THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 109 OF 2016

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

1. **PC.WAMALA EDSON (No. 13085)**
2. **PC.KARUGABA JOSEPH (No. 54357) :::::::::::::::: APPELLANTS**
3. **KASULE RICHARD**

VERSUS

UGANDA:: :RESPONDENT

(Appeal from the Decision of Duncan Gaswaga J sitting at Mbarara High Court dated 4th May 2016)

JUDGMENT OF THE COURT

The Appellants were indicted for the offence of Murder contrary to sections 188 and 189 and Aggravated robbery contrary to Sections 285 & 286 (2) of the Penal Code Act. The particulars of Count No. 1 were that the Appellants and others still at large, on the 29thday of July 2012, at Camp 3 Chinese Communication and Construction Company (CCCC), in Kiruhura district, murdered Zhan Xunhong.

In Count No. 2 it was alleged that the Appellants and others still at large on 29th July 2012 at Camp 3 of the Chinese Communication Construction Company (CCCC) in Kiruhura district, robbed Li Chang Ging of cash UGX 21,018,800/=(Twenty one million eighteen thousand eight hundred shillings) and two total station surveying machines valued at UGX 20,000,000/=(Twenty million shillings), all valued at UGX 41,018,800/= the property of Chinese Communication and Construction Company (CCCC), and at or immediately after the time of the said robbery, used a deadly weapon to wit a gun.

They were convicted and sentenced to 55 years imprisonment on Count No. 1 and 25 years imprisonment on Count No. 2. Dissatisfied with the decision, they appealed against both conviction and sentence on the following grounds;

Grounds of Appeal

1. **That the Learned Trial Judge erred in law and fact when he failed to conduct a trial within a trial when the charge and caution statement of the 3rd appellant was retracted.**
2. **That the Learned Trial Judge erred in law and fact when he failed to sum up the law, ingredients and facts to the assessors which occasioned a miscarriage of justice.**
3. **That the Learned Trial Judge erred in law and fact when he relied on some of the unsworn prosecution witnesses to convict the appellants which occasioned a miscarriage of justice.**

4. **That the Learned Trial Judge erred in law and fact when he relied on a charge and caution statement that was inadmissible to convict the Appellants.**
5. **That the Learned Trial Judge erred in law and fact when he relied on evidence of a single identifying witness, when conditions for proper identification were missing.**
6. **That the Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion.**
7. **That the Learned Trial Judge erred in law and fact when he passed a sentence against the Appellants without deducting the period spent on remand.**
8. **That the learned Trial Judge erred in law when he passed harsh sentences against the Appellants.**

Representation

At the hearing of the Appeal, the Appellants were represented by Mr. Vincent Turyahabwe on State Brief while the Respondent was represented by Ms. Samalie Wakooli, Asst. DPP from the Office of the Director of Public Prosecutions. The Appellants appeared via an online video link from Mbarara main prison.

Submissions for the Appellants

On Ground No. 1, Counsel for the appellant submitted that from the record of proceedings, the 3rd Appellant objected to the charge and caution statement, which the prosecution attempted to exhibit.

Counsel added that although the court had indicated that it would conduct a trial within a trial, throughout the record of proceedings, it is not shown that this was done. Counsel cited section 139 of the T.I.A and the Court of Appeal decision of **David Johnson Adiga v Uganda Court of Appeal Crim. Appeal No. 157 of 2010** and asked court to quash the finding of the Trial Judge and set aside the sentence of the appellants.

Regarding Ground No. 2, counsel contended that from the record of proceedings, there is no evidence that summing up was ever done to the assessors. He added that the Trial Judge just made a blanket statement that summing up done in open court. Counsel referred to S. 82 (1) of the TI.A, which requires a Trial Judge to sum up the law and evidence in the case to the assessors, and the provisions are couched in mandatory terms.

In respect of Ground No.3, counsel submitted that PW1 and PW2 did not testify on oath and they were detective police officers who actively participated in the investigations of the case. Counsel added that the record does not indicate whether the said witnesses were sworn in but the Trial Judge heavily relied on their evidence, which caused a miscarriage of justice.

In regard to Ground No. 4, counsel for the Appellant submitted that the 3rd Appellant was arrested on 29th July 2012 and his charge and caution statement was recorded on 6th August 2012 after 7 days which

is in violation of the 48 hour rule stipulated under Article 28 of the Constitution. Counsel added that the 3rd Appellant stated that he was tortured before he made and signed the said statement, and since the Trial Judge did not conduct a trial within a trial, the possibility of torture was not challenged.

On Ground No. 5, counsel contended that the Trial Judge did not properly apply the law on identification in the instant case. He noted the conditions for proper identification laid down in **Abdalla Nabulere & Anor v Uganda (1979) HCB 77** and stated that in the present case, the conditions for proper identification were missing.

In respect of Ground No.6, counsel submitted that the Trial Judge failed to evaluate the evidence on contradictions and inconsistences in the prosecution evidence.

On Ground No. 7, counsel submitted that apart from noting the period spent on remand, there was nothing to indicate that the Trial Judge reduced the period the Appellants had spent on remand in accordance with Article 23 (8) of the Constitution.

Regarding Ground No. 8, counsel submitted that there was no uniformity in sentencing the Appellants thus the sentences were harsh in the circumstances. He prayed that this court should revisit the terms of imprisonment by the lower court and pass a lenient sentence.

Submissions for the Respondents in Reply

In reply to Ground No. 1, Counsel for the respondent submitted that the trial court confirmed that a trial within a trial was conducted by court and found that the charge and caution statement of A3 was taken voluntarily. She argued that even if a trial within a trial was not conducted, such procedural error did not occasion any miscarriage of justice.

Regarding Ground No. 2, counsel submitted that summing up to the assessors was done as evidenced in the record of proceedings indicating that summing up was done in open court. She added that when the assessors were giving their opinion, they quoted the ingredients of the offence, which is a clear indication that they were properly briefed by court.

In respect of Ground No. 3, counsel submitted that the Appellants were represented and if there were any anomaly, they would have raised it. She added that the absence of the word 'sworn in' on record is a human error, which is curable and cannot go to the root of the case to occasion a miscarriage of justice.

In reply to Ground No. 4, counsel contended that the delay to record a statement does not render the statement inadmissible. She referred to **Mumbere Julius v Uganda SCCA No. 15 of 2014** where court rejected the argument that the recording of the charge and caution statement after 48 hours renders the statement a nullity. She prayed that court dismisses this ground of appeal.

Regarding Ground No. 5, counsel submitted that the trial court was alive to the law relating to evidence of a single identifying witness and gave the analysis in the Judgement. She added that court considered the fact that PW4 was familiar with A3 as he had seen him on three occasions and they used to deal together in siphoning fuel among others. Counsel prayed that court dismisses this ground of appeal.

In respect of Ground No. 6, it was counsel's argument that such grounds offend the provisions of **r. 66 (2) of the Court of Appeal Rules** which require a Memorandum of Appeal to set out clearly and concisely the grounds of appeal specifying in the first appeal the points of law or fact which are alleged to have been wrongly decided. Counsel submitted that Ground No. 6 is set out in general terms and does not indicate which specific piece of evidence was not considered by the trial court thus it should be struck off the record.

In reply to Ground No. 7, counsel argued that at the time the decision of the lower court was passed in 2016, **Rwabugande** was not yet law. She added that the requirements of the arithmetic deduction in **Rwabugande** came into force on 3rd March 2017 and cannot be said to operate retrospectively. She submitted that Court should disregard this ground.

Lastly on Ground No. 8, Counsel contended that a sentence of 55 years is way less than the death penalty and life imprisonment thus not manifestly harsh or excessive considering the circumstances of this

case. She also submitted that concerning Aggravated Robbery, the appellants were sentenced to 25 years to run concurrently meaning that on both counts the appellants were to serve only 55 years which was not harsh considering that a life was lost and property has never been recovered up to date.

The Duty and Reasoning of the Court

Section 11 the Judicature Act, cap 13 recognises the jurisdiction of the Court of Appeal. It stipulates that, 'for the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.'

The Trial on Indictments Act lays down both the law and the procedure of handling criminal appeals from the High Court to the Court of Appeal. **Section 132 (1) (a) and (d) of the T.I.A, Cap 23**, state as follows:

(1) Subject to this Section;

a) An accused person may appeal to the Court of Appeal from a conviction and sentence by the High court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact

and the court of Appeal may-

d) Confirm, vary or reverse the sentence and conviction,

The Court of Appeal can lawfully alter, increase or decrease a sentence under **S. 34(2) of the Criminal Procedure Code Act cap 116**.

All the above sections of the law are procedurally made possible under **Rule 32 (1) of the Judicature (Court of Appeal) Rules,** which states, that;

'On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.'

However in **Kamya Johnson Wavamuno v Uganda SCCA No. 16 of 2000**

"...It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration, or an error in principle was made. It was not sufficient that the members of the court would have exercised their discretion differently."

With the above background in mind, we now proceed to consider the evidence on court record to establish if there was any failure to take into account a material consideration, or an error in principle was made.

We shall consider Ground No. 1 and No. 2 together as they relate to procedural irregularities.

Considering Ground No.1, We note that the 3rd Appellant objected to the charge and caution statement and stated that he made the statement at 11:00pm, was tortured by police officers and did not make the statement voluntarily. The trial court then noted that a trial within a trial would be conducted to establish the voluntariness of the statement. The Trial Judge stated in his judgment that a trial within a trial was conducted and the statement was found to have been donated

by A3 voluntarily. However, there is no evidence on court record that this was done.

The law governing retracted and repudiated confessions is succinctly stated in **Tuwamoi v Uganda [1967] EA 84, 91** that:

'A trial Court should not 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 that case that the confession is true.

The purpose of carrying out a trial within a trial is to establish the voluntariness of the statements made by accused persons as was held by the **Supreme Court in Amos Binuge & ors v Uganda, SCCA No. 23 of 1989** as follows;

'It is trite that when the admissibility of an extra-judicial statement is challenged, then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial within a trial…the purpose of a trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted.'

The Supreme Court in **Walugembe v Uganda SCCA No. 39 of 2003** held that;

'Where an accused person objects to the admissibility of the confession on grounds that it was not made voluntarily, the court must hold a trial within a trial to determine if the confession was or was not caused by any violence, force, threat, inducement or promise to cause an untrue confession to be made. In such trial within a trial, as in any criminal trial, the onus of proof is on the prosecution to prove that the confession was made voluntarily.'

A close look at the material before this court reveals that there was no attempt by the trial court to carry out a trial-within-a trial. Without carrying out a trial within a trial there is no other way the Trial Judge

would have assessed the voluntariness of the confession vis-a-vis the appellant's denial. This was a fundamental error which made reliance on such a confession problematic. Moreover the trial Judge did not attempt to lay down reasons for believing the prosecution and not the defence case. We therefore we fault him for the above omissions which we find fatal. Ground No. 1 therefore succeeds.

Considering Ground No. 2, the appellants fault the Trial Judge for failing to sum up to the assessors. We noted that there is no evidence on record that the learned Trial Judge summed up the case to the assessors after the close of the case of both sides.

Section 82 (1) of the TIA imposes a statutory obligation on a Trial Judge to sum up the law and evidence to the assessors. It provides as follows;

'When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors."

In **Sam Ekolu Obote v Uganda [1995] SCCA No. 15 of 1994,** it was held that;

"There is no evidence on record that the learned Trial Judge summed up the case to the assessors after the close of the case of both sides. This in our view amounted to a failure to comply with the obligatory requirement of S. 81 (1) by the learned Trial Judge. It was a procedural error, which was fatal to the appellant's conviction."

This court has also held in **Agaba Lilian & Amutuheirw Patrick v Uganda CACA No. 247 & 239 of 2017** that;

"Failure to sum up to the assessors is an irregularity that is fatal and incurable under S. 139 of the Trial on Indictments Act. For that reason the trial is rendered a nullity."

Further, in **Adiga Johnson David v Uganda CACA No. 157 of 2010** this court while commenting on S. 82 (1) of the TIA stated that;

" This provision is couched in mandatory terms and that the failure of the learned Trial Judge to adhere to it rendered the trial a nullity and thus occasioned a miscarriage of justice."

It is also our opinion that **S. 82 (1) of the TIA** is couched in mandatory terms therefore the Trial Judge was obligated to follow it and the failure to do so rendered the trial a nullity. In light of the procedural irregularities we have pointed out herein above, we find that a miscarriage of justice was occasioned to the appellants. According to **Section 139 of the TIA,** a finding based on such irregularities should be reversed. It provides as follows;

"Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice."

We note that where a conviction by a lower court is quashed for being based on a fundamental irregularity in the proceedings which resulted into a mistrial, or where by reason of an error material to the merits of the case a miscarriage of justice has occurred, the interest of justice normally demands that a retrial be ordered.

The overriding purpose of a retrial as was well-articulated in **Rev. Father Santos Wapokra v Uganda, CACA No. 204 of 2012**, is to ensure that the cause of justice is served. Indeed, among other reasons, it was found that a serious error committed during the conduct of the trial or the discovery of new evidence which was not obtainable at the trial are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available at the time. However a court has the duty to ensure that the accused person is not in double jeopardy. It may gravely inconvenience the appellant and may indeed jeopardise them by way of expense, delay and inconvenience.

This court held a similar view in **Johnson David Adiga v Uganda CACA No. 157 of 2010.**In that case this court set aside the conviction and sentence on the basis of irregularities similar to the instant case, to wit; that the trial Judge erred in law when he failed to sum up the law and evidence to the assessors; that the trial Judge relied on a charge and caution statement without properly admitting it, and that he passed a sentence which was harsh and excessive. In **Turahi Mugambe & Anor v Uganda Court of Appeal Criminal Appeal No. 48 of 1998** a conviction for aggravated Robbery and sentence of death were quashed. We agree that from the above provision of the Evidence Act, the relevance of a confession is dependent on its voluntariness. Because voluntariness is the main essential to its relevance where admissibility in evidence of a confession is

challenged, the court after concluding a trial within a trial must make a specific finding on the voluntariness of the confession first before considering its relevance.

In the case now before us we find that there was no evidence that the trial Judge summed up to the assessors. The court record is devoid of this part of the proceedings. There is nothing on the record to suggest that such a procedure did happen and was taken not of.

More importantly the mode for admitting the charge and caution statements was completely flawed. Section 23 and 24 of the Evidence Act provide the legal framework within which confessions and extra judicial statements can become relevant to a trial.

23. Confessions to police officers and power of Minister to make rules

(1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of—

(a) a police officer of or above the rank of assistant inspector; or

(b) a magistrate, but no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b), unless the confession is corroborated by other material evidence in support of the confession implicating that person.

(2) The Minister may, after consultation with the Chief Justice, make rules prescribing generally the conduct of and procedure to be

followed by police officers when interviewing any person and when recording a statement from any person, in the course of any investigation.

It would appear that under the law, where an extra-judicial statement or a charge and caution statement is to be made by a person confessing to a crime, the charge itself must first of all be read and accepted and signed by the suspect. Before an extra judicial or charge and caution statement is taken by either a magistrate in the former or a commissioned police officer (above the rank of Assistant Inspector of Police), in the latter, the officer must satisfy himself or herself that the suspect fully understands the charges leveled against him.

24. When confessions irrelevant

A confession made by an accused person is irrelevant if the making of the confession appears to the court having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made.

It is important that the suspect is not forced, coerced, tortured, threatened or induced to believe that by confessing he stands to benefit. No promises must be made to the suspect whether during or before the statement is recorded. In other words the officer must ensure that the suspect is aware of the effect of self-incrimination and the need for presumption of innocence. The statement must be made

and written in a language which a person understands before it is translated into English. The non-English version should be placed on the record side by side with the English version. There should be a signature on the charge and caution to prove that it was read back to the maker and that he signed it willingly. Having charged the suspect, the officer may then take the confession. Once again the officer should ensure that the accused person speaks in a language he understands. If the language is not English, the confession must be translated into English which is the language of the court and both translations must be made available.

When the matter comes up for trial the defence should inform the prosecution at the earliest opportunity that it intends to contest the confession. A repudiated or retracted confession becomes a subject of another trial in order to assess whether it was voluntarily made. In a trial involving assessors, no mention must be made about the confession in open court or to the assessors in any way before Trial-within-a Trial. This is to avoid biasing them against the accused before the confession is admitted into evidence.

No witness must be allowed to testify about a confession made by the accused until the accused himself accepts the confession or until a Trial-within a Trial is held. This process is for the judge and the parties only. The assessors are excluded from the Trial within a Trial, again, to avoid bias. A confession is an acknowledgment that one is guilty however,within our context,the recording of the confession

must comply with the rules for obtaining confessions. Once a Trial-within a -Trial is held, the Judge must make a ruling about the voluntariness of the confession either admitting or dismissing the confession. It is only after this that evidence can be led about the confession.

We note, sadly, that the above procedures were not followed by the trial Judge making the whole process of admission of the confession a nullity. It is every accused person's constitutional right to understand the charges against him and to not incriminate himself. These are constitutional imperatives under Articles 23 and 28 of the Constitution. Article 23 enshrines the right to understand the charges against him. It stipulates that

(3) A person arrested, restricted or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice.

Article 28 states, in part that;

(3) Every person who is charged with a criminal offence shall-

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(b) be informed immediately, in a language that the person understands of the nature of the offence;

(c) be given adequate time and facilities for the preparation of his or her defence:

In view of the above constitutional imperatives, the process of recording a confession in order for it to become relevant and admissible must involve the accused person himself or herself and it must be made to a specified officer (Magistrate or a police officer above the rank of AIP). The confession must be voluntary. No credit ought to be given to a confession obtained from a suspect by the flattery of hope, agony of fear or torment of torture. In view of the finding that the Trial within a Trail was not conducted, the confession becomes inadmissible and irrelevant. Since the confession formed the core of the prosecution evidence, it means that the rest of the prosecution evidence cannot stand. We find that if the trial Judge had properly conducted the process he might have been able to gauge whether the confession was relevant, admissible and if it was voluntarily taken. Failure to properly conduct processes surrounding a trial within a trial renders the whole trial a nullity. We have not found other strong evidence that could support the serious charges of murder and aggravated ~~defilement~~ robbery. The option available would be to order for a retrial.

Regarding the question whether a retrial should be conducted, we note that the appellants were sentenced to 55 years imprisonment on count 1 and 25 years on count 2 to run concurrently. The appellants were committed to prison on the 4th may 2016, the day they were sentenced.

They had spent 3 years 9 months and 3 days on remand having been

remanded on 7th August 2012. This would mean that the appellants would have spent over 9years in incarceration.

It is therefore our conclusion that ordering a retrial over 9 years later might not only occasion another miscarriage of justice but may present serious impediments in tracing witnesses, locating exhibits, and relying on latter's memory after the passage of time. Indeed we find that it would be a trial in futility. In view of the above considerations we find that the grounds so far discussed answer the most fundamental questions in this appeal. Since the trial was flawed in material particulars and offended rule and reason, the conviction of the Appellants is quashed.

The Appellants are herewith acquitted. Having held as above it would be moot to discuss the other grounds of appeal. The Appellants are set at liberty unless held on other lawful charges.

We so order

Dated and delivered this 23rd Day of March 2022.

Hon. Mr. Justice Fredrick Egonda Ntende
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

Hon. Mr. Justice Christopher Madrama
Justice of Appeal