THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.

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

HON. LADY JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO. 149/04

BETWEEN

MUSINGUZI JONAS::APPELLANT

AND

UGANDA::RESPONDENT

[Appeal from conviction and sentence of the High Court of Uganda Western High Court Circuit sitting at Mbarara (*Maniraguha RIP) *dated 23rd January 2004 in HCCSC No.94/2000]

JUDGMENT OF THE COURT

This is a first appeal. It is from the decision of the High Court in the exercise of its original jurisdiction.

The appellant was indicted for murder contrary to **sections 188** and **189** of the Penal Code Act.

It was alleged in the particulars of the indictment that on the 10th day of November 1998, at Kabirizi village, in Mbarara District, the appellant murdered Alex Musinguzi.

The prosecution's case was based on the following facts:

The deceased who was aged 12 years at the time of his death lived in the same village as the appellant. On the day in question his father, Fredriko Kankusiime (P.W.6) sent him on a new Hero bicycle to buy paraffin from a nearby trading centre. He took a small jerry can and the time was about 6 p.m. He never returned home. The appellant was seen by Muhangi- Kabito (P.W.3) holding a *panga* and about 300 metres away the said Muhangi met the deceased. It was alleged that it was the appellant who hacked him to death.

The next day a search was mounted in the village and the body of the deceased was found buried in a shallow grave near the road going to the trading centre and near the home of the father of the appellant.

On 11th November 1998 the appellant was arrested on information that tended to implicate him. He was charged with murder.

The body of the deceased was examined and a postmortem report was exhibited at the trial. Other exhibits included a Hero bicycle, hoe and a *panga*. This latter exhibit was found wrapped in a mat in the house of the appellant.

The appellant denied the offence and raised the defence of alibi. He stated that on the day in question he went to the market and left at about 6 p.m. He reached home at about 7 p.m and he remained at home cooking. He denied having met Muhangi Kabito (P.W.3) that evening. He made two statements to the police which were both exhibited at the trial. He retracted both of them because he stated that he had been beaten.

The trial judge with the unanimous opinion of the assessors rejected the appellant's version of events and convicted him as charged- hence this appeal.

The memorandum of appeal filed on his behalf by M/s Kunya &Co Advocates contains the following grounds:

1. **That the learned trial judge erred in law and fact when he admitted the charge and caution statement on record thereby resulting into a miscarriage of justice.**
2. **That the learned trial judge erred in law and fact when he convicted the appellant on the basis of unsatisfactory circumstantial evidence.**
3. **That the learned trial judge erred in law and in fact when he convicted and sentenced the appellant to death without regard to his age which resulted into a miscarriage of justice.**

4. **That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence which resulted into miscarriage of justice.**

It was the appellant's prayer that the appeal be allowed the conviction quashed and sentence be set aside. In the alternative it was prayed that the file be transmitted to an appropriate court for an appropriate order regarding sentence.

Mr Henry Kunya represented the appellant on state brief. In his submissions on ground one of the appeal, Mr Kunya stated that during the investigations three statements were recorded- two from the appellant and another one from his step- mother. He contended that it was erroneous for the trial judge to admit the two statements in evidence without holding a trial within a trial. He further submitted that the statements were recorded by the same police officer after he had already visited the scene of crime. It was his contention that when the appellant was examined by a doctor some wounds were found on him and therefore torture cannot be ruled out. He cited to us the case of ***Wasswa &another v Uganda- SCCA No.48&49/99*** where the Supreme Court of Uganda observed that it was the duty of the trial court to exclude inadmissible evidence and not to rely on it in the judgment.

He also cited the case of ***Tindibanga Edirisa v Uganda CACA No. 93/2000*** in which this court followed a decision of the Supreme Court in the case of ***Babyesubuza Swaibu v Uganda SCCA No. 50/2000*** that where an accused person has pleaded not guilty caution must be exercised before a confession statement allegedly made by an accused before his trial is admitted in evidence. The court went on to state that a trial within a trial must be held to determine its admissibility.

On circumstantial evidence, learned counsel submitted that it was unsatisfactory and it did not exclusively point to the guilt of the appellant. He further pointed out that there was reliance on the *panga* which was discovered in the appellant's room but there were contradictory statements about it. Whereas P.W.5 talked of a *panga* stained with blood witnesses who had seen the same *panga* before him never alluded to the blood.

Other pieces of evidence that learned counsel criticized was the one given by P.W.6, the father of the deceased who testified that he saw blood on the shirt of the appellant and yet no other witness talked about the blood on the shirt. According to counsel this was a crucial piece of evidence which the prosecution could not have missed.

In her reply, Ms Okuo- Kajuga, Principal State Attorney, while supporting the conviction of the appellant, conceded that the charge and caution statements made by the appellant before his trial ought not to have been admitted without holding a trial within a trial.

On circumstantial evidence, learned Principal State Attorney, submitted that it established the guilt of the appellant beyond any reasonable doubt. She referred to the testimony of P.W.3 who testified that he met the appellant at about 6 p.m. holding a panga and three hundred metres later he met the deceased.

On the discovery of the body, she submitted that it was found in a shallow grave in the homestead of the father of the appellant. The bicycle was found within the same compound. The *panga* was found in the room where the appellant was sleeping. Two witnesses saw blood on the *panga.* She maintained that circumstantial evidence point to the appellant and the trial judge was right to convict him.

We shall now deal with the manner in which exhibits P.3 and P.5 were admitted in evidence. The two exhibits were the statements made by the appellant while he was in police custody. The Supreme Court in its recent decisions namely ***Chandia v Uganda SCCA No.23/01*** and ***Sewankambo &others v Uganda SCCA No.33/01*** both unreported has settled the law. In Chandia's case the court at page 9 of the judgment said:

"Firstly we would reiterate what we have stated in our recent decisions that because of the doctrine of the presumption of innocence enshrined in Article 28(3)(a) of the Constitution, where in a criminal trial, an accused person has pleaded not guilty, the trial court must be cautious before admitting a confession statement allegedly made by an accused person prior to his trial. We say this because we think that an unchallenged admission of such statement is bound to be prejudicial to the accused and put his plea of not guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that counsel for the accused person has not challenged or has conceded to its admissibility. Unless the trial court ascertains from the accused person that he or she admits having made the confession statement voluntarily, the court ought to hold a trial within a trial to determine its admissibility: see Kawoya Joseph v Uganda Criminal Appeal No. 50 of 1999(Supreme Court (unreported)***, Edward Mawanda v Uganda Criminal Appeal***

No.4/1999(unreported) and ***Kwoba v Uganda Criminal Appeal No.2 of 2000(Supreme Court)*** (unreported)."

The statements were admitted in evidence through Detective Inspector of Police Kabuye Suleiman (P.W. 1). Mr Mwene- Kahima who represented the appellant stated that he had no objection as long as the statements are not confessions. It is not clear what the learned counsel meant by the statement. The statements especially the one the appellant made on 18th November 1998 was a confession. The learned judge erred in admitting the statements made by the appellant without ascertaining from him whether he made them voluntarily.

The question is whether this error occasioned a miscarriage of justice. ***Section 166*** of the Evidence Act (Cap 6) provides as follows:

"The improper admission or rejection of evidence shall not be a ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that, if the rejected evidence has been received it ought not to have varied the decision."

This being the first appeal, we shall evaluate the evidence adduced and determine whether the findings of the trial judge should stand.

The evidence implicating the appellant in the commission of the offence was circumstantial. There was no eye witness and the time when the deceased met his death was unknown. The law regarding circumstantial evidence is well settled. The Supreme Court of Uganda restated the law in one of its recent decisions in the case of ***Janet Mureeba &2others v Uganda SCCANo.13/2003*** thus:

'There are many decided cases which set out tests to be applied in relying on circumstantial evidence to sustain a conviction. The circumstantial evidence must point irresistibly to the guilt of the accused. In R. v Kipkeri Arao Koske &another (1949)16EACA 135 it was stated that in order to justify a conviction on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That statement of the law was approved by the East African Court of Appeal in Simon Musoke v R[1958]EA 715".

In the case of ***Bogere Moses &another v Uganda SCCA No.1/97*** the same court said:

"The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt"

The learned trial judge was alive to the law applicable and the defence of the appellant which was an alibi.

The prosecution relied on the evidence of Muhangi Kabito (P.W.3) who testified that on the 10th November 1998 at about 6 p.m he met the appellant near a banana plantation holding a panga. They greeted each other as they knew each other very well. The appellant denied having met him. He later met the deceased about 300 metres away on a bicycle moving towards where he left the appellant standing.

Another piece of evidence which tend to connect the appellant with the commission of the offence was the recovery of a *panga* in the room where the appellant was sleeping. The *panga* was apparently wrapped in a mat. Kabashekyere Valeriano (P.W.4) who was the Local Council 11 Chairperson of the area stated that the panga was covered in soil. The other witness who talked about the *panga* was Detective Corporal Oliwa Richard (P.W.5). His evidence was that he saw drops of blood on the panga. The room of the appellant was searched in his presence and he stated that he did not know how the *panga* came to be in his room.

The panga was not subjected to any scientific tests to establish whether the blood in question belonged to the deceased.

Other pieces of evidence that tended to connect the appellant with the commission of the offence were the recovery of the body in a shallow grave and the bicycle belonging to the deceased.

The evidence of the recovery of the body and the bicycle was given by P.W.4. He said:

"On 11/11/1998 I received a report of the LC1 chairman of Kabirizi cell that a son of Kankusiime called Alex had gone missing the previous day. The child was eventually found dead. I saw the body after it had been recovered. It was in a short grave. I was able to see the legs out. After the body was removed from the grave I saw it. It had a cut on the neck and the ear. The cut was below the ear.

I had got information from the chairman LC 1 that Muhangi had met Alex in the evening on bicycle carrying paraffin. That the paraffin was tied on the bicycle in a small jerry can. And that Jonas had been met with a panga by Muhangi.

Upon that information I with GISO arrested the accused. The bicycle was also missing. It was at night and we remained at the scene where we found the body.

The next morning I got LDU and people in the village and looked for the bicycle. We found the bicycle below the home of the accused's father. The bicycle was covered with twigs and grass. From the home to where we found the bicycle is about 150 metres. From the body to the place where bicycle was is about 200 metres. Between the body and the home was about 50 metres."

The testimony of how the body was recovered was corroborated by the testimony of Mutalemwa (p.w.2) who was the first police officer to visit the scene of crime. He stated that the body of the deceased was buried in a shallow grave near the appellant's father's compound. The grave was about 50 metres away.

It is important before drawing the inference of the appellant's guilt from the above circumstances to ensure that there are no co-existing circumstances that would destroy or weaken the inference. The appellant shared the house where the panga was recovered with his father according to the evidence on record. The panga itself is an ordinary household item which anyone can use and bring back.

The time of death was also not established. The evidence of P.W. 3 was to the effect that he met the appellant and the deceased at about 6 p.m. the appellant denied having met the witness and the deceased on that day. He stated that he went to the market where he stayed till 6p.m when he left. He arrived at home at about 7p.m and stayed at home cooking.

The testimony of P.W.3, the recovery of the body, the bicycle and the panga did not satisfy the standard of proof required for cases which depend entirely on circumstantial evidence. It did not point irresistibly to the appellant as the one who committed the offence.

Consequently we allow the appeal quash the conviction and set aside the sentence of death. We order for the immediate release of the appellant unless he is being lawfully held on other charges.

Dated at Kampala this 17th day of November 2008.

***A.* E. N. Mpagi-Bahigeine**

Justice of Appeal

C.N. B. Kitumba

Justice of Appeal

5 **C.K.Byamugisha**

Justice of Appeal