**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

CORAM: ODOKI, G.J, TSEKOOKO, KAROKORA, MULENGA
KANYEIHAMBA, JJ.S.C.)

CRIMINAL APPEAL NO.39 OF 2000

B E T W E E N

NASHABA PADDY »»»»»»»»»APPELLANT

A N D

UGANDA »»»»»»»»»»»»»»RESPONDENT

**(Appeal from the judgment of the Court of Appeal at Kampala (Kato. Mpagi- Bahigeine, Berko, J.J.A), dated 9th August, 2000, in Criminal Appeal No 59 of 1996)**

***JUDGMENT OF THE COURT***

The background to this appeal is briefly as follows: The appellant and two other persons, namely Sergeant Alfred Beyaka and Peter Kanyarwene, were suspects in the commission of two aggravated robberies in the Bushenyi District, using a gun. One of the robberies was committed at the home of one Bona Byansi and the other at the home of one John Ibara, PW5. The two robberies appear to have been committed and investigated in the same period of time but the prosecution decided to proceed with the trial of the robbery committed at the home of Bona Byansi first. The three suspects were indicted and tried for that robbery, Alfred Beyaka was convicted and sentenced to death but both the appellant and Peter Kanyarwene were acquitted of that particular robbery. This was in 1994. On 4.9. 1995, the same three suspects were tried on an indictment charging them with the aggravated robbery that had taken place at the home of John Ibara, contrary to ss. 272 and 273 (2) of the Penal Code . The appellant was named in the indictment as A2, Alfred Beyaka as A1, and Peter

Kanyarwene as A3. At the trial, A1 who by then was a convict and still in custody, was not produced in court. Peter Kanyarwene was acquitted again. The appellant was convicted and sentenced to death. His appeal to the Court of Appeal was dismissed. He has now appealed to this court. It will be apparent from our judgment that some of the evidence in the two robberies overlapped.

The facts in this case may be summarised as follows: It was the prosecution's case that the appellant participated in a robbery committed in the night of 12.7.91 at the home of John Ibara, in Kitagata village, Kyamate in Bushenyi District and a number of goods including two hurricane lamps were taken by the robbers from the home.. Some five days after that robbery, the appellant sold a hurricane lamp to one, Eugene Kagezi, PW4, a bar operator at Mutale trading centre. Shortly after the sale, the appellant was arrested by William Muhangi, PW3, a local administration police sergeant. The lamp was subsequently identified at the trial by the complainant, Ibara, PW5, as one of the goods stolen from his home during the robbery and Kagezi, PW4, identified the appellant as the person who had sold her that same lamp. The appellant was first taken and detained at Mutale Gomborora Headquarters but was later transferred to Bushenyi Police Station.

Sergeant Muhangi removed the lamp from the Kagezi bar and the lamp was later produced in court as Exh. 5. While in police custody, the appellant gave to Assistant Inspector of Police Mirembe, PW2, then a station sergeant, incriminating information affecting himself and two accomplices who ***included*** Sgt.. Beyaka. He also told the sergeant that he could lead the police to a place where Beyaka was hiding.

A few days later and after securing a motor vehicle for transport, Sergeant Mirembe accompanied by police officer Kibesigire and Bona Byansi, the complainant in the first robbery case, went with the appellant to Rweshenyi village. On their way to that village, they came across Peter Kanyarwene, A3, who started running away but was pursued, and arrested. Peter Kanyarwene, with the appellant, led the police group to Kanyarvvene's house where Sgt. Beyaka was found hiding in a bed. When interrogated, Sgt. Beyaka admitted having possession of a gun and according to the

appellant Beyaka had also participated in the robbery at Ibara's home. Sgt. Beyaka led the group to a spot in a banana plantation near his own house where an army uniform, a gun and ammunition were found.

On 31.7.91, the appellant was taken to a Magistrate Grade II, Amudini Mugerwa, PWl, to whom he made an extra-judicial statement. In the extra-judicial statement, the appellant confessed that he, together with Sgt. Beyaka and one Muhanguzi, had robbed from Ibara's home and taken away diverse items which he proceeded to enumerate in the statement. At the trial, the appellant retracted the extra-judicial statement but after a trial - within - a trial, the learned judge held it to be admissible and it was received in evidence as Exh. P6. The trial proceeded, and on the basis of the extra-judicial statement, the stolen lamp as evidence of possession of recently stolen property and the

discovery' of the gun, the appellant was convicted of aggravated robbery

and sentenced to death. He appealed to the Court of Appeal which

dismissed the appeal. The appeal to this court is based on five grounds

framed as follows.

*1 - The learned Justices of Appeal erred in law when they upheld the trial judge's decision to admit the appellant's extra-judicial statement.*

2- *The learned Justices of Appeal made an error of mixed law and fact when they upheld the conviction based on circumstantial evidence that fell short of the legal test.*

3- *The learned Justices of Appeal erred in law to uphold the trial judge's conviction when the evidence on record was full of contradictions and inconsistencies.*

4- *The learned Justices of Appeal made an error of mixed law and fact when they rejected the defence of alibi by the appellant.*

5- *The learned Justices of Appeal erred in law in Jailing to reevaluate the evidence on record.*

Mr. Tayebwa, counsel for the appellant, argued grounds 1,4 and 5 separately and grounds 2 and 3 jointly.

On ground I, Mr. Tayebwa contended that the recording of Exh.6 was not done in compliance with the rules governing the recording of extra-judicial

statements. Counsel contended that the appellant was not informed of the charge against him before he made the statement, and that the statement was not recorded in the language in which the appellant spoke. Counsel further contended that the holding by both the trial judge and the Court of Appeal that the appellant's extra - judicial statement was made voluntarily was not supported by the evidence. Counsel pointed out the appellant's complaint that for two weeks prior to the making of the statement, he had been in police custody, subjected to torture and eventually, induced by Mirembe to make that statement. It was further contended by Mr. Tayebwa that the trial judge had not given any reason for disbelieving the appellant's evidence. Counsel for the appellant criticised the Court of Appeal for failing to reevaluate the material evidence on the matter before upholding the decision of the trial court on admissibility of the extra-judicial statement.

Mr. Elem- Ogwal, Principal State Attorney and counsel for the respondent, intimated that he would only argue ground 1 of appeal. He contended that the issues in the other grounds advanced for the appellant had not been raised in the Court of Appeal at all and therefore could not be argued in this Court as a second appellate court, He invited this court to ignore those other grounds. In support of his submissions, he cited the case of ***Festo Androa Asenua & Another v. Uganda,*** Crim. Appeal No. 1/98 (SC.), (unreported), in which this court commented adversely on a ground of appeal which in substance was the same as one that had been raised in the Court of Appeal but had been abandoned. In our judgment in that case, we said,

> ***"As we have already pointed out, grounds of appeal are objections to the decision from which an appeal arises. It would clearly be unfair to criticise the Court of Appeal on the basis that the Court failed to consider inconsistencies, discrepancies and contradictions, when such matters were not argued before nor drawn to the attention of the Court of Appeal"***

We do not find that the principle underlying our statement in the ***Festo Androa Asenua's*** case (supra), is applicable to the instant case. Grounds 2 to 5 of this appeal are basically objections or complaints focussing on the inadequacy of the prosecution case. In our view, that was the purport in grounds (ii) and (iii) of the Memorandum of Appeal in the Court of Appeal where it was contended that the doctrine of recent

possession of stolen property was inapplicable to the facts of the case and that the evidence had not been evaluated as a whole. Therefore, the contention that grounds 2 and 5 raise issues which were not before the Court of Appeal is untenable. In our view, the ***Festo Andoroa Asenua*** case (supra), is clearly distinguishable from this case. In the former case, the issue of contradictions and discrepancies in evidence had been raised and then had been expressly withdrawn from the consideration and determination of the Court of Appeal.

In any event, on ground 1 of appeal, Mr. Elem - Ogwal conceded that the Grade II Magistrate had erred in causing the extra-judicial statement to be recorded by the court clerk instead of himself, and in failing to record that statement in the Runyankore language which the appellant chose to speak. Learned counsel however contended that these minor errors did not occasion a miscarriage of justice in view of the appellant's testimony at the trial, that what was recorded was what he had said. He further submitted and we agree that the Court of Appeal had sufficiently considered the issue of the extra-judicial statement before upholding the findings of the trial judge who believed the testimony of Mirembe that the appellant was not tortured or otherwise induced to make the statement.

Section 24 of the Evidence Act does not prohibit the procedure adopted by the Magistrate in recording the extra-judicial statement in this case. In our opinion, it is not a material departure from the guidelines contained in the circular of the Chief Justice dated 2nd February, 1973 for a magistrate to ask the court clerk whose handwriting is apparently better than his own to record the statement under the supervision of the magistrate. The only omission was that the magistrate did not certify the recorded statement. However, we are of the view that the omission was cured by the confirmation of the appellant that the recording was accurate.

In the Court of Appeal, ground (I) combined the issues of admissibility and credibility. The ground complained that ***"the learned trial judge erred in law and fact in accepting and believing the extra- judicial statement made by the appellant and***

***thus came to a wrong decision.***" After summarising the arguments of counsel on this ground, the learned Justices of Appeal said,

> ***"We agree that the Chief Justice's rules for the guidance of magistrates in recording confessions should be followed with punctiliousness and care, but we think that a contravention of the guidelines in recording would not render the record bad if the confession is found to be voluntary. The statement in question was recorded in the court language which language the appellant understands since he is a sixth former and was using English in court himself. These are not rules of law but practice for guidance. If a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement The court however, in its discretion, can refuse to admit it if it thinks that there had been a serious breach of the Rules. The test of admissibility of the statement is its voluntariness.*** R.v. May Prayer (1972) ***56 Crim. App. R. 151:*** R. v. May (1952) ***36 Crim. App. R. 91 at 93. We think that the learned judge was correct in admitting the statement in evidence. We are fortified in our findings by section 29A of the Evidence Act which states: '29A Notwithstanding the provisions of section 24 and 25 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved,' This ground of appeal fails."***

We think that the requirement that such statements as the appellant made should be recorded in the language the suspect chooses to use in making it, is to ensure that what is produced in evidence is the correct reflection of the statement of the maker so as to avoid or minimize possible distortions, mistakes and or disputes resulting from the translation which the court would not be in a position to verify. It is our view however that, since in this case the appellant agreed in court that what was recorded is what he said, such distortations, mistakes or disputes do not arise.

In this case, we are unable to fault the conclusion by both the trial Court and the Court of Appeal that the statement was made voluntarily. It is noteworthy that the learned trial judge took the initiative to conduct a trial-within - a trial despite defence counsel's statement that the defence did not object to the confession. The appellant did not dispute the fact that he made the statement. On the contrary, he confirmed that what the statement contained is what he had told the magistrate. Consequently, ground 1 of this appeal fails.

Ground 2 and 3 which were argued together by the appellant's counsel constitute an objection to the effect that the conviction ought not to stand because the prosecution evidence did not amount to adequate proof It was the contention of the appellant's counsel that the evidence upon which the appellant was convicted and sentenced to death was of such circumstantial nature as not to satisfy the requirements of proof beyond reasonable doubt in a criminal trial. In support of his submissions, counsel relied on the cases of ***Simon Musoke* v. *R*** (1958), E.A. 715, ***Charles Bogere* v. *Uganda,*** Cr. App. No. 10/98, (SC.) (unreported), and ***Abasi Ssali & Another v. Uganda*** Cr. App. No. 7.98, (SC.), (unreported).

Mr. Tayebwa, argued that for a court to convict on circumstantial evidence, the evidence must be such as leaves nothing to chance. The circumstances must not be such as can be explained on evidence other than that the accused is guilty of the offence as charged. Counsel cited the case of ***Simon Musoke* v. *R.*** (supra) In support of his submission he also contended that the evidence relating to the stolen hurricane lamp and its recovery was full of contradictions and discrepancies. He contended that during the recovery of the stolen lamp from Eugene Kagezi, neither John Ibara, PW5, nor his son were present to identify the lamp as theirs. Appellant's counsel also contended that Kagezi's evidence contradicted that of the complainant, John Ibara. Whereas Kagezi testified that the lamp she bought from the appellant was a big lamp and she did not describe its colour, Ibara said that he recognised it as his because it was green and blue in colour. There was also the inexplicable evidence of Ibara that some of the property stolen from his home were found in the houses of two of the accused persons. According to Ibara, his second lamp which had also been taken during the robbery was recovered from Beyaka's house. Ibara also claimed that a pair of boots and bed sheets were recovered from Nashaba's house. However, the police evidence was to the effect that none of these items or indeed any stolen property was found in A2's house. We note that these contradictions and discrepancies relating to the discovery of the stolen property do not affect the facts and evidence which the trial court found and the Court of Appeal confirmed to be material. In any event, the learned trial judge adequately considered and

resolved these contradictions, when he said,

> ***"There were however some discrepancies and contradictions in the prosecution's case. PW5 testified that he recovered a pair of boots and bed sheets from A2.....But PW2 explained that he never recovered any stolen property from A2. The law regarding inconsistencies is that grave ones in the prosecution case unless satisfactorily explained will result in the evidence being rejected. The court will ignore minor inconsistencies*****.....**Uganda v. Sembatya, (1974) HCB 278. ***They have no effect on the main substance of the prosecution case."***

In his confession which we have confirmed to have been voluntary' and admissible, the appellant said,

> ***"I am (sic.) and Sergeant Beyaka came to Mutera village with a gun. Reaching the village from Kitagata, he talked to me and proposed a plan that we should start dealing with the gun. We went to Kitagata at the home of one Ibara. We were three. We were Beyaka, Muhanguzi and I was the third We had a gun. We arrived at the scene at around 1.00 a.m We asked him to open but he did not open. We forced his porters to open for us. They opened the front area of the house and the three of us entered We arrested these porters and locked them in one of the bedrooms. We looked for Ibara. He was not around We picked Shs.30,000 (Thirty Thousand shillings) from the table from the bedroom, the six foot mattresses, a spraying pump, one pair of sheets. We then left and put our loot at Fred Beyaka's home. While at Fred Beyaka's home, we shared the thirty thousand shillings equally. After four days, I was arrested at Mutara village while I had gone to see Beyaka Fred I found he had left for Kampala. That is all I can state."***

The appellant's own evidence of what happened at Ibara's home including the shooting with a gun is amply corroborated by the evidence of PW5, the complainant. Following the information given by the appellant, the police were able to carry out a search and arrest both Kanyarwene and Beyaka, A3 and A1, respectively. Eventually, the three suspects were charged but only the appellant and Kanyarvvene were tried for the robbery at Ibara's home. As a result of the information given and the search carried out by the police with the co-operation of both the appellant and Beyaka, an army uniform , a gun and three magazines of ammunition were found..

One of the household items robbed from Ibara's home was a hurricane lamp which the appellant denied ever having handled or sold. Yet, the evidence of Eugene Kagezi, PW4, is emphatic that the appellant sold the lamp to her. She testified that:

> ***" I still remember the lamp I bought Exhibit I. I remember the person who sold the lamp to me. I can identify him if I see him. That person is in the court"***

Kagezi then pointed at the appellant who was co-accused in the court. The appellant denied having anything to do with it but his evidence was rejected. The evidence which the court believed put the appellant in the category of the guilty under the doctrine of possession of recently stolen property without a plausible explanation. The Court of Appeal considered this part of the evidence and observed ,

> ****The only evidence against the appellant being in possession of a lamp which had been recently stolen had to be considered a long with the important time factor and the appellant's failure to explain its origin , when on the other hand , Mr. Ibara had satisfied the court that it was among the properties stolen from his house. There was therefore ample evidence that the appellant took part in the robbery. We do not doubt that a common participation has been established We have no hesitation in affirming (sic.) his conviction."***

We are satisfied that the learned Justices of Appeal properly made a correct decision. Therefore grounds 2,3, and 5 must fail. With regard to ground 4, counsel for the appellant argued that the defence of alibi by his client had not been properly considered and that it was wrong on the part of the Court of Appeal to have simply agreed with the findings of the trial judge. Mr. Elem - Ogwal for the respondent, supported the findings of both the trial court and the Court of Appeal on the alibi. He contended that the trial judge correctly addressed his mind to the defence of alibi and how the prosecution should deal with it.

The trial judge said,

> ***"The position of the law where an accused person puts up an alibi to a criminal charge. (sic) He does not thereby have the burden to prove the same. But the burden lies on prosecution to adduce evidence to destroy the alibi"***

In our opinion, the learned judge's statement is in conformity with the decisions we recently made regarding the defence of alibi in the cases of ***Kifamute Henry V. Uganda*** Cr. App. No. 10/97 (SC.), (unreported), and ***Abasi Sali & Another vs. Uganda*** (SC.) Cr. App. No. 7/1998 (SC.), (unreported). The Court of Appeal was correct to confirm the findings and decision of the High Court on the matter. In consequence, ground 4 of the appeal fails.

As all the grounds of appeal have failed, this appeal is dismissed.

**DATED AT MENGO, THIS 15th DAY OF APRIL 2002.**

B.J. ODOKI
CHIEF JUSTICE

J.W. TSEKOOKO JUSTICE OF THE SUPREME COURT

N. KAROKORA
JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT