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**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT KAMPALA  
CRIMINAL APPEAL NO.56 OF 2015.**

**[CORAM: KATUREEBE CJ; ARACH-AMOKO; MWANGUSYA; OPIO-AWERI;  
TIBATEMWA-EKIRIKUBINZA, JJSC.]**

**BETWEEN**

**BAKUBYE MUZAMIRU**

**15 JJUMBA TAMALE MUSA :::::::::::::::::::: APPELLANTS**

**AND**

**UGANDA :::::::::::::::::::: RESPONDENT**

*[Appeal from the decision of the Court of Appeal at Kampala before Nshimye, Mwendha, and Kiryabwire, JJA, Criminal Appeal No. 102 of 2012 dated 30<sup>th</sup> July, 2015.]*

**Representation**

*Both appellants were represented by Mr. Kafuko Ntuyo on private brief while the respondent was represented by Ms. Jane Kajuga Okuo, Senior Principal State Attorney in the Office of the Directorate of Public Prosecutions.*

**JUDGMENT OF THE COURT**

**Introduction**

This is a second appeal against the conviction and sentence of the High Court delivered by Monica Mugenyi, J on 19<sup>th</sup> April, 2012 at Kampala.

**Background**

The facts of the case as accepted by the High Court and Court of Appeal were that, between 11<sup>th</sup> and 14<sup>th</sup> April, 2008 at Tunduma, a place bordering Tanzania and Uganda, the appellants, Bakubye and Tamale, robbed Semakula Moses (deceased) of 3 motor vehicles, 2 passports, personal effects and documents. In the course of the robbery Semakula was murdered.

The appellants were indicted in the High Court on two counts. The first count was murder c/s 188 and 189 of the Penal Code Act and the second count was aggravated robbery c/s. 285 and 286 (2) of the Penal Code Act.

5 The trial Judge convicted the two appellants on both counts. She sentenced them to 40 years imprisonment on count 1 and 30 years of imprisonment on count 2. The sentences were to run consecutively.

10 The appellants were dissatisfied and appealed to the Court of Appeal against the conviction and the sentences on 3 grounds viz:

- i) *The learned trial Judge erred in law and fact when she adjudicated over a case in which she clearly had no jurisdiction to entertain.*
- 15 ii) *The appellants were not properly and lawfully represented and defended by their lawyers, which occasioned a miscarriage of justice.*
- iii) *Without prejudice to the above, the learned trial judge erred in law and fact when she passed a harsh and excessive sentence which was to run consecutively.*

20 On ground (i), the Court of Appeal held that the offences were committed partly within Tanzania and partly within Uganda and that therefore, the trial Judge was seized with jurisdiction in accordance with Section 5 of the Penal Code Act. The section provides that when an act which would be an offence against this Code is done partly within the jurisdiction, it may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

25 In regard to ground (i), the Court of Appeal found that there was no miscarriage of justice caused when the defence counsel did not raise any objection to the issue of jurisdiction of the High Court. The Court of Appeal held that ground (ii) failed since their findings in ground (i) were to the effect that the court had the requisite jurisdiction to try the offences.

30 For ground (iii), the Court of Appeal found that the sentence was neither harsh nor excessive and thereby upheld the conviction and sentences given by the High Court judge.

35 Dissatisfied with the Court of Appeal decision, the appellants appealed to this Court on 3 grounds as follows:

- 1. The Honourable Justices of the Court of Appeal erred in law and fact when they failed to properly re-evaluate the evidence on record to come to their own conclusion hence occasioning a miscarriage of Justice.**

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2. **The Honourable Justices of the Court of Appeal erred in law and fact when they based their conviction on with- drawn confessions to convict the Appellants.**

3. **The Honourable Justices of the Court of Appeal erred in law and fact when they affirmed the conviction of 30 and 40 years imprisonment without a legal basis at the time when the offences were committed.**

### **Submission of the Appellants**

#### **Ground 1**

10 The appellants faulted the Court of Appeal for failure to re-evaluate the evidence on record. Three issues were raised under this ground. The first one was a contention that six of the prosecution witnesses (PW1- PW6) were not sworn in before giving their respective testimonies c/s 40(1) of the Trial on Indictment Act. That this made the unsworn testimonies of these witnesses unreliable and that therefore, the testimonies could not be used as a basis for the  
15 decision of the Court of Appeal.

The second contention was that the Court of Appeal failed to point out the fact that during the trial, the High Court judge delegated to the Deputy Registrar, the responsibility of summing up the evidence and the law to the assessors. That this was in contravention of Section 82 (1) of the  
20 Trial on Indictment Act which mandates the judge as the only person with the responsibility of carrying out the summing up. That the anomaly led to a miscarriage of justice.

The third point was that the Court of Appeal Justices erred in law and fact when they failed to accord the appellants a fair trial by allowing their undelivered judgment (which is now before  
25 this Court on appeal) to be used as an authority in another case. The appellants contended that the undelivered Court of Appeal judgment in Uganda vs. Bakubye Muzamir & Anor No. 102 of 2012 was cited in Uganda vs. Lomanio Paul Darlington & Ors Criminal Session No.019 of 2011 delivered in Moroto on 3<sup>rd</sup> September 2011. That the Court of Appeal judgment was delivered much later - on 19<sup>th</sup> April 2012 - a year after it was cited as an authority. The appellants prayed  
30 that on this ground alone, this Court should set aside the conviction and sentences of the Court of Appeal.

#### **Ground 2**

35 On this ground, counsel for the appellants submitted that the learned Justices of Appeal erred in law and fact when they upheld the appellants' conviction based on a retracted confession. Furthermore, that the confession was made two days after the arrest was effected and was not made voluntarily. The appellants submitted that while in police custody, the Police Officers beat them for about 45 minutes with a pistol. In addition, the appellants stated that the Police Officer  
40 who recorded the confession had prior knowledge of the case since he was involved in the investigation. That this made the Police Officer biased and he was not a neutral person.

In support of the above submissions, counsel for the appellants relied on the authority of **Wasswa & Ors vs. Uganda SCCA No. 49 of 1999(unreported)** where this Court emphasized that, in as much as such irregularities in confession taking are not sufficient to reject a confession, they call for a negative comment before allowing the confession to form part of the evidence.

### **Ground 3**

The appellant submitted that the learned Justices of Appeal erred in affirming the 30 and 40 years imprisonment sentences yet there was no enabling law in place at the time for such sentences. Counsel cited Article 28 (8) of the Constitution which provides as follows:

#### **Article 28 (8) -**

**No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.**

Further reliance was on **Section 82 (5) of the Trial on Indictment Act** which provides that:

**If the accused person is convicted, the judge shall pass sentence on him or her according to law.**

Counsel also cited **Section 14 (2)** of the Judicature Act which states that:

**Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised—  
in conformity with the written law, including any law in force immediately before the commencement of this Act.**

Basing on the above provisions, counsel argued that at the time the offences were committed in 2008, they attracted a penalty of life imprisonment. That the meaning of life imprisonment was 20 years according to Section 46 (7) of the Prisons Act and the Supreme Court authority of **Livingstone Kakooza vs. Uganda SCCA No.17 of 1993**. That therefore, the Court of Appeal erred in confirming the sentences of 40 years and 30 years imprisonment beyond the 20 years prescribed by the Prisons Act.

### **Respondent's submission**

#### **Ground 1**

In reply to the appellants' submission that the Court of Appeal decision was premised on the unsworn testimonies of witnesses PW1-PW6, the respondent submitted that whereas the record does not indicate that the witnesses were sworn in, there is proof to the contrary.

The respondent contended that the failure to place on record the swearing in of the respective witnesses did not cause a miscarriage of justice. Counsel further submitted that although Section 40 (1) of the Trial on Indictment Act is couched in mandatory terms, it did not guarantee that the evidence of witnesses who testify on oath would be devoid of lies. The respondent also pointed out the fact that this issue was not raised in the lower courts.

In regard to summing up of the law and the evidence to the assessors, counsel contended that the summing up notes were made by the judge and the Deputy Registrar only read the notes to the assessors since the trial Judge was away on other official duties. That this did not occasion a miscarriage of justice.

The respondent also argued that the reliance of the appellants' case as an authority in another court case before it was delivered did not affect the appellants. Counsel therefore prayed that ground 1 be dismissed.

### **Ground 2**

The respondent supported the findings of the trial judge in admitting the confession. The respondent contended that the trial judge duly carried out a trial within a trial before admitting the confession.

In regard to the alleged bias of the Police Officer who recorded the confession, the respondent submitted that the Officer was not in full possession of the facts and circumstances of the case. That on 25<sup>th</sup> April 2008, the officer was only informed by his superior of a case reported by a relative of the deceased about his disappearance. Later on 27<sup>th</sup> April 2008, he was called to take a confession.

The respondent argued that the Police Officer had not actively participated in the investigation of the case as alleged by the appellant.

### **Ground 3**

In reply to the submission that the sentences were illegal, the respondent argued that the highest penalty for the offences of murder and aggravated robbery for which the appellants were convicted is death. Therefore the 30 and 40 years imprisonment sentences cannot be termed as illegal.

Furthermore, the respondent relied on the court's position in **Tigo Stephen vs. Uganda SCCA No.8 of 2009** and submitted that the definition of life imprisonment as 20 years in Section 46 of the Prisons Act was only relevant for remission.

### **Appellants' Rejoinder**

The appellants reiterated their earlier submissions. In addition to the provisions cited in respect to the mandatory requirement of swearing in of witnesses, the appellants cited a decision of this Court, **Sula Matovu vs. Uganda [2001] E.A 556-563** which emphasized the importance of oath taking by witnesses before they can testify.

5 The appellants argued that the omission by the trial court to swear most of the witnesses was not a mere technical omission but went to the root of the case.

## **Resolution of Court**

### **Ground 1**

10 The following issues arise out of this ground:

i) **Who is responsible for summing up the evidence and the law to the assessors and whether this responsibility can be delegated.**

15 ii) **Whether a decision of court premised on the evidence of unsworn witnesses caused a miscarriage of justice.**

iii) **To what extent can it be said that the citation of an undelivered judgment in another decision of the court is detrimental to the appellants.**

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We will address issue (i) first.

**Section 82 (1) of the Trial On Indictments Act** provides:

25 **When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors.** (Emphasis of Court)

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We agree with the submission of the appellants that the provision is couched in mandatory language. The presiding judge is duty bound to do the summing up and that duty cannot be delegated.

35 In the present appeal, the record indicates that the presiding Judge summed up the evidence herself and the ingredients that had to be proved by the prosecution on each count. However, the notes were read to the assessors by the Deputy Registrar of the Criminal Court division. Analysis of the content reveals that the summing up did not fall short of what was required. The judge did not misdirect herself on any point. In this regard therefore, we find that the reading of the summed up notes by the Deputy Registrar rather than by the judge neither prejudiced the appellants nor caused a

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miscarriage of justice. Be that as it may, this practice should be discouraged. As much as possible, the judge who presided over the hearing must personally give direction to the assessors and delegation to another court official should only occur if the presence of the judge has been made impossible by grave circumstances.

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**Issue (ii)**

The appellants argued that the Court of Appeal decision was premised on the testimonies of witnesses (PW1-PW6) who were not sworn in before they proceeded to give their evidence. On the other hand, the respondent argued that this was only an oversight in the record taking but the said witnesses were sworn in. The respondent also pointed out the fact that the appellants had not raised this issue in the lower courts and were therefore barred from raising a new issue in this Court.

Although **Rule 98 (a) of the Supreme Court Rules** prohibits the raising of a new ground or argument on appeal without the leave of the Court, this Court may on its own motion, in line with **Rule 2 (2) of the Supreme Court Rules**, consider a legal issue not presented and agreed upon by the litigants. The rule gives the Court inherent power to make such orders as may be necessary for achieving the ends of justice.

Premised on the above authority, we shall proceed to address the issue.

**Section 40 of the Trial on Indictment Act** requires every witness in a criminal cause or matter before the High Court to be examined on oath. The authority to administer this oath is vested in the court. A look at the record reveals that the prosecution based its case on ten witnesses (PW1-PW10). We have studied the record in regard to the commencement of the testimony of each witness. Each of the witnesses is recorded to have stated his or her name and then proceeded to testify. The record does not specifically indicate when each of the witnesses was sworn in. This pattern follows through all the witnesses.

However, in regard to PW6 (Superintendent of Police Mbabazi Henry) the record reveals that he was called to testify on 11/8/2011. In his testimony he stated that the second appellant had made a confession. At this point, an objection was raised by the second appellant to the effect that the confession was not voluntary. This necessitated the court to carry out a trial within a trial. The matter was then adjourned to 2/8/2012 when PW6 resumed giving of his testimony. Before he resumed testifying, it is recorded that the trial judge stated: “*witness reminded that he is still on oath.*” This was a clear indication that PW6 had earlier on been sworn in.

We however note that although it was only in relation to PW6 that there is specific indication that he was on oath, all the witnesses (PW1-PW10) were cross-examined. We take this as evidence that the witnesses were sworn in. We also observe that although the value of cross-examination is to test the veracity of the testimony, cross-examination is no guarantee that such witnesses will always tell the truth.

We similarly note that underlying the requirement for giving evidence on oath is the assumption that such a person would be truthful. However, even when a witness has testified under oath and has been cross-examined, a court may, having considered the entire evidence available in a case, come to the conclusion that a particular individual was not a truthful witness. In reaching this conclusion, a judge may be guided by factors such as the demeanour and level of consistency in a witness's testimony.

In the present case, the record indicates that the trial judge observed the demeanor of the prosecution witnesses and opined that they were witnesses of truth. In particular reference to PW1, the trial judge noted that he was a "*truthful witness*". In regard to PW4, the trial Judge noted as follows: "*witness struck me as very truthful.*" On the other hand, the judge came to a finding that the appellant (Jjumba Tamale) was an untruthful witness.

We therefore reject the appellants' arguments that the prosecution witnesses testified without being sworn in.

Be that as it may, we must emphasize that it is critical for a trial Judge to specifically put it on record that a witness was sworn in. Nevertheless, failure to do so in this matter did not lead to a miscarriage of justice.

### **Issue (iii)**

The submission of the appellants was that the decision of the Court of Appeal regarding their appeal against the judgment of High Court Justice Monica Mugenyi, was cited by another High Court Judge before the Court of Appeal had delivered the said decision. It was contended that the said anomaly violated their right to a fair trial.

**Article 28 of the Constitution** stipulates determinants and standards of a fair trial. These include a speedy and public hearing before an independent and impartial court established by law; the presumption of innocence; adequate time and facilities for the preparation of a defence; appearance before the court in person; in the case of any offence which carries a sentence of death or imprisonment for life, legal representation at the expense of the State etc.

We are not privy to the circumstances under which the prepared draft of the Court of Appeal was accessed by the High Court Judge who referred to it in her/his decision. However, an opinion only qualifies as a judgment or decision of the court after it has been pronounced/delivered. It is only then that such opinion has legal value. Before pronouncement, the opinion is but a mere draft. It was therefore irregular for the judge in *Uganda vs. Lomanio* (Supra) to cite such a document as legal authority.



Be that as it may, we do not see how, by any stretch of imagination, the mishap could be interpreted as a violation of the appellants' right to a fair trial. If anybody were to justifiably complain, it perhaps would be the appellants in **Uganda vs. Lomania Paul Darlington (supra)** and this is if it could be argued that the decision of the court in that case was arrived at as a result of reliance on the said undelivered opinion – an opinion which had no legal validity.

Since each issue in Ground 1 has been resolved in favour of the respondent, we find that ground 1 of the appeal fails.

## **Ground 2**

This ground was raised by the second appellant, Jjumba Tamale Musa.

The essence of the arguments in this ground is that the Court of Appeal upheld the 2<sup>nd</sup> appellant's conviction on a retracted confession. The 2<sup>nd</sup> appellant argued that the confession was not voluntarily made because of the torture he received while in custody. Furthermore, that the Police Officer who recorded the confession had prior knowledge of the case. On the other hand, the respondent contended that the trial judge had properly carried out a trial within a trial before admitting the confession and that the Officer who recorded the confession did not have the details of the offence.

We note as was the case in regard to ground 1 in this appeal that this ground was not raised in the Court of Appeal. However, in the exercise of our inherent powers under Rule 2(2) of the Rules of this Court, we will go ahead to determine the ground. In light of this, we will take on the role of a first appellate court and re-evaluate the evidence presented before the trial court regarding the confession.

The law relating to retracted/repudiated statements was reviewed by this Court in **Matovu Musa Kassim vs. Uganda, SC Criminal Appeal No. 27 of 2002** where the accused had retracted a confession that he made immediately after arrest because he alleged it was not made voluntarily. Affirming the decision in **Tuwamoi v. Uganda [1967] EA 84**, this Court held that:

**A trial court should accept any confession which has been retracted or repudiated or both retracted and 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.** (Emphasis of Court)

We note that the trial judge examined the appellants' claim that he was tortured while in custody of the Police by conducting a trial within a trial. The trial Judge in her ruling noted that the 2<sup>nd</sup> Appellant's evidence was riddled with numerous contradictions. She further stated that the demeanor of the appellant led her to the finding that he was untruthful and unreliable. She carefully weighed the objections of the appellant of the refuted confession against the prosecution evidence bearing in mind that the burden and standard of proof in a criminal trial at all times lay on the prosecution. The trial judge concluded that the appellant had voluntarily made and signed the confession statement. It was then admitted in evidence.

In such circumstances, we find no justification for departing from the finding of the trial judge in respect to the confession.

Ground 2 therefore fails.

### **Ground 3**

The ground relates to the illegality of the sentences imposed by the trial judge and upheld by the Court of Appeal. The appellants were sentenced to 30 years imprisonment in respect to aggravated robbery and 40 years imprisonment for murder. The trial judge ordered the sentences to be served consecutively. However, the Court of Appeal ordered the sentences to be served concurrently.

The argument of the appellants is that the sentences were illegal since interpretation of **Section 47 (6) of the Prisons Act in Kakooza vs. Uganda (supra)** meant that life imprisonment is equal to 20 years. That therefore, the 30 and 40 years imprisonment sentences were excessive and illegal.

First and foremost, we wish to emphasize that sentencing is the discretion of a sentencing judge. That discretion can only be interfered with if the sentence is excessive and was premised on wrong principles of the law. [**See: Kyalimpa Edward vs. Uganda, SCCA No.10 of 1995**].

It is our view that the 40 and 30 years imprisonment sentences were neither premised on wrong principles of law nor excessive. Both a conviction of murder and aggravated robbery attract the death penalty as a maximum sentence. The trial judge and the Justices of Appeal in exercise of their discretion did not award the maximum penalties prescribed by the law for each of the respective offences.

The above view was maintained by this Court in its recent decision of **Okello Geoffrey vs. Uganda SCCA No. 34 of 2014**. The Court stated as follows:

**In terms of severity of punishment in our penal laws, a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws.**

5 However, following the case of Attorney General vs. Kigula, Constitutional Appeal No. 03 Of 2005, which declared mandatory death sentence unconstitutional though it remains the maximum sentence for capital offences, courts have not found it necessary to pass death sentences on convicts. Courts have instead opted to pass sentences of terms of imprisonment of well above twenty years in respect of offences which formerly attracted a mandatory death sentence.

10 Section 86 (3) of the Prisons Act deems a sentence of life imprisonment to be 20 years for purposes of remission. If life imprisonment is the highest sentence only next to death sentence, where then do sentences of above 20 years imprisonment fall? We are of the view that sentences of more than 20 years imprisonment for capital offences cannot be said to be illegal because they are less than the maximum sentence which is death. Courts have powers to pass appropriate sentences as long as they do not exceed the maximum sentences provided by law. Article 28 (8) of the Constitution provides that, “no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum that could have been imposed for that offence at the time when it was committed.” (Emphasis of Court)

20 In the premise, we find that Ground 3 fails.

### Conclusion and orders

Having found that all the grounds of the appeal fail, the appeal is hereby dismissed. We uphold the conviction and the sentences confirmed by the Court of Appeal.

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Dated at Kampala this ...9<sup>th</sup>... day of ...April..... 2018.

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**BART KATUREEBE CJ,**

30 **JUSTICE OF THE SUPREME COURT**

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**HON. JUSTICE STELLA ARACH-AMOKO,**

**JUSTICE OF THE SUPREME COURT.**

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5 **HON. JUSTICE ELDAD MWANGUSYA,**  
**JUSTICE OF THE SUPREME COURT.**

.....  
10 **HON. JUSTICE RUBBY OPIO-AWERI,**  
**JUSTICE OF THE SUPREME COURT.**

.....  
15 **HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA,**  
**JUSTICE OF THE SUPREME COURT.**

*17<sup>th</sup> jan 2018 (final)*