THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J, ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, J.J.S.C.)

CRIMINAL APPEAL NO 27 OF 2002

BETWEEN

MATOVU MUSA KASSIM :::::::::::::::::::::::::::: APPELLANT

AND

UGANDA ::

RESPONDENT

[Appeal arising from the judgment of the Court of Appeal (Mukasa-Kikonyogo, D.C.), Okello, Mpagi-Bahigeine, JJ.A), dated 16th May 2002 in Criminal Appeal No. 33 of 2001]

JUDGMENT OF THE COURT

The appellant and three other persons were indicted on two counts namely, of murder, contrary to sections 183 and 184 and aggravated robbery, contrary to sections 272 and 273(2) of the Penal Code Act. A *nolle prosequi* was entered by the D.P.P in respect of 2nd accused person on both counts. At the end of the trial, the 3rd and 4th accused persons were acquitted on both counts for lack of evidence. Only the appellant was convicted on both counts. He was sentenced to death on each of the counts but sentence on count 2 was suspended.

He appealed to the Court of Appeal which dismissed his appeal. Hence this appeal.

The facts of the case may be summarized as follows: On 28 September 1996, robbers attacked the residence of one Markowski, at Mackay Zone, Mengo in Kampala District. They stole several of his household items including a knife which was Exhibit P2 at the trial. In the course of the robbery, Mr. Mike Markowski was shot dead. His wife was raped. None of the robbers was seen or identified by any eyewitness. The incident was nevertheless reported to the Police and after investigations; the appellant and his co-accused were arrested and charged with the murder and the robbery. Later, the appellant made a charge and caution statement in which he confessed to the offences.

At the trial, the appellant gave sworn evidence in which he repudiated the confession which had been received in evidence without objection from his counsel. He set up a defence of alibi. The trial judge, while treating the appellant's confession as repudiated, accepted it as true and rejected the appellant's defence of alibi. Having taken into account the surrounding circumstances of the case and the detailed account of what occurred as narrated in the repudiated confession, the learned trial judge convicted the appellant and sentenced him to death. The learned Justices of Appeal reevaluated the evidence and came to the same conclusion as the trial court. They therefore dismissed the appellant's appeal and confirmed the sentence.

The Memorandum of Appeal before this court contains two grounds of appeal framed as follows:

1. **THAT the learned Justices of Appeal erred in law and fact when they upheld the finding of the High Court**

Judge that the appellant made the statement and that it is well corroborated and made by the first accused and as a result came to a wrong decision.

2. **THAT the learned Justices of Appeal erred in law and fact when they failed to adequately evaluate the evidence as a whole regarding the confession statement and as a result came to a wrong decision.**

Mr. Edward Muguluma Ddamulira, counsel for the appellant argued the two grounds together. He contended that the findings by the trial judge that the repudiated statement was made by the appellant and it contained the truth of what actually occurred in the night of the murder and the aggravated robbery was wrong. He further contended that the learned Justices of Appeal erred both in law and fact when they confirmed the findings and judgment of the trial judge when they themselves had not reevaluated the evidence.

Mr. Muguluma contended further that the fact of the matter was that police officers who investigated and charged the appellant had prior knowledge of what had occurred and they also knew that the appellant had not participated in the commission of the crimes with which he was subsequently charged. The police had deliberately framed the charges against him. There had been more than one police officer interrogating the appellant - a fact which counsel contended was against the law. He contended that even assuming that the repudiated confession was admissible, it still lacked one necessary ingredient, namely corroboration. He argued that in law it is assumed that if a judge finds that there is no corroboration to support an

accused's alleged statement, the judge should acquit the accused. Counsel cited **Njuguna s/o Kimani and** 3 **Others v. R.** (1954) 21 EACA 316 and **Tuwamoi v. Uganda** (1967) EA 84, as authorities in support of his submissions.

For the respondent, Miss Sarah Kerwegi, Senior State Attorney supported both the conviction and sentence of the appellant. She contended that the treatment and consequences of a repudiated confession as determined by the learned trial judge were the only correct approaches to adopt in this case. She further contended that whereas corroboration is desirable, it is not the position in law that where it is not available a court cannot convict. As long as the trial judge is satisfied that the statement was made voluntarily and that what it contains is the truth of what occurred, the judge is entitled to bring in a verdict of guilty as happened in this case.

Miss Kerwegi further contended that in this case, the learned justices of Appeal on their own volition analysed the facts and evidence of the case and came to the same conclusion as that of the trial judge whose findings and judgment they confirmed. Miss Kerwei conceded that there may have been some loopholes in the way the evidence was presented to court but on the whole none was anywhere near rendering the trial a miscarriage of justice. Counsel for the respondent contended further that the information the appellant revealed in his repudiated confession could only have been known and come from a person who had personal and intimate knowledge of both the murder and the robbery. In Counsel's opinion, the courts below made the proper findings and reached the correct decisions and they should be upheld.

We are constrained to observe that the police investigations in this case were unsatisfactory. It is clear that the appellant did not play the most significant roles in both the murder and the rape, if his repudiated confession is to be believed. On the other hand, the main planners and principal participants in the two crimes were either uncovered or not successfully prosecuted because of lack of adequate inquiries for which the police were responsible. However, we are satisfied that the evidence available before the courts below was more than sufficient to justify the conviction of the appellant.

Before his trial, the appellant made a detailed statement disclosing facts and events which only a person who was an active participant and eye witness to much of what occurred on the night of the murder could have been familiar with. It is true that at his trial, he gave sworn evidence in which he repudiated the confession. However, a number of factors exist to discredit any claim that his repudiation, in any way, affected the facts and events he disclosed. We have already observed that the story he told could only have been known by a person who had actively participated in the incidents of the crimes. The appellant's contention that he was framed have no grain of truth in it. At the trial his own counsel, Mr. Muyonjo who must have had instructions from the appellant since the latter did not contradict him said;

> **"*My client says he made the statement I will only cross-examine the witness but not challenge the confession as such.*"**

The sole ground upon which the appellant challenged the conviction in the Court of Appeal was not that he did not make the statement but that it was not voluntary.

While accepting the ingredients of a voluntary confession under the rules established in **Njuguna s/o Kimani and** 3 **others v. R,** (supra), in this case we agree with the findings of the learned Justices of Appeal and their observation that

> **"*Court can convict on a retracted or repudiated or both retracted and repudiated confession alone if it is satisfied after considering all material points and the surrounding circumstances of the case that the confession cannot but be true.*"**

The learned Justices of Appeal further examined the appellant's claim that he was tortured by the investigating or and the interviewing police officers and concluded that the claim was an afterthought and concocted. The Justices of Appeal concluded;

> **"*If it were true, the appellant would have told his lawyer. He did not appear to have done so. His evidence portrayed the torture as having been grim and extensive. It was inevitable that torture of that magnitude would have caused extensive injuries which would have left scars on his body. The record of proceedings does not reveal that he ever showed the trial judge any such scar.*"**

We reiterate the law governing retracted or repudiated confessions as was succinctly stated in **Tuwamoi v. Uganda,** (1967) E.A. 84;

> **"A *trial court should accept any confession which has been retracted or repudiated with caution and***

must, before founding a conviction on such a confession, be fully satisfied in all circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

The learned trial judge, Katutsi J. commented on the extra judicial statement of the appellant when he describes his role as minor compared to the role assigned to his freed and other accomplices. We have already commented on the regrettable circumstances under which those accomplices gained their freedom. Be that as it may, the learned trial judge was alive to the law with regard to alleged minor accomplices like the appellant. The judge cited section 21 of the Penal Code Act which enumerates the persons who, if they participate in the commission of an offence they are equally guilty of the same offence and they include;

"21 (1) (c), every person who aids or abets another person in committing the offence."

We agree with the learned trial judge when he observes that the appellant cannot be heard to say that for him he was left outside to keep a watch on whoever would be approaching and then warn those who were inside actively committing the offence. He is as guilty as if

he was inside the house looting like the rest of them. The trial judge emphasized his decision by reference to S.22 of the same Act which provides that:

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence."***

The Court of Appeal confirmed this reasoning and the findings and decision of the learned trial judge. We are unable to fault those findings and decision.

In our view, there is no merit in this appeal. It is accordingly dismissed.

Dated at Mengo this 18th day of August 2005.

B.J.ODOKI
CHIEF JUSTICE

A.O. ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A. KAROKORA

JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT