

IN THE COURT OF APPEAL FOR UGANDA
AT KAMPALA
(Coram: Saied, C.J, Lubogo, P.J, Nyamuchoncho, J.A.)

CRIMINAL APPEAL NO. 8 OF 1977

BETWEEN

ZIDORO KAKOZA Alias MAYINJAAPPELLANT

AND

UGANDA.....RESPONDENT

(Appeal from a conviction and
sentence of the High Court of
Uganda at Masaka (Manyindo, J)
dated 14th June, 1977.

in

Criminal Session Case No.28/77).

JUDGMENT OF THE COURT

NYAMUCHONCHO, J.A.

The appellant was convicted of the murder of Idi Mbaraka and sentenced to death. He has now appealed against both the conviction and sentence.

The deceased and Yozefu Zamuleta (P.W.3) were employed as porters by Alani Sekimbugwe (P.w.2). They resided at Sekimbugwe's home and shared the same house. Sometime on 11th October, 1975, D. Mutebi (P.W.6) bought 105 bunches of bananas from Sekimbugwe (P.w.2). He left them there. He returned on 13th October, 19, to P.W.2's place to collect them; when he was loading them on a lorry he found that 13 bunches were missing. He asked the deceased what had happened to his bananas. The deceased undertook to find out. Two days later, the deceased made report to him as a result of which he arrested the appellant and another John Kakoza in

Connection with the theft of his bananas. He took them to Kasali Gombolola Headquarters where they were re-arrested by the police.

They were later charged with the theft of the bananas. The hearing of their case was fixed on 5th January, 1977. The appellant and John Kakoza were released on bail. On 26th December, 1975, P.W.G visited the Deceased at his residence to remind him to attend the court on 5th January, 1976. The deceased is alleged to have told him that the appellant had threatened to kill him as he was bent on giving evidence against him. That day at about 4.00 p.m. the deceased left his residence. He told P.W.3 that he was going for drink in a bar at Bunyonyi village. He did not return home. When P.W.2 (the deceased's employer) discovered that the deceased was not in his house he reported his absence to Yoweli Mbirontono (P.W.4). P.W.4 in turn reported to the muluka chief, Gaburiel Lubega (P.W.1) who reported the disappearance to the police. The police told him to search for the body. On 8th January, 1976, P.W.1 mounted a search. The deceased's body was discovered in a bush at Kyakanyomozi village. It was hidden 200 yards from the nearest footpath; it was very badly decomposed. A post-mortem examination was carried out on the body by Dr. Kamaludin on 12th January, 1976. Because the body was so badly decomposed the examination revealed no external injuries. Internally the doctor found that there was a fracture of the right parietal temporal part of the skull. The cause of death was established due to the state of the decomposition.

The appellant was arrested by the police in the local district administration prison. He was being detained there after his bail had been cancelled on 5th January, 1976, the date of the trial of the banana theft case.

The muluka chief (P.W.1) had earlier arrested Paulo Kayondo and Maulisio Kawesa (P.w.8) in connection with the murder of the deceased. No charge was brought against these two. The appellant was charged with the murder of the deceased tried and convicted.

The prosecution case against the appellant mainly depended on the evidence of a threat which the deceased is alleged to have mentioned to P.W.2 and P.w.6, on two incriminating statements allegedly made by the appellant to Akilewo Kawesa (P.w.7) and Maulisio Kawesa (P.w.8) and on the testimony of P.W.5. Briefly this is what they said.

P.W.2 testified that the deceased told him that the accused (now appellant) had threatened to kill him if the case went against him (accused). He said this shortly before he disappeared.

P.W.5 testified that on 26th December, 1975 the deceased and the appellant and others were in his bar from 6.30 p.m to 7 p.m. drinking banana beer. As he was busy he did not see them leave, though they left at about the same time.

P.w.6 testified that on 26th December 1975 when he visited the deceased at his residence to remind him of the hearing date (which was on 5th January, 1976) the deceased then told him that the appellant had threatened to kill him as he was bent on giving evidence against him.

P.W.7 stated that on 27th December, 1975 at about 3 p.m the appellant went to his house and asked him to assist him in carrying the body of the deceased whom he had killed. He said that he wanted to remove the body from the place where he had killed the deceased to a spot where it could not be seen by anyone.

He promised to pay him 200/= if he gave him that assistance. P.W.7 testified that he refused to assist him. He went on to say that the appellant told him not to tell anyone about the matter lest he (the appellant) would kill him also.

Maulisio Kawesa (p.w.8) stated that on 26th December, 1975, when he was at Sentongo's bar (iw.5) drinking banana beer, the appellant asked him to go with him outside so that he could talk to him. When they went out, the appellant told him, "I have kept my thing somewhere and I need your assistance in removing it from there". He (P.W 8) asked him what that thing was and the appellant replied, "let us go there and you will see it" P.W.8 further stated that the appellant offered him a reward of 200/ if he did the job. P.W.8 told the appellant that he must first tell him what they were going to carry before he could agree to go with him and that when the appellant refused to tell him what it was he (p.w.8) refused to o.

The learned trial judge believed the testimony of P.W.2, P.W.3, P.W.6, P.W.7 and P.W.8 and convicted the appellant of the murder of the deceased. He held that the appellant had a motive in killing the deceased. This motive was to silence the deceased who was about to give evidence

against him. His finding was against the advice of both assessors who had advised him to acquit the appellant.

The appellant's memorandum of appeal lists 11 grounds of appeal, all of which are directed mainly against the credibility of witnesses and discrepancies in their evidence all which do not merit consideration.

There are, however, two grounds of appeal which merit Consideration. The first is about the threat. The appellant disputes its existence. The second is about the credibility of P.W.8. The appellant disputes his evidence because P.W.8 was a Suspect.

The evidence of the existence of the threat was given by P.W.2 and P.W.6. Both assessors believed P.W.2. They doubted the evidence of P.W.6 because P.W.6 did not tell the police about this threat. The learned trial judge believed P.W.6 and accepted his explanation that he forgot to tell the police about it. If this witness was able to make a comprehensive statement to the police covering the period between October 1975 and 5th January, 1976 we find it rather difficult to believe that he would have omitted such a vital piece of evidence through forgetfulness. We have, however, given this matter serious consideration and have come to the conclusion, like the learned trial judge, that his explanation is not unreasonable.

We have also considered the fact that the deceased did not mention this threat to P.W.3, a fellow porter with whom he worked and shared a house and perhaps meals as well. We think it would have been natural for the deceased to mention this to him. We do not think that this failure would affect the weight to be attached to this piece of evidence. The deceased told his employer (P.W.2) and P.W.6 who had an interest in the matter and that was sufficient. We think that the appellant's argument that P.W.6 should have taken him to court on of this threat has no merit.

We now turn to the incriminating statements. We will take them in order of time. P.W.8 stated that on 26th December, 1975, (the day the deceased disappeared) about 5.00 p.m. he was at Sentongo's bar (P.W.5) drinking banana beer with other people, later that night the appellant arrived at the bar. He asked him to go with him outside so that he could talk to him. When they were outside, the appellant told him "I have kept my thing somewhere. I need your assistance in removing it from there". When he asked him what that thing was he replied, "let us go there and

you will see it". The appellant has argued that P.W.8 told lies. He himself was a suspect. He should not be believed. P.W.8's evidence about the presence of the appellant later that night in the bar conflicts with the evidence of P.W.5. According to P.W.5, the deceased and the appellant were in the bar from 6.00 p.m. to 7.00 p.m. P.W.5 does not seem to have seen the deceased at the bar that evening. If we believe P.W.8, then, we have to believe that the appellant returned to the bar later in the night after killing the deceased a fact which is not supported by P.W.5. We think that P.W.5's evidence should be preferred. We believe P.W.8 is confused on this point. P.W.8's evidence is also tainted by the, fact that he was arrested as a suspect by P.W.1 on the 8th January 1976 along with Paul Kayondo. The chief (P.W.1) arrested him pursuant to a report which he received, the source of which we do not know. The Fact that P.W.8 was suspected of having killed the deceased weakens his evidence. We think that his evidence on this confession should not be believed, firstly, it is difficult to construe the meaning of the word 'thing' as referring to the deceased with absolute certainty, an secondly, this witness had been in a bar dinking from 5.00 p.m. till late in the night when he allegedly heard the incriminating statement from the appellant. It might as well be that he was not wholly sober. See *Rafaeri Munya alias Rafaeri Kibuka vrs R* (1953) 20, E.A.C.A. 226. In that case the prosecution wanted to rely on an incriminating statement alleged to have been made at a Christmas beer party by the appellant to the effect that:—

"I have covered Kasule with a woolen blanket of earth which, he will never be able to remove."

The court rejected this evidence on the ground that it was unsupported and that it was unlikely that the witness himself was not wholly sober on that occasion. We think P.W.8 was in no different position. He had been drinking from 5.00 p.m. till late that night. Besides he was arrested as a suspect his evidence required corroboration. We do not see such corroboration.

The other incriminating statement is what the appellant is alleged to have told P.W.7 on 27th December, 1975, Kawesa P.W.7 stated that on 27th December, 1975, at about 3.00 p.m. the appellant went to his house and asked him to assist him in carrying the body of the deceased whom he had killed. He said that he wanted to remove the body from the place where he had

killed the deceased to a spot where it could not be seen by anyone. He promised to pay him 200/= if he gave him that assistance. P.W.7 refused to assist him.

The appellant had attacked the credibility of this witness. He argues that if what this witness states is true that he went to his home for assistance, he should have told the search party that he was the killer. The short answer to this argument is that before the search was mounted he informed P.W.1 about this conversation. Next he argued that he could not have confided such a delicate matter to him as he did not know how trustworthy he was. We agree that the appellant did not trust P.W.7 that is why he threatened to kill him if he disclosed this information.

The assessors were divided in their opinions on this confession. One assessor rejected it because P.W.7's version differs from the version of P.W.8; the second assessor was slightly hesitant and said it might be true. The learned trial judge believed it. He also believed that P.W.7 had a good reason for not revealing it to the muluka chief (P.W.1) early enough. He put it this way –

“Kawesa (P.W.7) did not tell muluka chief Lubega (P.W.1) about the confession the accused had made to him until 5th January, 1976. His explanation that he waited until accused returned to court or lie believed he would then be tried, convicted and imprisoned is reasonable and natural. It is to be remembered that he himself was never suspected in this matter.”

We think P.W. 7 confused the date when he told P.W.1 about the confession. P.W.1 testified that it was on 8th January, 1976, when p.W.7 told him the conversation he had had with the accused some days back. We think the correct date should be 8th January, 1976.

This was an oral confession of guilt which ought to be received with caution. The trial judge was alive to this issue; he found it was corroborated by P.W.8. Though we have said that the confession to P.W.8 not worthy of belief, we believe the evidence of the confession to P.W.7 is amply corroborated by other evidence such as the finding of the body of the deceased hidden at a spot where it could not be seen. We have no doubt that it was true.

We are satisfied that on the evidence that the appellant was rightly convicted. We, therefore, dismiss the appeal.

DATED AT KAMPALA this 1st day of July, 1978.

Sgd: (M. Saied)

CHIEF JUSTICE.

Sgd: (D.L.K. Lubogo)

PRINCIPAL JUDGE

Sgd: (P. Nyamuchoncho)

JUSTICE OF APPEAL.

I certify that this is a
true copy of the original.

(M. Ssendegeya

CHIEF REGISTRAR