THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CRIMINAL APPEAL No. 264 OF 2003

NAMANYA PETER :::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::: RESPONDENT

[An appeal from Conviction by the High Court of Uganda sitting at Mbarara (Mugamba,J).
Dated 23/1/2003 in Criminal Session case No.100 of 2001]

JUDGEMENT OF THE COURT

Namanya Peter, the appellant, was indicted for the murder of Girashebuza Emmanuel, who was his father, contrary to sections 188 and 189 of the Penal Code Act. He was convicted of manslaughter and sentenced to 14 years imprisonment.

The prosecution case as accepted by the learned trial judge was that on 30th June, 2003. Nuwagira Apolo, PW3, went out looking for his missing goats. He found an opening in the ground which was covered with a stone. He saw many flies at the spot and suspected that they were attracted by a possible stench brought by his dead goat or goats. The stone was heavy and he called his brother Mugume for assistance. When the stone was removed, there was inside a sack commonly known as (Kadeya) which contained human remains. A report was made to the relevant authorities.

The appellant together with his brothers and Turyatunga Davis and Kakye Leo, were arrested. The appellant and his brothers were arrested because, they had had misunderstanding with their father, over land matters. When the appellant was arrested, he

admitted before the local authorities that he had killed his father and had been assisted by his brothers to hide the body.

The police came to the scene with the doctor who performed a post mortem examination. The doctor's report was admitted in evidence, under section 66 (2) of Trial on Indictments Act. The report indicated that the body was in skeleton form. There was a cotton rope tied in several loops around the neck. The cause of death could have been asphyxia.

The appellant made a charge and caution statement before D/IP Gumisiriza Karinkija, PW7. In that statement, he admitted that the deceased came to attack him with a spear. He removed it from him and in the process, he fell down and died. He sought for the assistance from others to hide the body. They complied and he paid them 10,000/=. These were Turyatunga Davis and Kakye Leo. This statement was admitted in evidence after holding a trial within a trial. The appellant was charged with murder and his co-accused were charged with, being accessory to the fact of murder, contrary to section 377 of the Penal Code Act.

In his defence, the appellant denied the charge as did his co –accused.

The learned trial judge rejected their defences and believed the prosecution case. He convicted the appellant's co-accused as charged and sentenced them to the rising of the court, since they had been on remand for more than two years. He convicted the appellant of manslaughter, contrary to section 187 of the Penal Code Act and sentenced him to 14 years imprisonment.

Dissatisfied with the judgment of the High Court, the appellant has appealed to this Court. Counsel for the appellant had filed the appeal to this Court on 4 grounds, but dropped one of them at the hearing of this appeal. The remaining three grounds of appeal read: -

1. ***The learned trial judge erred in fact and in law in holding that the appellant's confession was voluntary and in admitting the appellant's extra judicial statement in evidence.***

2. ***The learned trial judge erred in fact and in law when he relied on the extra judicial statement of the appellants to conclude that the first appellant killed the deceased.***

3. ***The learned trial judge erred in fact and in law in holding that the death of the deceased had been proved beyond reasonable doubt.***

During the hearing of the appeal learned counsel, Mr. Brian Othieno, appeared for the appellant and Ms Betty Khisa, learned Senior Principal State Attorney, represented the respondent.

Counsel for both parties argued grounds 1 & 2 together and ground 3 separately and in that order. We shall handle the grounds of appeal similarly in this judgment.

The complaint by appellant's counsel in grounds 1 and 2 was about the appellant's extra-judicial statement and the evidence corroborating it.

Counsel complained that the learned trial judge erred in law and in fact when he relied on the extra judicial statement by the appellant on the ground that it was voluntary and on finding corroboration in the evidence of his co-accused's statements that were involuntarily made. He submitted that the appellant's statement was not made voluntarily. The appellant had been beaten. The co-accused had also been tortured and their statements could not corroborate that of the appellant.

Ms Betty Khisa, learned senior Principal State Attorney, for the respondent conceded that the statement of the co-accused could not corroborate that of the appellant. She, however, submitted that the appellant's statement was made voluntarily and a conviction could be based on it.

We have carefully perused the extra judicial statement which was admitted in evidence at the trial. In that statement, the appellant stated that the deceased was his father. It is true, he killed him because of their differences. On the material day the deceased

wanted to kill him with a spear. He removed it from him but in the process, he fell down and died. As the appellant was alone, he called other people who helped him to hide away the corpse.

It is our considered view that the appellant's statement did not amount to confession to murder. The appellant raised a defence of self defence which if believed entitled him to a complete acquittal.

It is our considered opinion that, as the learned trial judge believed the appellant's statement and found that there was no malice a fore thought, he should have acquitted him. Considering the circumstances of the case, the appellant's statement is true as the judge found it to be, he only pushed his attacker who had confronted him with the spear. The force used by the appellant in self defence was not excessive.

We have on record evidence from Nuwagira Apollo (Pw3) and Byabagambi Jovenal PW2 that the appellant and his brothers were arrested. They were beaten by LDUs. As a result of severe beating, they confessed that they killed their father. We are of the considered view that the appellant's admission of killing his father was not voluntary. Additionally, we do not know why the appellant's brothers and sister were released and only the appellant was charged with the murder. Further, the appellant's co-accused, too, testified in their defences that they participated in beating the appellant and his brothers at the orders of the Chairman. That they were also beaten up by the LDUs. We have taken into account all the foregoing and find that the appellant's statement was of no evidential value.

We now consider the third ground of appeal which reads: -

"The learned trial judge erred in fact and in law in holding that the death of the deceased had been proved beyond reasonable doubt."

Regarding this ground, appellant's counsel contended that the learned trial judge erred in his judgement to find that death of the deceased had been proved beyond reasonable

doubt. He argued that there was no flesh and the body was a skeleton. Pw2 testified that he identified the body of the deceased from the fingers but there was no flesh on the fingers.

In reply, the Senior Principal State Attorney disagreed and supported the learned trial judge's finding that the deceased's body was properly identified.

In his judgment the trial judge found that the body of the deceased was properly identified. He relied on the **Supreme Court Case of John Magezi Vs Uganda, Criminal Appeal No.8 of 1993.** In that case, the two bodies had identifying marks as one had a bracelet and another had a bronze tooth in the skull. We respectfully agree with that Supreme Court decision, but in the appeal before us, there was no identifying mark on the body that was found hidden in the cave. We are of the view that this appeal is on all fours with the case of **Uganda Vs Yosefu Nyabenda, [1972] 2 ULR.19.**

In that case after a search of the deceased, who had been missing from the village for ten days, a skeleton was found in the bush in the village where he had been living. Two witnesses purported to have identified the remains as those of the deceased from the belt and the pair of shorts which were found around his body and were known to belong to the deceased. These items were not produced as exhibits at the trial. The court held that the evidence of identification adduced fell short of establishing that it was the body of the deceased.

In the instant appeal, we have no conclusive evidence that the body that was found was that of the appellant's father. According to the evidence of Byabagambi Jovenal PW2, who was the LC. Chairman of the village, the appellant and his father now deceased had a lot of misunderstanding over land matters. In fact the misunderstanding was with all members of the family.

PW2, in his testimony said that when the dead body was found, the appellant and his brother were the first suspects because of the history of misunderstanding. He testified

that before the body was found, the appellant used to tell him that the deceased had gone to Rwanda. Even other members of the family, for example the

deceased's wife used to say that the deceased had gone to Rwanda. In fact the deceased had relatives in Rwanda, including two sons had gone as soldiers in 1974. This court has no evidence that deceased is not in Rwanda.

We are uneasy about the appellants' conviction because of the reasons stated above.

We find that this appeal has merit. In the result, this appeal is allowed.

The conviction is quashed and the sentence is set aside. The appellant should be set free forthwith unless, he is otherwise lawfully held.

Dated at Kampala 9th day of April 2009.

S.G. Engwau
Justice Court of Appeal

C.N.B. Kitumba
Justice Court of Appeal

C.K. Byamugisha
Justice Court of Appeal