heard what Kamugisha Fred had said above. He did not know Kamugisha Fred and he had never seen him before the date he appeared in court. He never made any statement before Kamugisha. He does not even know Muhumuza. He stated that he made no statement at the police post. He

was taken to the office and told that the person who was to release him was in Kampala. Then he was taken back to the cells. He does not know about the statement. Further the appellant testified as follows:

> I signed the piece of paper which was blank when they promised to release me. It was a lady who made me sign, she was called Abigaba. They tortured me before signing the blank paper. I do not know the person who tortured me, he found me inside the office at Rusherere police station.
>
> I do not know how to read, I can write my name, I can recognise my signature.

The witness when showed the charge and caution statement indicated that he could see his name but it was not in his handwriting. He stated that he was removed from the cells at 9 PM and tortured.

In cross examination he testified that he had gone to see his father who stays in Lwentama in Kinoni sub County. He reached there on 3rd October 2011 and was arrested on 5th October 2011. When he was arrested he was taken to Rusherere police station. He was told that he had killed somebody whose names he did not know and the names he came to know in court. In further cross examination he testified that he was not the one who wrote the names in the charge and caution statement. Further he confirmed that he saw Kamugisha Fred for the first time in court that day.

In the ruling of the court, the issue was whether the charge and caution statement was recorded voluntarily. The learned trial judge relied on the testimony of Kamugisha Fred for the evidence of circumstances when he recorded the charge and caution statement. He said that there was no reason whatsoever to suspect that the witness ever tortured the accused when recording his charge and caution statement. The court could not find any evidence of torture prior to the making of the charge and caution statement. He further found that the languages of Runyankore and Rukiga are mutually intelligible. Further that the appellant laboured to deny having ever signed the charge and caution statement but his name surprisingly appears after the charge and caution statement itself and he accepted the testimony of Kamugisha Fred that the appellant signed the charge and caution statement and the entire statement. He concluded

that the charge and caution statement was voluntarily made and recorded by Kamugisha Fred on 7th October 2011 and admitted it in evidence.

Having considered the ruling of the learned trial judge and the evidence he relied upon, the first matter we see is that of characterisation of the charge and caution statement in terms of whether it is a retracted or repudiated statement. A retracted statement is one which is withdrawn or departed from after it is made when there is no dispute as to whether it was made by the accused. On the other hand, a repudiated statement is one which is denied. This distinction was discussed in **Tuwamoi v Uganda [1967] EA 84** by the East African Court of Appeal at pages 88, - 91. As far as are retracted statements are concerned, the court noted at page 88 that:

> We now come to the distinction that has been made over the years between a statement "a retracted" and a statement "repudiated". The basic difference is, of course, that a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one. On the other hand, a repudiated statement is one which the accused person avers he never made.

With regard to retracted statements, the court while citing several authorities approved the following principles:

- It was unsafe to rely on or act on a confession which has been retracted unless after consideration of the whole evidence.

- The evidential value of a retracted confession is very little and it is a rule of practice, also rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars.

- Further, a retracted statement would not be acted upon without consideration in material particulars or unless the court after full consideration of the circumstances is satisfied of its truth.

On the other hand, the court found that the position with regard to a repudiated confession has not always been very clear. Citing a passage from **Gathugu v R (1953) 20 EACA** at page 296 where the court noted that while there is a distinction in principle between a statement or confession which is retracted and one which is repudiated, in the retracted statement the court looks for corroboration as a matter of practice if not of law to assist in the determining which of the two stories told by the accused is likely to be the truth.

> On the other hand, the case of repudiation, once the court is satisfied that the accused did not in fact make the statement, it is reasonable inference to draw in the absence of contrary indications that it has been denied because of its truth.

At page 91 the court attempted to simplify this position and stated as follows:

> First the onus of proof in any criminal cases is on the prosecution to establish the guilt of an accused person. A conviction can be founded on a confession of guilt by an accused person. The prosecution must first prove that this confession has been properly and legally made. The main essential of the validity of the confession is that it is voluntary, but the other legal requirements of each territory must also be established. Thus in Uganda if the confession is made to police officer then it must have been made to an officer of the rank of corporal or upwards and also in accordance with the Evidence (Statement to Police Officers) Rules, 1961. If the court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession, the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a criminal case. This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true.

The law governing the person before whom a charge and caution statement may be made in Uganda has since changed by virtue of section 23 (1) (a) of the Evidence Act Cap 6 which provides *inter alia* that the

statement may be in the presence of a police officer of or above the rank of Assistant Inspector.

The facts and circumstances of this case are that the appellant first of all repudiated the confession on the ground that he wrote his signature on a blank piece of paper. The consideration of this aspect of the appeal does not relate to whether the confession was voluntarily made in terms of whether he was coerced into making it or induced in any other way. A repudiation is an assertion that he never made the confession. The learned trial judge never considered the question of whether it is true that it is the appellant who wrote his name on the charge and caution statement. Instead, he considered the testimony of Detective Assistant Inspector of Police Mr Fred Kamugisha as credible. The learned trial judge disregarded the testimony of the appellant that he signed on a blank piece when he was promised that he would be released. Secondly, that it was a lady who made him sign the blank piece of paper. Thirdly, that he was tortured before he signed the blank paper. Last but not least he also testified that he did not know detective Sgt Muhumuza who brought him to record the charge and caution statement. The record shows that detective Sgt Muhumuza was never called on the aspect of the voluntary nature of the statement. The court solely relied on the evidence of one witness that is the detective assistant inspector of police Mr Fred Kamugisha.

If we go by the premise that the witness only states that what is stated in the charge and caution statement is not true, then it would amount to a retracted statement. Ground 1 on the other hand deals with whether the statement was voluntarily made.

The learned trial judge again relied on the testimony of Kamugisha Fred who had not dealt with the appellant. He was brought by another police officer to Kamugisha Fred and that police officer never testified. Thirdly, the torture alleged by the appellant happened before he was brought. The onus was on the prosecution to lead evidence that the appellant was never tortured. This was before he was brought to make a statement. If there was any inducement or threat, it must have occurred before the appellant was brought to make his statement.

What is further troubling being the fact that TWTW1 Mr Kamugisha Fred testified in cross examination that it would be true to say that the appellant was tortured after the charge and caution statement. However, what is material is that the appellant was never subjected to any medical tests or examinations as to the correctness of his statement.

If any torture happened before he was brought before the detective assistant inspector of police, then no evidence was led to disprove it. In fact, the only evidence of possible torture which needed to be rebutted by the prosecution is the evidence adduced by the prosecution being the medical examination of persons accused of serious crime admitted as an exhibit. It was filled by detective Sgt Muhumuza Sebastian was signed on the part which was supposed to indicate the injuries on the accused persons that there were no bruises, scratches, stab wounds, cartoons, onwards or other signs of injury.

This is contradicted by the medical report are dated 10th of October 2011 on the same form signed by the medical officer of Rusherere Community Hospital showing that the appellant had multiple bruises in the back L.I.F region. Secondly his mental condition appeared normal. The multiple bruises on the back of the appellant corroborates the appellant's story that by 10th October 2011 he had been tortured. Though the charge and caution statement is dated 7th October 2011, there is no evidence to suggest that the bruises occurred after that date. The testimony of the appellants was that he was arrested on 5th October 2011.

In **Walugembe Henry and Others v Uganda; Supreme Court Criminal Appeal No 39 of 2003 [2005] UGSC 22** (01 November 2005), the appellants had been convicted by the High Court upon relying heavily on the written confessions of the 1st and 2nd appellants made to the police. In the Court of Appeal, the appellants complained *inter alia* that the trial judge erred in holding that the statements were made voluntarily and were properly admitted in evidence. The Court of Appeal held that the statements were meticulously tested by the court during the trial within the trial. From that the 1st appellant denied having made any statement. He then changed the story and said that he had made one because of the beating. That the judge was therefore correct to find him as a liar. On the other hand, the 2nd appellant claimed to be illiterate and that he was guided by the police

to write his name yet when he was requested to read, he read it without hesitation and therefore the trial judge found that the story of torture was untrue. The Supreme Court held as follows:

> It is obvious to us from the ruling, that the learned trial judge proceeded on the erroneous premise that the appellants had to prove that they were tortured. This is so because in respect of each statement, the learned trial judge in effect, held that since he did not believe the appellant's story, the prosecution evidence was unchallenged and therefore true. That is an obvious misdirection. We think that if the learned trial judge had evaluated the evidence bearing in mind that the onus was on the prosecution, he may well have concluded that the prosecution had not discharged the onus. In that regard, counsel for the appellants argued that notwithstanding that the trial judge disbelieved the appellants, the possibility of torture was not ruled out because no medical evidence was adduced to negative the allegations of torture. While we do not wish to give the impression that only medical evidence can negative allegations of torture, we think there is some substance in this argument. It is a routine practice to subject an accused person taken into police custody, to medical examination and subsequently to adduce medical evidence of his/her physical and mental condition, particularly in trials of serious crimes. In appropriate cases, this helps to resolve pertinent disputes such as the one at hand or in respect of criminal liability on account of age or mental status. In the instant case where it was alleged inter alia that one of the appellants was stabbed and underwent medical treatment, such medical evidence would most likely have helped to either support or belie the allegation.

That is exactly the situation in this appeal. The testimony of the defendant and the allegation was that he was tortured before he made the confession. He was led to the confession table by one Sgt Muhumuza. Sgt Muhumuza who was never called to testify in the trial within a trial. Detective assistant inspector of police Fred Kamugisha only saw the appellant when he was brought into his office to record a statement. He admitted in cross examination that he did not know whether the appellant had been threatened prior to being brought to his office. Therefore, this left the matter of whether the appellant was tortured in the balance. The appellant also testified that he was tortured at night.

Secondly he was told to sign the paper before he could be released. Thirdly the appellant testified that he was illiterate though he could write his name. He denied his signature. Last but not least, the medical

evidence exhibit P1 shows that the appellant suffered multiple bruises at the back.

This corroborates the testimony of the appellant that he had been tortured or beaten. We therefore find that the prosecution did not discharge the burden of proving that the charge and cation statement was voluntarily made. Ground 1 of the appeal succeeds.

Notwithstanding our allowing ground 1 of the appeal, we have considered the evidence as a whole. The 2nd ground of appeal is that **the learned trial judge erred in law and fact when he relied on the evidence of PW5 (accomplice) to corroborate a repudiated and retracted charge and caution statement of the appellant which occasioned a miscarriage of justice**.

PW5 Mucunguzi Geoffrey testified that he came to the village where the offence took place in September 2011. He had stayed there for 2 weeks when the offence took place and he did not know the deceased. Soon after he came, a teacher was killed in the area and he was arrested. It was the chairman LC1 who arrested him. Upon arrest he was taken to the police cells at Kanoni police station. He was arrested with Baguma Nyongole. They spent 2 nights at the police station. At the police post at a suspect's parade, they were asked and the Baguma denied the offence. He also denied the offence. When they asked Baguma how many pangas he owned, he stated that he had one panga. He was quizzed about the panga and the fact that his wife admitted that the panga was his. That is when Baguma disclosed that they murdered the teacher together with the appellant. That Baguma held the teacher and the appellant cut him with a panga.

Obviously the evidence of what happened at the scene of the crime as narrated by another person is hearsay evidence. Mr Baguma was never called and apparently there is no evidence that he was charged. The proceedings in this matter were solely against the appellant. The learned trial judge relied on this testimony and stated as follows:

> Upon the arrest of Baguma he denied commission of this offence, but what let him down was the discovery of his panga which his wife acknowledged to be

his. This is when Baguma admitted to have participated in the killing of Mucunguzi Sam.

It was the evidence of PW8 Mucunguzi Sam that he was present at Rusherere police station at the suspects parade when Baguma admitted having killed Mucunguzi Sam together with Owamani Gordon and indeed Owamani Gordon was also present at this suspects parade.

This court is therefore not surprised that the accused person voluntarily made the charge and caution statement to PW2 detective AIP Kamugisha Fred.

This evidence is supposed to have corroborated the retracted statement. It is on the above basis that the learned trial judge disagreed with the opinion of the assessors that the court should acquit the appellant. The assessors formed the joint opinion that the prosecution had not proved the offence charged beyond reasonable doubt.

All facts which are to be proved by oral testimony is supposed to be proved by direct oral evidence as provided under section 59 of the Evidence Act cap 6 laws of Uganda which provides that:

59. Oral evidence must be direct.

Oral evidence must, in all cases whatever, be direct; that is to say—

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds, except that—

(e) the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which those opinions are held, may be proved by the production of those treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable; and

(f) if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of that material thing for its inspection.

The alleged confession of one Baguma who is a third party and who was not procured to testify in court cannot be used to prove anything. PW3 did not see what Baguma confessed about. The alleged confession of Baguma is about another event in the statement of another person. According to **Osborn's Concise Law Dictionary, 11th Edition page 207**:

> hearsay. The general rule at common law was that hearsay evidence (oral statements of a person other than the one testifying or statements contained in documents offered to prove the contents) was not admissible.

This rule of common law was further explained in **Subramanian v Public Prosecutor [1956] 1 WLR 965**, 969 by the Privy Council:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.

In the circumstances in this appeal, the prosecution sought to prove and the object of the evidence was to establish the truth contained in the statement of one Baguma who said something about the offence. It was not meant to establish that a certain statement was made by Baguma. The contents of the statement of Baguma narrated by PW5 are inadmissible and cannot found a conviction, the basis of grounds 1, 2 and 3 of the appeal.

Secondly the person reported to have confessed purports to be an accomplice witness. We agree and accept the submissions of the appellant's counsel that accomplice evidence is very unsafe to rely on. In **Mushikoma Watete alias Peter Wakhoka and 3 Others v Uganda Supreme Court Criminal Appeal No. 10 of 2000, reported in [1998 – 2000] HCB page 7** at page 10 the Supreme Court held that:

It is unsafe to rely on accomplice evidence unless it is corroborated. An appellate court will quash a conviction based on accomplice evidence if it is uncorroborated and the trial court failed to warn itself of the danger of relying on the uncorroborated evidence of an accomplice. However, if after warning itself of the danger, it is satisfied that the evidence is reliable the court may rely on such evidence. Secondly in a criminal trial,

a witness is said to be an accomplice if he participated, as the principal or accessory, in the commission of the offence which is the subject of the trial. Further in **Ezera Kyabanamaizi and others versus R [1962] EA 309**, the East African Court of Appeal at page 315 cited with approval the statement of law on what an accomplice is from **Sarkar on Evidence** (10th Edition) page 295:

> It is abundantly clear from the relevant cases on the point, that in order that the statement of an accused may be taken into consideration against his co-accused tried jointly for the same offence, it must implicate himself substantially to the same extent as others, and must expose himself to the same risk along with the fellow prisoners; otherwise the confession cannot be taken into consideration under this section. If the statement implicates him as fully as the others or in a greater decree, it is then only that it can afford a sort of safeguard for truth. If the statement criminates the maker partially or in a lesser degree, or throws the main burden of the blame on others, it cannot be used against his co-accused....

From the above passage, an accomplice is a person who is a co-accused or is exposed to the same risk as the person they testify against. There is no evidence that Baguma is exposed to the same extent as the appellant. Moreover, the court proceeded from the assumption that the evidence of PW5 is that of an accomplice. In other words, the court considered the contents of the testimony of PW5 who clearly was not an accomplice. He only purported to convey the evidence of an accomplice alleged to have been contained in his confession at a certain police post. In such a roundabout way, such evidence is inadmissible as hearsay evidence and it is an unacceptable way to prove a very serious offence. The best the prosecution could have done was to have procured Baguma to testify. That Baguma would have been exposed to the same risk of prosecution as the appellant for the offence of murder. In the premises, ground 2 of the appeal succeeds.

Having allowed grounds 1 and 2 of the appeal, we need not consider grounds 3 and 4 of the appeal, as the conclusion of the court on grounds 1 and 2 are sufficient to allow the appeal.

We accordingly allow the appellants appeal against conviction and sentence and set aside the conviction and sentence of the appellant.

The appellant stands acquitted of the charges of murder and shall be set free unless held on any other lawful charge.

Dated at Mbarara the 24th day of March 2022

Fredrick Egonda – Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal