THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE G. M. OKELLO, JA.

HON. MR. JUSTICE A. TWINOMUJUNI, JA.

HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 7 OF 2002

1. **MASIKI SOSAN**
2. **NUME CHARLES :::::::::::::::::::::::::::::: APPELLANTS**

Versus

UGANDA:: RESPONDENT

[An appeal from the juddgment of the High Court of Uganda sitting at Jinja (Bamwine, J.) dated 21-2-2002 in Criminal Case No. 59 of 2001]

JUDGMENT OF THE COURT:

Masiki Sosan and Nume Charles, in this judgment referred to as the first and the second appellants respectively and together as the appellants, were jointly indicted with two others for murder contrary to sections 188 and 189 of the Penal Code Act. The appellants' co-accused was acquitted but the appellants were convicted as charged and sentenced to death.

The prosecution case as accepted by the learned trial judge was that one Kasaga Vincent, the victim of the murder, was a brother of the first appellant. Before the murder both of them lived at Kananage village, Buyindo zone in Kamuli District. The deceased had no wife and lived alone in his house. The wife and the son of the first appellant died in succession. The deceased was suspected to have caused their deaths by witchcraft. The first appellant and his son, who was the second accused at the trial, hatched a plan to kill the deceased. They sought for the services of the second appellant to execute their plan. According to the testimony of Kolostiko Nabaiga,

PW1, whenever the first appellant went out drinking he would utter threats that he would kill Kasage.

On the 29th March 1999 the body of the deceased was found in his house by a wife of the late Byansi Yakonia. She made an alarm which was answered by many people including PW1. A report was made to Kamuli Police Station. On the following day the police came and took the body to Kamuli Mission hospital for post mortem examination. The autopsy was performed by Dr. Nyalia James, PW6. He found deep cut wounds on the left parieto region of the head and bruises on both sides of the neck. He was of the opinion that the cause of death was either subdural haemorrhage due to the penetrating wounds on the head or asphyxia due to strangling.

The police arrested the first appellant at the home of the deceased on 31/3/1999 as they were preparing for the funeral. The arrest was based on suspicion because of the previous threats to kill the deceased. The second appellant was arrested on 6/4/1999. His arrest was also based on suspicion. He was found with a blood stained T-shirt by Musere James, PW4. The blood stains on the T-shirt were confirmed by the Government Chemist's report to be of group O which was the same blood group as that of the deceased. A charge and caution statement by the second appellant, which was recorded by D/AIP Osera Sharphan, Pw2, was admitted in evidence as exhibit P1. The second appellant confessed to having participated in the commission of the offence. He also implicated the first appellant as one of the people who had hired him to kill the deceased. The confession statement was admitted in evidence without holding a trial within a trial to determine its admissibility.

In their defences both appellants denied the offence and put up a defence of alibi. The first appellant stated that on the day the deceased was murdered he was away from home. He was called to return home after the death of the deceased. The second appellant stated that on the 29/3/1999 he was at home the whole day. He did not know any of his co-accused.

The learned trial judge believed the prosecution case, rejected the appellants' defences, convicted them and sentenced them to death.

Dissatisfied with the learned trial judge's decision, they have appealed to this court. The joint memorandum of appeal contains the following grounds: -

"**The learned trial judge erred in law and fact when he admitted in evidence the charge and caution statement of the second appellant.**

1. **The learned trial judge erred in law and fact when he took into account the second appellant's confession to convict the first appellant.**

2. **The learned trial judge misdirected himself and came to the wrong; conclusion in his consideration of previous threats by the first appellant and a finding existence of common intention between the two appellants.**

3. **The learned trial judge erred in law and in fact when he relied on the exhibits, whose source was questionable, to convict the second appellant.**

4. **The learned trial judge erred in law and in fact when he relied on very weak and discredited circumstantial evidence to convict the second appellant."**

Mr. Stephen Mubiru, learned counsel for the appellant, submitted on grounds 1 and 2 together and on the rest of the grounds separately. We shall handle the grounds following the same order.

Submitting on grounds 1 and 2, learned counsel submitted that the confession by the second appellant, exhibit P1, was the principal piece of evidence against both appellants and the learned trial judge misdirected himself and the assessors with regard to it in the following instances.

Firstly, he admitted it in evidence without holding a trial within a trial, inspite of the fact that counsel for the appellants objected to its admissibility. Secondly, the confession was recorded by PW2 who was an investigating officer and by that reason it should not have not been admitted in evidence. Thirdly, the learned trial judge relied

on it to convict both appellants. Fourthly, he misdirected the assessors that they were entitled to attach no weight to it. In counsel's view, the proper direction to the assessors would have been that they should not at all consider the second appellant's confession.

In reply, Mr. Wilfred Murumba learned Principal State Attorney, who represented the respondent, at first submitted that the learned trial judge admitted the confession statement in evidence because counsel for the appellants did not object to its admissibility in good time. Later on he conceded that the confession was not properly admitted in evidence. He informed court that without the confession the conviction of both appellants cannot stand. He stated that he offered no further submissions on the appeal.

This is a first appellate court. It is, therefore, our duty to consider and re-evaluate the evidence as a whole and come to our own conclusion. See **Moses Bogere and Another v Uganda** Supreme Court Criminal Appeal No. 1 of 1997 (unreported) and **rule 29 of The Court of Appeal Rules Directions, 1996.**

In the instant appeal PW2 gave evidence at trial. He narrated the role he played as an investigating officer. He also stated that he recorded the confession from the second appellant and read out the statement in court. After that the prosecuting State Attorney sought to tender it in evidence as an exhibit. At that juncture, counsel for the appellants objected to its admissibility on two grounds namely: - that the second appellant denied making the statement and that the officer who recorded it played a part in the investigation of the case.

The State Attorney replied that the objection was raised belatedly, whereas counsel for the appellants had all the time known that the police officer who recorded a charge and caution statement was going to testify. He left the matter to court to decide. The learned trial judge ruled as thus:

> **"In a case where an accused is presented by senior counsel, which I take Mr. Habakurama to be, the objection is not raised after the substance of the confession has been read to court and the assessors but before.**

Counsel does not wait until the statement has been read to court and then raise objections. As soon as the witness hinted that A3 made a statement admitting the offence, I expected counsel to seek instructions from his client, if such instructions had not been given already, since the summary of evidence mentions reliance on the confession. The idea of a trial within a trial is to ensure that damaging material does not find itself on record unless its acceptability has first been tested. Prejudicial material is difficult to erase from the mind of court and assessors and hence the need not to hear it unless it is opportune to do so. The prosecution and defence must assist court in this regard. Having said so, I would consider it unnecessary to conduct a trial within a trial when all that the prosecution should perhaps not have said about the accused is already on record. Defence counsel shall be at liberty to cross-examine the witness on the statement. For more reasons which I will detail in the judgment while assessing the weight to attach to the statement, the same shall be received in evidence whether its worth since in any event there is already a summary of it on record."

The accused must get a fair trial as provided by article 28 (1) of the Constitution. The law is now settled that in a case where the accused pleads not guilty, he or she is entitled to a full trial of all the facts in issue. If incriminating or prejudicial evidence is tendered and is not challenged by counsel, the court should not allow it in evidence without ascertaining from the accused person that he or she is aware of the consequences of the reception of such evidence. See **Kawooya Joseph v Uganda** – Criminal Appeal NO. 50 of 1999 Supreme Court (unreported) and Chandria **Omaria v Uganda** Criminal Appeal No. 23 of 2000 Supreme Court (unreported).

The learned trial judge had the duty before allowing PW2 to testify on the charge and caution statement to ascertain from both appellants whether they were aware of the consequences of receipt of such evidence. The record of appeal does not show that he did so. We are of the considered view that later on when their counsel objected to the admissibility of the confession, exhibit P1, the learned trial judge should have held a trial within a trial. We believe it was not too late, as he appears to have thought. We appreciate the fact that the judge and the assessors had heard the evidence and that had done some harm. If the trial within trial had been held and resulted in a ruling

that the second appellant's confession was inadmissible, the learned trial judge should have directed the assessors and himself to ignore it completely. The confession exhibit P1 was improperly admitted in evidence.

With due respect to the learned trial judge, he misdirected himself when he relied on it to convict both appellants. We note that PW2 was an officer investigating the case. The confession recorded by the investigating officer is not admissible in evidence. See **No.RA 78064 CPC Wasswa and Ninsima v Uganda** Supreme Court Criminal Appeal No. 48 & 49 of 1999. He further misdirected the assessors when he said that they were entitled not to rely on the confession. Grounds 1 and 2, therefore, succeed.

This disposes of the whole appeal.

In the result we find the appeal by both appellants has merit. It is accordingly allowed.

The convictions of both appellants are quashed and the sentences are set aside. The appellants are to be set free forthwith unless they are otherwise lawfully held.

Dated at Kampala this 2nd day of August 2004.

G. M. Okello
JUSTICE OF APPEAL

A. Twinomujuni
JUSTICE OF APPEAL

B. N. B. Kitumba
JUSTICE OF APPEAL