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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-CN-0018-2009

(From Buganda Road Cr. Case No. 303 of 2009)

1. **ATHUMANI AYAIKIN** }
2. **NGOKO ELIKANA** }.....**APPELLANTS**

VERSUS

UGANDA .....**RESPONDENT**

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

This is an appeal from the judgment of the Grade I magistrate sitting at Buganda Road court dated 17/04/2009 in which he found the two accused persons Athumani Ayaikin A1 and Ngoko Elikana A2 (the appellants herein) guilty on five counts and sentenced them to terms of imprisonment.

The brief facts of the case as accepted by the trial court are as follows. The two appellants are nationals of Tanzania. On 10/3/2009 A1 booked a room at Light Candle Guest Lodge in Mutesa II Mengo. His friend A2 booked a room at Muyenga International Hotel. He was given room 507. I will refer to these two places as the guest house and hotel respectively. A1 went to the hotel and while there, was noticed by the hotel Manager PW1 moving around the hotel corridor in a suspicious manner.

The hotel manager alerted his guard PW2 who later saw A1 walking out with a polythene bag. He asked to check the bag, and A1 moved back into the hotel room 507. This was the room which had been booked by A2. A1 locked himself inside and it was only when the hotel security chief threatened to shoot that A1 opened. Meanwhile A2 had escaped through the small gate of the hotel.

Upon checking, A1 was found in possession of a laptop computer with its accessories. The police were called in and it was discovered that the laptop belonged to the occupant of room 506.

The laptop owner was a foreigner who was attending a workshop in town and needed his computer for his business. It was apparently returned to him, and that was the last the laptop was seen and the foreigner heard of. A1 was taken to Kireka at a unit known as Rapid Response Unit (RRU), and after interrogation, he led the police to the guest house and A2 was arrested. Upon search some items were recovered from that room. These included 3 padlocks, a master key, a sharpening file, metal hooks plus currencies of Libya 40,000, United Arab Emirates 10, Kenya 2000, Ethiopia101, Tanzania 1000 and Sudan 151. These were exhibited.

The two accused persons were taken to RRU Kireka and 13 days later on 26/3/2009, they were produced in court and charged. While in police custody the two recorded statements under charge and caution before the Operations Officer of that Unit D/SP Kwerit in which they admitted having committed the offences charged.

On the basis of the above evidence the two appellants were charged in five counts as follows.

Count 1 burglary c/s 295 (1) and (2) of the PCA

Count 2 theft c/s 254 (1) and 261 of the PCA,

Count 3 possessing instruments of house breaking c/s 300 (1)(a) of the PCA

Count 4 possessing suspected stolen property c/s 315(1) of the PCA

Count 5 possessing suspected stolen property c/s 315(1) of the PCA.

The two appellants were charged jointly in respect of the first three counts. The last two counts 4 and 5 were in respect of the currency notes of different countries found on each of them. Count 4 was in respect of A1 only while count 5 was in respect only of A2.

The trial magistrate found the two appellants guilty on each of the counts charged and sentenced them to imprisonment terms of

3 years on count 1;

18 months on count 2;

12 months on count 3;

18 months on counts 4 and 5.

The sentences were ordered to run concurrently. The two were dissatisfied with the conviction and sentence and appealed to this court.

Three grounds were set out in the memorandum of appeal as follows.

1. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record thereby reaching a wrong conclusion.
2. The learned trial magistrate erred in law when he was biased against the appellants.
3. The learned trial magistrate erred in law when he failed to give the appellants adequate time to engage a lawyer and prepare their defence.

The appeal was set down for hearing in the presence of Counsel for the appellants and for the DPP. When the appeal came up for hearing, the DPP was not represented and no reasons were known to court for this failure by the DPP to appear. The matter therefore proceeded in their absence, and this court was thereby denied the opportunity of knowing whether the DPP supported the conviction and or sentences.

I will start with the last two grounds of appeal. I intend to deal with them summarily as I was satisfied that they were lacking in merit. Ground two was that the magistrate was biased. The reason being that the matter was heard the day that plea was taken. It is difficult to justify a complaint where a prosecution is heard speedily. The reverse ought to be the case, where there is delayed prosecution. That was a baseless argument.

The 3rd ground was that the trial magistrate did not avail the appellants sufficient time to enable them secure legal representation. The record showed the exact opposite. When A1

asked for time to engage counsel, a week's adjournment was granted. When Counsel was said to be absent on the adjourned date, a yet other adjournment was granted. That ground was equally without merit. Counsel for the appellants abandoned these two grounds and rightly so in my opinion. One need not waste any more time on these two grounds.

The substantive ground was a complaint by the appellants in the 1st ground of appeal that the learned trial magistrate did not properly evaluate the evidence on record thereby coming to the wrong conclusion.

In the attempt to prove the charge, the prosecution relied on the evidence of four witnesses. I will put down what each testified to and consider whether that evidence when seen along the defence evidence proved the ingredients of the offence charged beyond reasonable doubt.

PW1 Shahaji Patel was the General Manager of the hotel. While in his office, he noticed on his internal surveillance camera (CCTV) a man whose movements in the hotel corridor raised his suspicions. He alerted his security guard PW2 Kato Moses who also watched and noted the same. This man moved out of the hotel and the security guard asked to check what he was carrying in his polythene bag.

That man who was A1 retreated into the room and locked himself inside. At that time, another man was seen jumping over the fence and moving away through the small gate of the hotel. The head of hotel security who was armed with a gun threatened to shoot and at that point A1 then opened the room. A laptop computer with its accessories was found inside the room.

Police was called and a foreigner who was resident of the opposite room 506 identified the laptop as his and it was returned to him. A1 was taken to RRU for interrogation. Under cross examination PW1 said he did not know or see A2.

PW2 Kato Moses the security guard told court that his boss PW1 alerted him of the suspicious movements of two people, A1 and A2 as they were seated near the person from whom they allegedly stole a laptop computer. The witness saw that they were moving out and A1 was holding a polythene bag. He asked to check the bag and A1 told him to come and do it from the room. A1 went into the room which A2 has booked and locked himself inside till he was threatened to be shot by the hotel security head. He opened and a laptop computer with a charger was found in the room. The witness told court that the accused said he got the laptop from the next room.

PW3 No. 21974 D/C Isiiko Jamal attached to RRU Kireka was assigned to investigate this case by D/SP Kwerit. He arrived at the hotel and found A1 under arrest together with a laptop computer, housebreaking instruments and currencies of different countries including Tanzania, Kenya, Ethiopia and Sudan. He interrogated A1, who led them to the guest house and they arrested A2. In the room where A2 was found were three padlocks, a master key, sharpening file, metallic wire, and currencies of different countries including Sudan, Kenya, Tanzania, Ethiopia and US dollars. Under cross examination the witness confirmed that when he arrived at the hotel, A1 was already under arrest in a car.

PW4 D/SP Kwerit was the Operations Officer of RRU Kireka. He recorded the statements of A1 and A2 under charge and caution. These were tendered in court as exhibits P1 and P2 for A1 and A2 respectively.

In his defence A1 testified under oath and said that on 10/3/2009 he was in the room of his friend A2 at the hotel. When he wanted to leave, he was ordered to remain in the room. He locked himself inside and security people one of them armed with a gun demanded that he opens for them. He at first refused fearing for his life. When he opened, they checked his camera which was in a polythene bag with its charger. Police also came and he was taken to RRU in Kireka and severely tortured and ordered to admit that they were thieves. This was at a place referred to as 'Liverpool'.

On 16/3/2009 he was taken to Central Police Station (CPS) but later Kwerit came and demanded to take them back to 'Liverpool'. He took them back to RRU Kireka for further torture because they were demanding for their properties which were taken from them when they were arrested. These included money in foreign currency and a camera. While at RRU Kireka they were taken to the office of Kwerit and told to sign a document written in English whose contents they did not know. On 23/3/2009 they were taken to court and charged.

A2 told court in his defence that on 10/3/2009 he booked a room at the hotel. At about 4.00 pm, he left and said it was true when PW1 said he never knew or saw him. At about 10.00 pm, while he was at the guest house with his girlfriend police came with his friend A1 and arrested him also. He had with him 2 phones, 3 keys, a padlock and key holder all for his house in Tanzania. He was not aware of the so called master key and no one tested such a key to see if it could open any door let alone the one allegedly broken into. The witness wondered why the so called owner of the laptop was not called to testify. He was a foreigner, but so were they. He told court that he never recorded any statement at the police but was simply asked to sign a document written in English after intense torture.

I noted from the outset that the procedure adopted by the trial court in admitting the statements of the appellants recorded by D/SP Kwerit under charge and caution left a lot to be desired. These statements were admitted in evidence and D/SP Kwerit gave details of their contents to court. The trial court heavily relied on these statements to convict the appellants.

The Supreme Court in the case of *Sewankambo Francis & 2 others v. Uganda* SC Crim. App. No. 33 of 2001 reiterated the principles to be applied in a criminal trial regarding the admissibility of a confession statement made by an accused person. In view of the frequent failure by the lower courts to follow these principles, I will quote their Lordships in the Supreme Court extensively on this matter, so that hopefully this may act as guidance to the trial courts when dealing with confession statements. The court stated in part thus;

'The issue of whether a confession the admissibility in evidence of which has not been objected to by the defence can be admitted in evidence, without a trial within a trial to determine its admissibility can be used to convict an accused person has been considered by this Court in recent cases. The clearest and the most relevant decision of this Court was in the case of Omaria Chandia -vs- Uganda, Criminal Appeal No. 23 of 2001 (SCU) (unreported). In that case the appellant was convicted by the High Court of the murder of his wife in Owino Market in Kampala, where the deceased was a trader in a stall. Several eye witnesses saw the appellant stab the deceased to death with a knife.

A confession statement allegedly made by the appellant was admitted in evidence without objection from counsel for the appellant. His appeal to the Court of Appeal failed because, apart from his alleged confession, there was ample evidence from eye witnesses to support the conviction.

In his appeal to this Court, one of the grounds of appeal was that the learned Justices of Appeal erred in fact and in law when they admitted the charge and caution statement, extracted from the appellant.

Regarding that ground of appeal this Court said:

"Firstly, we would reiterate what we have stated in our recent decisions that because of the doctrine of the 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.

We say this because an unchallenged admission of such a statement is bound to be prejudicial to the accused and to put the plea of not guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that counsel for the accused person has not challenged or has conceded to its admissibility. Unless the trial Court ascertains from the accused person that he or she admits having made the confession statement voluntarily, the court ought to hold trial within a trial to determine

its admissibility. See Kawoya Joseph -vs- Uganda, Criminal Appeal No. 50 of 1999, (SCU) (unreported) Edward Kawoya -vs- Uganda, Criminal Appeal No. 4 of 1999 (SCU) (unreported) and Kwoba -vs- Uganda, Cr. App. No. 2 of 2000, (unreported).

Therefore, and with respect, we think that it was improper for the learned trial judge to admit in evidence the confession statement (exhb. P.3) of the accused on the basis that his counsel did not object."

Applying the Court's decision in Omaria Chandia's case (supra) to the instant case, our view is that it was improper for the learned trial judge to admit in evidence the confession statements of the three appellants (Exbt. P.5, P.6 and P.7) on the basis, that neither the appellants nor the defence counsel challenged the admissibility of their confession statements, and without holding a trial within a trial to determine the admissibility of the confessions.

A part from the failure by the trial judge to ascertain from the appellants whether the confessions could be admitted, there are other unsatisfactory features in the case which affect the voluntariness of these confessions. First, we think that it is irregular for one Police Officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. The temptation on the part of the policeman to use contents of statement to record a subsequent statement cannot be ruled out.'

In the appeal before me, the charge and caution statements of the appellants were admitted in evidence without first asking each of them whether they had no objection to their being admitted. The appellants alleged that they were severely tortured before signing them, meaning that the statements were not made voluntarily. It was imperative to hold a trial within a trial in order to determine their voluntariness.

The supreme court has held in the above cases that statements under charge and caution, which have been retracted or repudiated by the makers, and whose voluntariness has not

been tested through a trial within a trial cannot be used as a basis of a conviction of an accused person.

There were other reasons why the so called confession statements of the appellants caused a lot of unease. The statements of the two appellants were both recorded by the same officer D/SP Kwerit. As held by the Supreme Court in *Sewankambo Francis & 2 others v. Uganda* (supra), this was highly irregular. What was more, the same officer was the head of the investigation team in this case according to PW3. This made his participation as the officer recording the charge and caution statements even more irregular. See *Isaeal Kamukolse v. R* (1956) 23 EACA 521.

Lastly on this point, there were allegations of torture of the appellants while in police custody at RRU Kireka. The trial magistrate glossed over this matter simply saying that since he did not see any marks of torture on the bodies of the appellants therefore there was no torture. That conclusion was with respect naïve. He did not ask them how the alleged torture was inflicted, and when this was done. The evidence on record which was not controverted was that the appellants were held at RRU Kireka for 13 days, and often taken or threatened to be taken to what was touted as the torture chamber called 'Liverpool'.

In a case which was so simple and where the accused were said to have confessed the very next day after arrest, why were they held in police custody for so many days. They were brought to the Central Police Station but immediately returned to the rather clandestine RRU Kireka. That lent credence to the allegations by the appellants of torture.

I noted that the charge and caution statements stated that the accused were charged with burglary c/s 297 (a) and (b) of the Penal Code Act. The court tried and convicted the appellants under burglary c/s 295(1)(2) of the Penal Code Act. These are two different offences, as the former in respect of which the alleged confessions were made relates to breaking and entering a store, schoolhouse or workshop or place of worship. The latter offence which the appellants denied and upon which the trial proceeded relates to

breaking and entering a dwelling house. That made the charge and caution statements irrelevant as they were not concerned with the offence charged.

I would therefore hold that the charge and caution statements made by the accused persons were not only irrelevant, but they were also irregularly admitted and in any event evidence showed that they were not voluntarily recorded. Such evidence was therefore inadmissible and ought not to have been considered by the trial court.

Once the evidence of the charge and caution statements is removed, that leaves only the evidence of PW1, PW2 and PW3. PW1 saw only one person on his CCTV camera while in his office. That person was in the hotel corridor. But PW2 told court that he saw two people seated next to the one they stole from. This certainly was not in the hotel corridor. That was a contradiction in prosecution evidence.

PW2 then asked A1 what was in the bag he was carrying and they both moved back into the hotel where A1 locked himself inside the room of his friend A2. That was not the room allegedly broken into. PW3 arrived when A1 was under arrest and in a car.

Regarding the evidence of burglary no one saw either A1 or A2 break into or enter any room let alone room 506. A1 was seen entering room 507 which A2 booked. There was no evidence from the occupant of room 506 which was allegedly broken into. PW2 said A1 was in room 507 with a laptop and its charger. The laptop which was allegedly recovered from A1 was not produced in court. Its owner was produced in court to testify. It was claimed that he was a foreigner, but there was no evidence that he ever recorded any complaint or statement anywhere regarding the theft and or recovery of his laptop either to the police or the hotel or made a statement on oath to that effect. Evidence of burglary was entirely missing.

The same is true for the count of theft. There was no person who complained to anyone let alone the hotel or the police that a laptop was missing. There were no details of the

recovered laptop on record. The count was simply not sustainable from the non existent evidence of theft.

There was a count of being in possession of instruments of house breaking. PW2 arrested A1. he said A1 was found in possession of a laptop computer, its charger, and wallet. He never mentioned any instrument which could remotely be said to be a house breaking instrument. The re arresting officer arrived and found A1 in the car. But he mentioned instruments of house breaking. Where these came from was not known.

Later A2 was arrested and again house breaking instruments were mentioned as having been recovered. The question was where exactly these instruments were recovered from. There was no evidence that the instruments recovered were indeed those used or capable of being used for breaking into a house. There was no evidence that any of these items were tested and found capable of opening any room let alone room 506 at the hotel.

A2 told court that some keys on a key ring and a padlock were found on him but that these were for his house in Tanzania. The evidence of PW2 was that at the hotel he saw one presumably A2 moving away. He did not stop him, but only stopped A1 who was carrying a bag. A2 was arrested from the guest house and if that was where the instruments were recovered from he could not have had them in his possession at the time A1 was stopped by PW2 least he also would have been stopped and searched, as these items could not be hidden in a pocket.

All the above raises doubt whether there were any such instruments of housebreaking, and as none were proved so to be that count would also fail.

The last two counts related to being in possession of suspected stolen property. The property in question being the currencies of different countries which were found on the appellants. The appellants did not deny being in possession of the currencies mentioned. They said in their sworn evidence that there was more which was recovered from them but which the police refused to return let alone admit having taken. Their evidence was

that this was one of the reasons why they were kept in detention at RRU Kireka. Whenever they asked for their money and more particularly the US $ 500, they would be threatened with or taken to 'Liverpool' for torture.

Being in possession of foreign currency per se is not an offence in Uganda so far as I know. There was no evidence that any money in any of the currencies found on the appellants was stolen. Even the elusive foreigner whose laptop was allegedly stolen did not complain of having any money stolen, least there would have been evidence that it was also returned since the prosecution evidence alluded to the fact that the laptop was also returned to him.

There was no offence committed by the appellant for being in possession of the monies in the different currencies as alleged by the prosecution. That count would also fail.

In the premises the prosecution evidence fell far too short of proving the charges against the appellants. There was no proof beyond reasonable doubt that each of the appellants committed the offences charged. If the trial magistrate had considered the evidence appropriately he would have come to a different conclusion. In the event, this appeal is allowed. The conviction of the appellants is quashed and sentences and orders of the trial court set aside. They shall be released forthwith unless otherwise lawfully held. The monies which were found on them should be returned to them immediately.

RUGADYA ATWOKI
JUDGE
05/11/2010.