

THE REPUBLIC OF UGANDA

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

**(CORAM: ODER, TSEKOOKO, KAROKORA, AND MULENGA,
KANYEIHAMBA, JJ.SC.)**

CRIMINAL APPEAL NO. 17 OF 2004

OFWONO SAMUEL :::::::::::::: VS :::::::::::::: UGANDA

(An appeal from the judgment of the Court of Appeal at Kampala (Okello, Eugwau and Kitumba, JJ.A) in Criminal Appeal No. 220 of 2002 dated 8th November, 2004)

JUDGMENT OF THE COURT

This is a second appeal against the decision of the Court of Appeal dismissing the appellant's appeal against conviction and sentence to death by High Court for robbery with aggravation, contrary to sections 285 and 286 (2) of the Penal Code Act.

The background to the appeal briefly is that on 5/11/99, at about 10.30 p.m at Namataba Zone in Kampala, one Kabaho Nathan (PW 2) and his wife Kabaho Windred (PW 3) returned home in a hired taxi from their shop. When they were at the gate of their house, gunmen emerged, put them at

gunpoint and demanded for money. PW 3 surrendered to one of the robbers her handbag containing Shs:

800,000/=. The robbers fired a gun, smashing the windscreen of the taxi car. There was electricity light from security lights of the house. PW 2 and PW 3 were able to see the robbers. PW 2 and PW 3 then went into hiding in the banana plantation near the house. One Kityo, shot by the robbers, was subsequently admitted in Mulago Hospital casualty ward. During the same night the appellant was found lying down on the compound of someone near the scene of the robbery. The appellant had bullet wounds on the arm and in the chest. When No. 28416 D/C Charles Kemba, (PW5) asked him if he knew how he had sustained the injuries, he explained that his fellow robbers had shot him. PW5 took him to Mulago Hospital: When PW2 and PW 3 went to visit one Kityo at the Hospital they found that the appellant had also been admitted in the same ward. Both witnesses saw and recognized the appellant as one of those who had robbed them. On 16/11/1999, W/D/IP Balidawa Margaret (PW 4) recorded a charge and caution statement from the appellant. In the statement, the appellant admitted participation in the robbery, but during the trial he retracted and repudiated his confession. After holding a trial within a trial, the judge admitted the confession statement as having been made voluntary and as true. The statement was admitted as exhibit P.3.

In his defence, the appellant denied participation in the offence. He said that he was shot by unknown people as he was returning to his brother's house. The learned trial judge rejected the appellant's defence, and believed the prosecution evidence, convicting the appellant as indicted. His appeal to the Court of Appeal was unsuccessful. Hence this appeal, based on two grounds, which are firstly, that the learned Justices of Appeal erred

in law and fact when they upheld a conviction based on an unsatisfactory confession, and secondly that the learned Justices of Appeal erred in law and fact when they failed to judicially evaluate the evidence on record thereby coming to a wrong decision.

Mr. Noah Sekabojja learned counsel for the appellant said that he would argue both grounds of appeal together, but in essence his argument revolved only around the first ground. He contended that, the appellant's evidence in the trial within the trial shows that there was no confession in the real sense. That evidence shows that the appellant was illiterate. He said that he was told to sign the statement before he could be taken for treatment. Policemen were not the ones guarding him at Mulago. He was a mechanic but he had never gone to school. He gained experience on the job. He knew how to write his name although he had never gone to school. Learned counsel submitted that the confession was not made by the appellant because he did not know that it was a confession.

Ms. Kagezi, State Attorney, supported the conviction. She submitted that there was no merit in the appellants' complaint against Court of Appeals upholding the finding that the confessions was corroborated by medical evidence. The wounds found on him amounted to such corroboration. The medical report was 10 days old, having been made on 17th November 1999.

In our opinion, the learned Justices of Appeal made a thorough evaluation of the evidence of the circumstances of the appellant's confession and other evidence in the case as a whole and reached their own conclusion upholding the guilt of the appellant. Regarding the appellant's confession statement, the learned Justices of Appeal referred to the appellant's

confession that he and his colleagues planned the robbery. They stopped PW 2 and PW 3 at the gate of their house and robbed them of the bag containing money. After the robbery someone arrested the appellant. Patrick shot at the person who had arrested the appellant and they had a struggle. In the process the appellant was accidentally shot in the leg. He had to be carried by his fellow robbers. When his fellow robber, Kiwa, was tired of lifting him up, the other robber, Patrick, shot the appellant in the abdomen and was left for dead. The learned trial judge found that the appellant's confession was true. Relying on the authority of **Tuwamoui Vs Uganda (1962) EA. 84** the learned Justices of Appeal agreed with the learned trial judge that on the confession alone without corroboration, the appellant could be convicted. The trial Court and the Court of Appeal found that the evidence of PW 2 and PW 3 corroborated the appellant's confession. We are unable to fault both courts in this regard.

The learned Justices of Appeal also found that apart from the aspect of the number of pistol/s that were used during the robbery and recognition of the appellant at the scene of crime, PW 2 and PW3's testimony corroborated the appellant's commission of the crime. Both witnesses testified that robbers who had a pistol attacked them at their gate. When the pistol was fired the windscreen was smashed. The robbers demanded money at gunpoint and PW 3 surrendered her bag containing the money.

The learned Justices of Appeal found further corroboration of the appellant's confession in the medical evidence by Dr. Taddeus Birungi, PW 1 and the medical report PE1. This evidence showed that the appellant had a fracture of the right leg, and was a lacerated wound on the abdomen. The wounds were about 10 days old. The medical report was made on the 17th November 1999, which was about twelve days after the robbery. The

injuries described in the medical report tallied with what the appellant stated in his confession. The appellant stated that Patrick had accidentally shot him on the leg. Subsequently because Kiwa was tired of carrying him, Patrick shot him in the abdomen leaving him for dead. The learned trial judge was therefore right to base the appellant's conviction on his confession, which was made voluntarily, true and was corroborated. The learned Justices of Appeal, rightly so in our view upheld this finding. There was ample evidence to support his conviction.

In the circumstances, the two grounds of appeal must fail and we find no merit in the appeal. It is accordingly dismissed.

Regarding sentence, the appellant in this case, along with appellants in other cases listed for hearing in the same session, who had been sentenced to death, filed supplementary grounds of appeal maintaining that the Court of Appeal erred in upholding the death sentence as mandatory. The supplementary ground was based on the decision of the Constitutional Court No. 6 of 2003 in which it was held that the law rendering death sentence mandatory was unconstitutional. We heard full arguments of the supplementary ground in Criminal Appeal **No. 16 of 2004. Phillip Zahura Vs. Uganda** and intimated that our holding thereon would be applied to other appeals in which the sentence of death had been imposed as a mandatory sentence. Accordingly we order as we did in the Philip Zahura case that in exercise of our discretion under Article 22 (1) of the Constitution we postponed confirmation of the sentence until disposal/determination of the Appeal against decision of the Constitutional Court in No. 6 of 2003, Constitutional Petition.

Dated at Mengo this 21st day of December 2005

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

**J. W.N. TSEKOKO,
JUSTICE OF THE SUPREME COURT.**

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

**J.N. MULENGA,
JUSTICE OF THE SUPREME COURT.**

**G.W. KANYEIHAMBA,
JUSTICE OF THE SUPREME COURT.**