# THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**CORAM: HON. LADY JUSTICE C.N.B.KITUMBA, JA.**
**HON. LADY JUSTICE C.K. BYAMUGISHA, JA.**
**HON. MR. JUSTICE S.B.K. KAVUMA, JA.**

## CRIMINAL APPEAL No.190 OF 2003

**1. No.RA. 48862 CPL. NGOBI KATO GALANDI ]**
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**APPELLANTS**
**2. ABDALLA NSEREKO ]**

**VERSUS**

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

***[Appeal from conviction and sentence by the High Court of Uganda (Wangutusi, J) dated 3rd October 2003, in Criminal Session Case No.133 of 2003 holden at Jinja]***

## JUDGEMENT OF THE COURT

CPL. Ngobi Kato Galandi, the first appellant and Abdalla Nsereko, the second appellant were jointly indicted with one Ziraba Muhammed alias Kigenyi and Bwoya Bakari with aggravated robbery, contrary to sections 285 and 286 (2) of the Penal Code Act. Bwoya Bakari passed away before the commencement of trial in the High Court and the case against him abated. Kigenyi was acquitted but the two appellants were convicted and sentenced to death. They appealed to this Court against the convictions and sentences.

The prosecution case against the appellants was based partly on a

confession by the appellant and other circumstantial evidence.

Nakimera Hellen (PW6) was a businesswoman in Iganga town at Bugumba, Zone B and lived there with her family. On the 18/12/2000 at around 9.00 p.m., she was inside her house with her children when robbers attacked her. The electric lights were on. One of the robbers was carrying a rifle, which he pointed at PW6 while saying that she was the one they were looking for. Another one was dressed in a light blue jacket with a red cap advertising coca-cola Talanta.

The robbers demanded money from PW6, while pointing a gun at her. They made her lie down and pushed her head under the bed. Later they dragged her from underneath the bed. When PW6 succumbed to their demands and gave them money, they left the house with it and carried other house hold property. PW6 and her family members made an alarm, which was answered by many people. Later in the night while Hussein Kadugala, (PW8), who was an LDU and secretary for youth and others, were patrolling the village, they found a man whom they later learnt was Bakari. He had no identification papers. He was putting on a bluish jacket, black trousers and had a cap with white and red colours. He dropped a long knife when he was called by PW8. PW8 and others, found a bag near where he was. The man was arrested and taken to PW6's house, where he was instantly identified by PW6 and her children as one of those who had taken part in the robbery. On being questioned, he revealed that he was together with both appellants and one Kigenyi during the robbery. He was taken to Iganga Police Station. On the 26th December 2000, the first appellant was arrested. One Nabirye was in the house, which

he has previously occupied and when it was searched, some stolen property, which was later identified by PW6 at Iganga Police Station to be hers, was recovered.

During the course of the investigation, the first appellant admitted that he had participated in the robbery. He led No.27685 D/C Sserwadda (PW5), D/C Wamboga Steven (PW2) and others to a coffee plantation where the gun was hidden. The gun and rounds of ammunition were recovered. The same were examined by a ballistic expert who made a report. The gun and the ballistics expert's report were exhibited in court.

On 27/12/2000, D/AIP Otim, (PW3) recorded a charge and caution statement from the first appellant, while PW5 acted as the interpreter. In the charge and caution statement, the first appellant implicated himself and the second appellant. The second appellant was subsequently arrested from his home.

In their defence, at the trial, both appellants set up the defence of alibi. The learned trial judge did not believe them and convicted them as indicted. The conviction of the first appellant was based on the confession statement exhibit P4 and the fact that he led PW2 and PW5 to where the gun was hidden. The second appellant was convicted on the confession of the first appellant. The judge found corroboration of the confession in the fact that the first appellant before taking the police to where the gun and ammunitions were recovered, first consulted the second appellant in order to confirm whether it was still in the same place where they had kept it.

The two appellants are dissatisfied with the decision of the learned trial judge and have filed their appeal to this Court. The five grounds in their joint memorandum of appeal read: -

1. ***That the learned trial judge erred in law and fact in failing to properly evaluate the evidence on record thereby leading to the conviction of the appellants.***

2. ***The trial judge erred in law and fact in admitting a charge and caution statement procured by coercion of the first appellant.***

3. ***The learned trial judge erred in law and fact to convict on accomplice evidence without sufficient corroboration.***

4. ***That the learned trial judge erred in law and fact to hold that the appellant's were properly identified at the scene of the crime in conditions unfavourable to correct identification.***

5. ***That the trail judge erred in law and fact disregarding the major inconsistencies in the prosecution case hence reaching a wrong conclusion.***

During the trial of this appeal both appellants were represented by learned counsel, Mr. Kenneth Ssebagayunga and learned Principal State Attorney, Ms Caroline Nabasa appeared for the respondent.

Both counsel argued the ground of appeal consecutively starting with ground one. On our part we find that some of the grounds of appeal are interrelated. We shall, therefore, deal with the appeal in the following manner. We shall handle grounds 2 and 5 together, ground 3 separately and, grounds 1 and 4 jointly.

In grounds 2 and 5 appellants' counsels' complaint is that the learned trial judged erred in law and in fact in admitting in evidence a charge and caution statement that had been obtained by coercion. Counsel contended that although a trial within a trial was held, there were contradictions in the prosecution evidence regarding the circumstances in which it was recorded. He argued that according to the evidence of D/AIP Otim (PW3) the first appellant spoke Lusoga whereas D/C Sserwadda (PW5) who was the interpreter testified that the first appellant gave his statement in Luganda. Counsel submitted that the learned trial judge should have believed the first appellant's evidence that there were several people in the room, some of them had guns, they threatened and tortured him to make the statement.

The learned Principal State Attorney conceded that the charge and caution statement was not recorded in strict compliance with the rules.

The statement was only recorded in English and not in the language that was spoken by the appellant. She submitted that since the confession statement was true and led to the discovery of the gun and ammunitions, the learned trial judge was right to admit it in evidence and to base the appellants' convictions on it. In her view,

the failure to follow the correct procedure of recording confession was a mere technicality, which is curable under article 126 (2) (e) of the Constitution.

In his ruling after trial within a trial the learned trial judge found that the charge and caution statement was voluntarily made by the first appellant. According to the learned trial judge, the appellant had simply told lies to Court. On this point, the judge stated as follows in his judgement.

> ***"The subsequent proceedings revealed that the accused had made the charge and caution statement free of any torture, duress or inducement. The grounds for that decision were based on the evidence of the accused. He told court that he was forced to thumbprint. But later said he was seeing the statement for the first time in court. He had told court that he was stabbed so as to endorse the statement, but (PW9) Joseph Ojambo told court that when the accused was arrested on 26/12/2000, he was beaten. That on arrest he was found with other wounds on his legs and thighs and had told them that he had earlier been beaten by thieves."***

With due respect, we disagree with the above conclusion by the trial judge because it is not correct from the evidence on record.

During the trial within trial D/AIP Otim, (PW3) testified that he was in the office with D/C Sserwadda, (PW5) and the first appellant. The languages used were Lusoga and English. However D/C

Sserwadda, (PW5) testified that when the charge and caution statement was being recorded, he was translating between the first appellant and D/AIP Otim, (PW3). He used Luganda. There were other people in the office who were doing other things. The appellant testified that there were several people in the office who coerced him to make the statement and that he was forced to thumb print it.

In view of the contradictions in the prosecution evidence of how the confession statement was recorded and the obvious failure to follow the rules the learned trial judge should not have admitted it in evidence on the basis of its voluntariness. To us the possibility of the police having used violence to obtain the statement cannot be ruled out. The confession offended the provisions of section 24 of the Evidence Act (Cap 6). Additionally, D/C Sserwadda, (PW5) who had participated in the investigations, which lead to the recovery of the gun and ammunitions, acted as an interpreter. The law is now settled that the investigating officer in a case should not participate in recording a charge and confession statement from the accused.
The Supreme Court in **No.RA.780664 CPL Wasswa & Ninsiima Dan**, Criminal Appeal No.48 and 49 of 1997. (unreported) categorically stated so.
In that case, a police constable who had participated in the investigation of the case acted as an interpreter for the officer who recorded the charge and caution statement. The confession statement was held to be inadmissible in evidence.

The argument by the Principal State Attorney that the charge and

caution statement is true because it led to discovery of the gun and ammunition is not tenable. According to the evidence of D/C Wamboga Steven (PW2) and D/C Sserwadda (PW5), the gun and ammunitions were recovered after PW2 removed the first appellant from the cell and interrogated him. He admitted participation in the robbery and that they had buried the gun at Bugumba in a coffee plantation. He agreed to lead them there. He together with D/C Sserwadda (PW5) and others went and recovered the gun and ammunitions. The charge and caution statement was recorded later. It is our considered view that it could not be admitted in evidence on the basis of section 29 of the Evidence Act (Cap 6) that it lead to the discovery of a fact.

With due respect to the learned, Principal State Attorney, we do not agree with her submission that failure to follow the proper procedure in recording a charge and caution statement is a mere technicality that can be cured by article 126 (2) (e) of the Constitution. We have to compare article 126 (2) (e) of the Constitution, which provides that in adjudicating cases substantive justice is to be administered without undue regard to technicalities with article 28 of the Constitution which provides the right to a fair hearing. This right includes, among others, the presumption of innocence unless accused either pleads guilty or is proved guilty. Article 44 (c) of the Constitution prohibits derogation from the right of fair hearing.
For the foregoing reasons grounds 2 and 5 succeed.

We now turn to ground 3 which is conviction of the second appellant on accomplice's evidence without corroboration. This ground

concerns only the second appellant.

Learned counsel argued for the 2nd appellant that the trial judge found corroboration of the confession statement in the evidence of PW5. This was to the effect that the first appellant consulted the second appellant whether the gun, was in the place they had kept it. We have already held that the confession statement was in admissible, therefore, there was nothing to corroborate in order to convict the second appellant. Besides, though PW5 and PW2 who allowed the first appellant to consult the second appellant did not hear the conversation between the two. Their conversation could have been about something else. Ground 3 too succeeds.

We now consider ground 1 and 4, which are on evaluation of evidence. Counsel for the appellant criticised the trial judge for failure to properly evaluate the evidence that led to a wrong conviction of the first appellant. He submitted that PW6 did not recognise her attackers apart from Bwoya who died before trial. A search was conducted and some of the property that had been stolen was found at the home of one Nabirye. However, the prosecution did not call Nabirye as its witness. A gun and ammunitions were found hidden in some coffee plantation. However, the owner of the land did not testify. After allowing in evidence the inadmissible confession, the judge convicted the both appellants.

The learned Principal State Attorney disagreed and supported the trial judge in his evaluation of evidence. She argued that the absence of the evidence of the owner of the land where the gun was

found did not weaken the prosecution case. The arrest of Bwoya led to the arrest of others who included the first appellant. Besides, prosecution witness, Joseph Ojambo, (PW9) testified that Nabirye was the first appellant's girl friend. When the first appellant saw him on two occasions, he ran away. She submitted that this witness was not at all cross-examined on this evidence.

We appreciate the submissions of appellant's counsel on the judge's reliance on Bwoya's admission and naming those with whom he had committed the robbery. Bwoya was a co-accused and therefore an accomplice. His evidence against the first appellant required corroboration. He did not testify and was never cross-examined. Joseph Ojambo (PW9) was probably an accomplice. In his own testimony he told court that he was arrested for this very offence, but was released at the intervention of the police. One wonders why the police, which had arrested him, decided to release him. He testified that the first appellant run away on two occasions when he saw him. He was arrested after being chased. However, no one of the people who participated in the arrest of first appellant gave evidence. Additionally, the LC Chairman of the area where the first appellant hired the house and later left because of the arrest of Bwoya was not called as prosecution witness. We are of the considered opinion that if the LC. Chairman had been called, his evidence would have corroborated the testimony of Joseph Ojambo (PW9).

We appreciate that the learned trial judge observed in his judgement that the appellant told a lot of lies. However it is a cardinal principle

of our criminal law that it is the prosecution to prove the charge against the accused beyond reasonable doubt. The accused is not convicted on the weakness of the defence case but on the strength of the prosecution evidence. Ground 1 and 4, therefore, succeed.

In the result, 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 27th day of November 2008.

**C.N.B Kitumba**
**JUSTICE COURT OF APPEAL**

**C.K. Byamugisha**
**JUSTICE COURT OF APPEAL**

**S.B.K. Kavuma**
**JUSTICE COURT OF APPEAL**