

UGANDA PROSECUTOR

VERSUS

NIONZIMA PHILLIP KATO ACCUSED

RULING

1. This is the ruling on the admissibility of the charge and caution statement alleged to be made by the accused Nionzima Phillip Kato and recorded by No. K/2143 Assistant Inspector of Police Kiiza Edson on 17th August 2018. On 20th January 2022, the prosecution called No. K/2143 Assistant Inspector of Police Kiiza Edson as their third witness (herein after PW3) and sought to have a charge and caution statement recorded by him admitted in evidence to prove the prosecution's case.
2. It was PW3's evidence that in 2018, he was attached to Kyenjojo Police Station. While at the Police station, Detective Constable Munnu, the Investigating Officer in this matter took the accused to him to record his charge and caution statement. The accused was in normal condition and the charge and caution statement was recorded after the accused was medically checked and Police Form 24A had been filed. PW3 had never



interacted with the accused before he was taken to him to record his statement in his office at Gender main office at Kyenjojo Police Station.

3. Further that it was only PW3 and the accused in the office when the statement was recorded and PW3 was dressed in civilian clothes. The accused informed PW3 of his particulars as Nionzima Phillip Kato aged 20 years, Mukiga by tribe, a peasant and resident of Kyangaramata LC1, Kihura Sub-county in Kyenjojo District. PW3 read to the accused the offence he is indicted for. PW3 introduced himself as Assistant Inspector of Police, a Mukonjo and a Police Officer working in Kyenjojo. PW3 then informed the accused that he was suspected of unlawfully performing a sexual act with Kayesu Juliana, a young girl aged 10 years. He asked the accused whether he had understood the offence, to which the accused confirmed that he had understood.
4. PW3 then asked the accused whether he had performed the said act with the Kayesu Juliana. The accused answered that it is true he had performed the sexual act with the victim and he signed the statement. PW3 issued a caution to the accused and informed him that whatever he told him would be brought against him in court and the accused said that he wanted to say something. The accused told PW3 that he came to that area in October 2017 to work at the home of an old woman called Bonabana Angelica, where he found the victim Kayesu Juliana. During the course of staying there, the accused got used to Kayesu until April 2018 when he left that home and went back to his village of Kasororo Ntundwa, Kamwenge District. Later in the month of August 2018, the accused was called upon to



come back and resume his work at Bonabana's place where the accused and the victim were sleeping in different rooms.

5. On 14th August 2018 during night time, before the accused could go to his bed room, he and the victim Kayesu Juliana came together for supper. As they were in that sitting room, Kayesu directed the accused to touch her private parts but he refused. Kayesu started touching his penis but he warned her to leave his penis. At that time, Kayesu directed the accused to pull out his penis and have sex with her. During the course of these events, the accused's penis had erected. That is when he pushed the victim to the coffee set seat, pulled out his penis and pushed it into the vagina of the victim. However, the penis did not enter the vagina properly. At that time, the victim started making an alarm which attracted the neighbors including Ategeka, Abwoli and many others.
6. During the interview by Ategeka, the accused denied the allegations against him and thereafter ran away and hid himself in a roof. Later on 17th August 2018, a group of people arrested him and took him to Kyenjojo Police Station. The statement was read back to the accused in a language he understood and he found it to be true, correct to the best of his knowledge and signed it by thumb printing it. PW3 also signed the statement and wrote his name and Force Number on 17th August 2018. PW3 further testified that while he is a Mukonjo, he knows Runyakole and Rukiga, which are the accused's languages. In the course of his duties, he interacts with many people so he knows all those languages. He was not armed when he recorded the statement and he maintained that he was putting on civilian clothes



7. When the prosecution applied to tender in the charge and caution statement, defence counsel objected on grounds that it was recorded in English, a language that the accused does not understand. She further submitted that the law was very clear that a charge and caution statement should be recorded in a language that the accused understands and later translated in English. Counsel was relying on the case of **Festo Androa Asenua & Anor v. Uganda SCCA No. 1 of 1998**.
8. The court conducted a trial within a trial to ascertain the voluntariness of the charge and caution statement and whether it complied with sections 23 and 24 of the Evidence Act, Cap 6. The court also needed to verify the language used during the charge and caution statement.
9. In answering questions from court, PW3 testified that he is a Detective Assistant Inspector of Police by rank. In 2018, he was an Assistant Inspector of Police by rank. He used Rukiga when recording the statement. He ascertained that the accused understood the language he was speaking. He confirmed that in Rukiga, he told the accused what he had recorded. Court asked PW3 to translate the statement "yes it is true I performed sexual act with the said victim" in Rukiga and PW3 translated the same.
10. In answering questions from court, the accused testified that he never spoke to PW3 and had never seen him. He denied signing any document while in police custody. When the charge and caution statement was shown to him and he was asked whether he signed it, the accused denied signing it. He said he did not know how to read so he did not know the language in which the statement was written. He testified that he was never beaten while



in police custody. He was threatened to sign documents in police but he did not sign. Later he said that he put a thumbprint but did not know anything. When shown the charge and caution statement again, the accused admitted thumb printing it but said that he did not know anything. Later he said that he did not thumb print all those papers. He thumb printed only one paper. When court asked him to show which paper he thumb printed, he chose page two of the charge and caution statement as the one he thumb printed. When court asked him whether he had sex with Kayesu, he insisted that he did not.

11. Section 23 (1) of the Evidence Act provides that "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.
12. Section 24 of the Evidence Act provides that "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."
13. In **Chandia v. Uganda SCCA No. 23/01** the Supreme Court held that "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) 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 we think that an unchallenged admission of such 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 a trial within a trial to determine its admissibility; see **Kawoya Joseph v Uganda Criminal Appeal No.50/1999, Supreme Court (unreported), Edward Mawanda v Uganda Criminal Appeal No.4 of 1999 and Kwoba v Uganda Criminal Appeal No.2 of 2000(Supreme Court) (unreported).**"

14. The purpose of carrying out a trial with in a trial is to establish the voluntariness of the statement made by the accused person as was found by the Supreme Court in **Amos Biruge & Ors v. Uganda, SCCA No. 23 of 1989**. The court held that "it is trite 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 with in 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. Court cannot by simply looking at the statement, conclude that it was made voluntarily."



15. In **Festo Androa Asenua & Anor v. Uganda SCCA No. 1 of 1998**, the court laid down the procedure for recording extra judicial statement as:

- i. It must be remembered that the prisoner is not on trial. It follows that such statement must not be taken in any court as part of court proceedings.
- ii. No police officer should be present in the chambers of Magistrate. The police officer escorting the prisoner should leave after informing the Magistrate of the reason for taking the prisoner before him, that is, the offence with which he is charged or the offence he is suspected of having committed, as the case may be. The police officer should then wait outside the chambers out of sight.
- iii. The Magistrate should inquire of the prisoner the language which he understands. If it is one which the Magistrate does not know he should send for an interpreter.
- iv. The charge, if any, or the nature of the suspicion for which he has been arrested, shall then be explained to the prisoner.
- v. The prisoner should be asked if he wishes to say anything about the charge or the offence he is suspected to have committed, and should be told that HE IS FREE TO MAKE, OR NOT MAKE, ANY STATEMENT.
- vi. The Magistrate must satisfy himself by all reasonably possible means that statement about to be made to him is entirely voluntary. It must not be assumed that he is going to make a confession. The document containing the statement should be prefaced by a memorandum containing notes of the foregoing



and the steps which the magistrate takes to satisfy himself that the statement is voluntary. This prefatory part will enable the magistrate to refresh his memory, in the event of his being called at the trial to prove the statement.

- vii. It is advisable that a Magistrate who is about to take a statement should administer a caution the normal form

"You need not say anything unless you wish but whatever you do say will be taken down and may be given in evidence at your trial".

- viii. The person wishing to make a statement should not be asked whether he wishes to be sworn or affirmed, but if he requests the magistrate without suggestion from the Magistrate, to place him on oath or affirmation, this may be done but the prefatory memorandum must clearly state so.

- ix. The statement should be recorded in the language which the prisoner chooses to speak. This may be done through an interpreter or the magistrate may himself, if he is fully conversant with the vernacular being used, record it in the same language. The prisoner is not to be cross-examined when he is making the statement. Any question put to the prisoner must be designed to keep the narrative clear, and the question so asked must be reflected in the statement. It must be understood that the role of the Magistrate simply is to record accurately the prisoner's story, if he chooses to make a statement.

- x. The vernacular statement should be read back to the prisoner incorporating any corrections he may wish to make.



- xi. The prisoner should certify the correctness of the statement by signing or thumb-printing it. The Magistrate and the interpreter, if any, should counter-sign it. If the statement covers more than one sheet of paper all sheets should be so signed or thumb-printed by the prisoner.
- xii. An English translation of the vernacular statement including the prefatory memorandum, should then be made by the magistrate or the interpreter, as the case may be.
- xiii. After the foregoing has been complied with the prisoner should be handed back to the police officer.

16. The court concluded that "we suggest that pending the making of rules by the Minister as required by s.24 (2) of the Evidence Act the Police should with necessary modifications follow these guidelines when recording statements from suspects." This therefore means that the same rules apply to the charge and caution statements recorded by police officers with necessary modifications.

17. At trial, the accused denied making the statement. He also denied ever seeing PW3 or talking to him. However, the accused gave contradicting answers to the questions put to him by court. At first, the accused denied ever signing any document while at police and said that even when threatened to sign, he refused to do so. The accused did not give any details of who threatened him and how he was threatened. Later the accused changed his story and said that he had signed a document while at police but he did not understand what he was signing. He insisted that he only signed one document. When he was first shown the statement, he denied signing it



saying he did not even understand the language in which it was written. When shown the statement the second time, he said he only signed one document and when asked to show court which document he had signed, he chose page two of the statement. However a look at the statement shows that all three pages of the statement bear the same thumb print. The accused also said that he was never beaten while at the police station. From the above contradictions, it seemed as though the accused had first made up his mind to deny anything related to the statement. However, the more questions were put to him, the more his answers changed. This pointed to the accused being untruthful.

18. In **Uganda v. Kavuma Ismail, Criminal Session No. 819 of 2016**, it was held that "It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see **Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969**, **Uganda v. F. Ssembatya and another [1974] HCB 278**, **Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989**, **Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and Uganda v. Abdallah Nassur [1982] HCB**). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory

evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case."

19. The contradictions in the accused's evidence are grave because they are central to whether or not he made the statement. His evidence is unreliable and therefore rejected. In comparison, PW3 never wavered in his answers to the questions put to him. He was consistent in the answers he gave court which point to him telling the truth. I find his evidence more reliable and believable. In the totality of the evidence before court, there is no reason why PW3 who was not the investigating officer in this matter, or had any other connection to it, would forge the statement or lie about it. The statement is also very detailed with information which PW3 would not ordinarily know unless he was informed by someone else about it.

20. PW3 testified that in 2018, he was an Assistant Inspector of Police by rank when he was in Kyenjojo. Therefore he met the qualification in section 23 (1) (a) of the Evidence Act and could record the charge and caution statement. The statement has three pages. At the first page, the accused described his particulars and how he came in contact with the victim Kayesu Juliana. He recounted the events that happened on 14th August 2018 which led him to having sex with Kayesu just as explained by PW3 in his evidence. On page two, the charge against him was read to him and a caution was issued to him. On page three, the accused further explained the events that occurred on 14th August 2018 which led to the indictment against him. The statement is thumb printed on all the pages.

21. Clearly PW3 observed the procedure laid down in *Festo Androa Asenua* (Supra). He introduced himself to the accused, explained the charge against him and cautioned him that he did not have to say anything but if he did, it would be used against him and the accused chose to recount the events of that day. They were only two in PW3's office. PW3 was not armed and he was in civilian clothing. This shows that there was nothing to induce fear in the accused and compel him to make the statement involuntarily. The accused signed after every stage of recording the statement. A thorough look at the statement shows that it was recorded in observance of the law.

22. The objection raised by counsel for the accused is that the statement is written in English, a language that the accused neither understands nor speaks yet the law requires such a statement to be recorded in a language used by the accused and later translated in English. She relied on *Festo Androa Asenua* (supra). However, in *Ssegonja Paul v. Uganda SCCA No. 42 of 2000*, the Supreme Court held that "on the issue concerning the language in which the confession statement was recorded, the Court of Appeal found that the fact that the Appellant made the statement in vernacular and it was recorded by a Police Officer in English through an interpreter, was not fatal to the prosecution case. The Court of Appeal applied the decisions of this court in *Festo Androa Asenua -vs- Uganda* (supra) and in *Namulodi Hassadi -v- Uganda* (supra). It held that as long as the charge and caution statement was read back to the Appellant through a translator and he signed it, which was done in the instant case, no miscarriage of justice was occasioned to the Appellant. We agree with the findings of the Court of Appeal that the Appellant's confession statement was correctly admitted in evidence as having been voluntarily made and that the



procedure followed in recording it did not cause a failure of justice to the appellant."

23. In the instant case, because PW3 understands and speaks Rukiga, the language of the accused, there was no need for an interpreter. It follows therefore that recording the statement only in English yet Rukiga was used in communicating with the accused is not fatal as long as the statement was read back to him in Rukiga. On the last page of the statement, it is written "that is all and read back to me in the language that I understand, found true and correct to best of my knowledge." The accused then thumb printed and PW3 also signed. It can be deduced that the statement was read back to the accused and he found it to be true and correct in a language he understood. Therefore, there is no merit in defence counsel's objection.

24. Based on all the above, there is no basis to find that the statement was not made or was made involuntarily by the accused. The accused made the statement voluntarily and it was properly recorded in observance of the procedure as discussed above. The charge and caution statement is therefore admissible as prosecution evidence and is hereby admitted and marked PE3. I so rule.

This ruling is made this 27th day of January, 2022.



FLORENCE NAKACHWA

JUDGE.