

**REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO**

*(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KATO,
JJSC.)*

CRIMINAL APPEAL NO.23 OF 2001

BETWEEN

OMARIA CHANDIA APPELLANT

AND

UGANDA RESPONDENT

[Appeal from judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ; BERKO & KITUMBA, J.J.A) dated 4TH June, 2001, in Criminal Appeal No.47 of 2000]

REASONS FOR THE JUDGMENT OF THE COURT: This is a second appeal which arises from the judgment of the Court of Appeal dismissing the appeal of the appellant against his conviction, by the High Court, for murder. We heard the appeal on 17/7/2002 and dismissed it, but reserved our reasons for dismissing the appeal. We now give the reasons.

It was the case for the prosecution that on 23rd September, 1997, in Owino Market, the appellant, Omaria Chandia, murdered Hadijja Abdhalla, his wife, by stabbing her with a knife. The facts accepted by the courts below are simple. The appellant and the deceased had been married since 1973. They had a number of children and had a matrimonial home at Namuwongo, in Kampala. The deceased had left the

home three months before her murder. At the material time the appellant was a long distance driver plying along the road from Mombasa in Kenya through Kampala in Uganda to Bujumbura in Burundi via Kigali in Rwanda. The nature of his job was such that he could stay away from home for many days. The deceased operated a business in a stall in Owino Market in Kampala. On the fateful day of 23rd September, 1997, the appellant returned home in the morning. He went to the Owino Market at 9.30 a.m. to check on the deceased. At that point the version of events given by the prosecution differs from that given by the appellant. The prosecution case was given by Ayisa Nantogo (PW1). She operated a business similar to and in the same business area as the deceased, though separate from the stall of the latter. The business was that of selling palm tree leaves which are used in making marts. The stall of this witness was close to, and directly opposite, that of the deceased. Because of that proximity, Ayisa Nantogo used to see the appellant whenever he visited the deceased in the market. She and the deceased had been in business since 1989. So by the time of the murder of the deceased, Ayisa knew the appellant very well. This witness described what took place in these words:

"On the 23rd September, 1997, around 10.30 a.m., the accused came and I thought he had come as he used to come to see his wife. During that time, I got a customer. As I was attending to my customer I gave my customer what he wanted. As the customer was leaving I heard the deceased making a sound (uh) and she held on to the accused. I saw the accused pulling out a knife from the stomach of the deceased. Then I saw him stab her at the back. He was holding it with his right hand. He stabbed her twice, one in the stomach and another one at the

back. Between our stalls there was a path, it was near. You could see what was happening. I made an alarm. Even other people who were nearby also made an alarm. There was Mastulla, Hamida her daughter. People did not come immediately. They did not know that something had happened - Later on LDU came got hold of him with his knife, took him to the Police Post in Owino. The deceased remained down".

The witness saw blood on the knife. The LDU man referred to in the above passage is Sekitoleko who testified as PW2. He disarmed the appellant whom he arrested there and then. The Mastulla also mentioned above testified at the trial as Mastulla Kigonza (PW5). She carried on the same business as the deceased but operated in her own stall three metres away from the deceased's stall. Mastulla had known the appellant for nearly ten years. She did not see the appellant stab the deceased. But she is the one who pulled away and separated the appellant from the deceased. She saw the appellant holding a knife and concluded that the appellant had stabbed the deceased with it. The deceased fell down on her knees after she was separated from the appellant. Mastulla placed the deceased on the ground from where the deceased was taken to Mulago hospital, though already dead. Dr. D. Zamalala, a medical officer, performed autopsy on the body of the deceased. Externally, he saw a stab wound caused by a sharp object such as a knife in the right second intercostal space in the mid-clavicular line. Internally there was perforation of the right ventricle of the heart with massive bleeding. The cause of death was cardio-genic shock following stab wounds.

A confession statement allegedly made by the appellant was admitted in evidence without objection from counsel for the appellant. We will revert to it later.

In his defence, the appellant acknowledged the deceased to be his wife. He claimed that she had deserted him three months before her death on 23/9/1997 to live separately. He, in effect, admitted there was a misunderstanding between himself and the deceased. He suspected a man called Haruna to be having an affair with the deceased and that she deserted his (appellant's) home because of Haruna. He admitted that on 23/9/1997, at 9.30 a.m., he visited the deceased in the market where he found her and Mastulla. He claimed that when the deceased saw him, she ran away and fell down in ditches. He saw blood coming out of her nose. He agreed that he was arrested at the scene by the police and LDU on allegation that he had killed the deceased. He denied killing the deceased.

At the conclusion of the trial the two assessors advised the trial judge to convict the appellant. The learned trial judge believed the prosecution evidence and disbelieved that of the appellant whom he convicted of the murder of the deceased. The appellant's appeal to the Court of Appeal was unsuccessful. The appellant has now appealed to this Court against the decision of the Court of Appeal. The memorandum of appeal contains three grounds. But Mrs. Luswata Kawuma, counsel for the appellant, abandoned the second ground. She only argued grounds 1 and 3 which she did together. The complaints in these two grounds are formulated this way -

1. **The learned Justices of Appeal erred in fact and law when they admitted the charge and caution statement extracted from the appellant.**
2. **The learned Justices of Appeal thereby erred in law to find that the murder had been proved beyond reasonable doubt.**

We notice that ground one in this appeal was also the first ground of appeal in the court below.

Be that as it may. Mrs. Luswata Kawuma, counsel for the appellant, asserted that the trial judge and the Court of Appeal relied on the appellants' confession to convict the appellant and contended that whereas the appellant made the statement in Lugbara, only the English translation was produced in evidence. She argued that since the appellant denied the contents of the confession statement and as DIP Tumwine (PW3) did not know Lugbara, but recorded the English version through an interpreter, reliance by the two courts on the English version confession statement caused miscarriage of justice. Learned counsel maintained that view in spite of the fact that both the trial judge and the Court of Appeal were each of the opinion that even if the confession were ignored, there was other overwhelming evidence to support the conviction of the appellant. Learned counsel contended that the remaining evidence namely that of Ayisa, Sekitoleko (PW2) and Mastulla was not enough as it was contradictory and weak; and so she asked us to allow the appeal. Ms. B. Khisa, Principal State Attorney, supported the decisions of the courts below. In her view, there was overwhelming evidence. She argued that both Ayisa and Mastulla who saw the appellant at the scene and who witnessed the murder, knew the appellant very well, and their evidence alone was sufficient to support the conviction of the appellant. She further argued that although the confession was made in Lugbara, it was translated into English and in light of the evidence of Ayisa and of Mastulla, the Court was entitled to rely on the contents of the confession statement as incriminating evidence.

There are three sets of evidence adduced against the appellant. First of all, there is the evidence of Ayisa who is essentially an

eyewitness to much of what happened. Secondly there is the evidence of Mastulla, another eyewitness to what happened immediately after the stabbing. Mastulla physically pulled the appellant from the deceased before the latter collapsed to the ground bleeding while the appellant stood there holding a knife. Thirdly there is the evidence of Sekitoleko, the LDU man, who found the appellant at the scene whilst he was still armed with a knife. Sekitoleko disarmed the appellant and observed that the handle of the knife was stained with blood. He arrested the appellant there and then and took him into custody. The appellant himself in his defence in court at the trial admitted being at the scene and stated that his deceased wife sustained some injury at the scene from which she died.

The difference between the appellant's version of what happened and the prosecution evidence is that whereas the prosecution key witnesses, namely, Ayisa and Mastulla, testified that it is the appellant who stabbed the deceased, the appellant, on the other hand, in his evidence denied stabbing the deceased, claiming that when the deceased saw him, she fled the scene out of fright and in the process fell down and sustained injury which caused her to bleed through the nose.

Although Mrs Luswata Kawuma contended in her arguments that the evidence of Ayisa and Mastulla was contradictory, she did not clearly point out any contradictions. Ayisa and Mastulla knew the appellant very well. Their evidence was not identical but it was not contradictory either. Each of these two witnesses separately sighted the appellant when he was at the scene confronting or assaulting the deceased. Ayisa was the first to see the appellant arrive at the scene. We have already quoted her description of what transpired after the appellant had arrived at the scene. Suffice it to say here that after noticing his arrival, she was next

attracted to the couple by the cry of the deceased. From the description of what Ayisa heard and then saw, we draw the irresistible inference that the deceased cried out when she saw the knife in the appellant's hand or when the appellant stabbed her probably forcing her to instinctively grab the appellant in desperation. Although the point in time at which Mastulla began witnessing what transpired is not quite logical, it can be reasonably inferred that it was about the time of the stabbing that she became aware of what was happening. She testified that Hamida, the child of the deceased cried and continued:

"While I was raising my face up I saw Chandia. He was approaching the stall of the late. I thought they were fighting. I pulled Chandia. I pulled him twice. On the third pull that is when I saw a knife. The late cried. When I saw him with a knife I thought he had stabbed her and I left the accused. He was holding the knife in his hand that stabbed the deceased. I was crumbling (sic). I heard the cry. I know he stabbed her but I did not know which place. She fell down on her knees. I came and laid her down."

It is quite clear from the evidence on record that both Ayisa and Masitulla saw the appellant at the most critical moment. Each of the two witnesses described what she was able to observe. The evidence of both witnesses shows that at the time when the deceased cried, the appellant was body to body with the deceased. Thereafter Mastulla physically pulled the appellant from the deceased. When he was pulled from the deceased, three material things were observed. First, the deceased collapsed on the ground while bleeding. Secondly the appellant had a knife in his hand. Thirdly the handle of the knife was blood stained.

The evidence of the two key witnesses, namely Ayisa and Mastulla is corroborated by other evidence. As already observed Sekitoleko (PW2), the LDU Commander, answered an alarm in Owino market at 10.00 a.m. He found the appellant standing two meters from the body of the deceased soon after the stabbing. The appellant was still holding a knife in his right hand. Blood was oozing from the left side of the body near the heart. Sekitoleko forcibly disarmed the appellant and arrested and detained him. The appellant admits he was arrested when he was standing near the deceased who was bleeding. He only denied being found in possession of a knife. Thus the appellant's evidence places him at the scene of the crime at precisely the period when the key witnesses, Ayisa and Mastulla, say they saw him during the murder of the deceased.

The medical evidence shows that the deceased sustained stab wounds inflicted by a sharp object like a knife. This evidence corroborates the evidence of the eyewitnesses to the effect that the deceased was stabbed with a knife.

We think that the courts below rightly rejected the appellant's version that the deceased was injured in a fall. In our view this evidence alone was so overwhelming that it was sufficient by itself to justify the conviction of the appellant, irrespective of any minor contradictions or inconsistencies, if at all, in the prosecution evidence, or of some error in the recording of the confession statement (exh.p.3) to which we will return presently.

We now return to the confession statement. Mrs. Luswata-Kawuma's complaint is to the effect that failure to record the confession statement in Lugbara contravened the Chief Justice's administrative instructions issued on 2nd February, 1973 and, therefore, the reliance by

the Courts below on the English translation of the confession statement caused injustice to the appellant. 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 we think that 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 a trial within a trial to determine its admissibility: See **Kawoya Joseph Vs Uganda** Criminal Appeal No. 50 of 1999 (Supreme Court) (unreported), **Edward Mawanda Vs Uganda** Criminal Appeal No.4 of 1999 (Supreme Court) (unreported) and **Kwoba Vs Uganda** Criminal Appeal No.2 of 2000 (Supreme Court) (unreported). Therefore, and with respect, we think that it was improper for the learned trial judge to admit in evidence the confession statement (exh. P3) of the accused on the basis that his counsel did not object. The Chief Justices' instructions (supra) were approved by this court in such cases as **Beronda Vs Uganda** (1974) EA. 46 and **Festo Androa Asenua and Another Vs Uganda** S.Ct - Cr. Appeal No. 1 of 1998 (unreported). We said in **Asenua's** case that failure to comply with some aspects of the instructions contained in the Chief Justice's circular would not by that fact alone affect the admissibility of a charge and caution confession statement unless such a failure goes to the root of the case. Obviously where a confession is the only incriminating evidence presented by the

prosecution against an accused person and the breach of the instructions is not satisfactorily explained, such breach may result in the rejection of the confession on such grounds that it is unreliable. Counsel for the appellant did not point out the injustice caused to the appellant and we find none.


The facts in the present case are different. Not only did the appellant admit on oath in court that he made a statement albeit without knowing its contents, he also admitted signing it in several places. In addition, in his evidence in court, the appellant admitted being at the scene of crime during critical moments. Moreover, apart from his denial of killing the deceased, some important facts given on oath are also contained in his statement, and therefore, the reliability of and truthfulness of the contents in the statement cannot be doubted. In any case both the trial judge and the Court of Appeal held that even if the statement was ignored, there was overwhelming evidence to support the conviction of the appellant. With that conclusion we agree entirely. Accordingly both grounds 1 and 3 must fail.

For the foregoing reasons, we dismissed the appeal.


Delivered at Mengo this -----day of -----2002.



A. H. O. ODER.
JUSTICE OF THE SUPREME COURT.




J. W. N. TSEKOOKO.
JUSTICE OF THE SUPREME COURT.



A. N. KAROKORA.
JUSTICE OF THE SUPREME COURT.

J. N. MULENGA
JUSTICE OF THE SUPREME COURT.



C. M. KATO.
JUSTICE OF THE SUPREME COURT.