THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, JJSC)

CRIMINAL APPEAL NO. 48/2000

BETWEEN

KYEYUNE JOSEPH ……..

APPELLANT

AND

UGANDA ……

RESPONDENT

(Appeal from judgment of the Court of Appeal (Kato, Okello, Berko, JJA) in Criminal Appeal No. 96 of 1999, dated 15th November, 2000).

REASONS FOR THE DECISION OF THE COURT.

When this appeal came up for hearing on 27/11/2002 we dismissed it after the submission of Counsel for appellant only. We found it unnecessary to hear Counsel for the respondent because, clearly there was no merit in the appeal. We reserved our reasons for the decision and now we proceed to give them.

The brief facts of the case were as follows:-

The appellant had a child named Sharon Kabakama by a woman who kept it until it was 1 1/2 years old when she handed it to the appellant. The appellant kept the child in his uncle's (Bugungu's) home. On 29/6/95, the appellant carried away the child, now the deceased, from the home of his maternal uncle, Yorokamu Bagungu PW2. His cousin, Tumuheirwe Francis, PWl saw him taking away the child. When the child was not seen after three days, the appellant was asked in presence of Tumuheirwe, PW1, where the child was. The appellant replied that he had taken her to Ibanda Sanyu Babies Home. He was not believed. He was arrested and taken to John Besisira, PW5, the Chairman ***L.C.I*** of the area. There, the appellant repeated his story that he had taken the child to Ibanda. He was not believed either. The chairman and other people led him to the sub-county Headquarters, where a Local Government Askari beat him up. The appellant thereupon admitted having killed the child. He led PW1 and the local authorities to a pond where he retrieved the body of the deceased. He was thereafter taken to Mbarara Police Station where he confessed to the killing. He was eventually charged with murder.

At his trial the appellant denied the charge. The trial judge conducted a trial within trial.. At the conclusion of the trial, the judge evaluated the evidence and held that the confession was voluntary and true. The judge thereafter looked for corroboration as confession had been repudiated. He found corroboration in the circumstantial evidence. He convicted the appellant for the murder of his daughter. His appeal to the Court of Appeal was dismissed. He appealed to this court on two grounds, namely:-

1. The learned Justices of Appeal erred in fact and in law in upholding the conviction of the appellant by the learned trial judge who based his conviction on insufficient prosecution evidence which never established malice aforethought on the part of the appellant in the murder of the deceased.

2. ***The learned Justices of Appeal erred in fact and in law as did the trial Judge when they relied on circumstantial evidence which was got after the appellant was tortured.***

The first ground was considered by the Court of Appeal where the complaint was that the learned trial judge erred in fact and law when he found that the offence of murder had been proved beyond reasonable doubt. In substance this is the same complaint in ground one before us. We note that the prosecution evidence upon which the lower court relied to convict the appellant was circumstantial. The lower courts found that it irresistibly pointed to appellant's guilt and was incapable of being explained upon any other reasonable hypothesis than that of his guilt. This circumstantial evidence was that PW1 had seen the appellant carry the deceased away from the home where the child lived. After three days when the child could not be seen and appellant was asked about its whereabouts, the appellant could not satisfactorily explain. He was arrested and taken to L.C.I Chairman of the area and later to the Sub-county Headquarters where the appellant confessed to killing of the child. He led the team to the pond where he had dumped the body. The body of the child was retrieved from the pond.

His confession, as result of beating, that he had killed the child was inadmissible under Section 25 of the Evidence Act, because he confessed after he had been beaten. The section provides that:-

"25 ***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 promises calculated in the opinion of the court cause an untrue confession to be made,"***

Whereas appellant's confession that he had killed the child and dumped it in the swamp was initially obtained involuntarily after he had been beaten, so much of it as it related distinctly to the fact thereby discovered was admissible under section 29 A of the Evidence Act, which provides that:-

"29 A 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."

Consequently, the appellant's statement as it related to the fact that he led the team of people to the pond where the body was retrieved, undoubtedly relates distinctly to the discovery of the child's body. See our recent decision in the case of ***Balyebuza Swaibu v Uganda SC. Cr. Appeal No. 47 o f 2000*** where we stated:-

"The rationale for its overriding of Sections 24 and 25 is that the discovery of the fact as a result of information received from the accused person confirms the information to be true."

Consequently we could not fault the Court of Appeal's conclusion on the law governing circumstantial evidence, when it stated that:

"In a case depending exclusively upon circumstantial evidence, the court must before deciding upon a conviction be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See *Simon Musoke v R (1958) EA 715.* In the English case of *Teper v R (1952) AC 489* which was followed in *Simon Musoke* (supra), the court stated that before drawing the inference of the accused's guilt from circumstantial evidence, court had to be sure that there are no co-existing circumstances that would weaken that inference."

The court was satisfied that there was ample evidence to support the appellant's conviction.

We are satisfied that both courts acted properly on the evidence available.

It was for those reasons that we dismissed the appeal.

Dated at Mengo this 2nd Day of May, 2003.

B.J. Odoki,

Chief Justice

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

G.W. Kanyeihamba,

Justice of the Supreme Court.