THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

5 **CORAM:** **HON. JUSTICE S.G.ENGWAU, JA.**
HON. JUSTICE C.N.B KITUMBA, JA.
HON. JUSTICE A.S NSHIMYE, JA.

CRIMINAL APPEAL No.130 OF 2003

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1. SIRASI KIZZA alias TUMURAMYE]
:::::::::::::::::::: APPELLANTS
2. NUWAMANYA FERDINAND]

15 **VERSUS**

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

20 **JUDGEMENT OF THE COURT**

Sirasi Kizza alias Tumuramye, the first appellant and Nuwamanya Ferdinand, the second appellant, were jointly indicted for murder contrary to sections 188 and 189 of the Penal Code Act. They were convicted and sentenced to death.

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The prosecution case as accepted by the learned trial judge is as follows: - The two appellants were brothers. The first appellant carried on the business of roasting meat together with one Mujuni Remigio, who is now deceased, at the bar of one Twongyeirwe Joy (PW1) in Ishaka Town, Bushenyi District.

30 On the night of 31st November 2000, the second appellant went to the bar and informed the first appellant that their goat was sick. Both appellants requested the deceased to go with them

to the village to slaughter the sick goat. The deceased obliged but on the way the first appellant picked an axe from a nearby bush and hit the deceased on the head with it, whereby he fell down. The first appellant continued beating the deceased. In the meantime, the second appellant chased way one Namanya Pision, PW2 and another person who were walking along the same route. The deceased apparently died that very night at the spot as a result of injuries that were inflicted upon him. The two appellants took his body to their father's home and buried it there in a shallow grave. On the following morning the first appellant went to PW2's home and warned him not to tell any one what he had witnessed in the night, or else he would kill him.

When PW1 realised that the deceased was missing, she reported the matter at Ishaka Police Station and advertised his disappearance on Radio West. She also found that her radio was missing from her bar. She reported that to the police. On information received No.22675 D/SGT Katukore, PW5 learnt that the first appellant had murdered the deceased and had a stolen radio in his possession. He went to the home of the appellants' father for investigations. He found a grave covered by leaves and on further search, he found a decomposing human body. On the body there was a green T-Shirt, grey pair of trousers and black belt. He arrested the second appellant who admitted that he and the first appellant had killed the deceased with an axe. He took the witness to the place near the grave where they had hidden the axe. PW5 recovered the axe and took it as an exhibit. The second appellant and his mother were arrested and taken to Ishaka Police Station together with the decomposing body. PW1 identified the body as that of the deceased from the gap in the teeth and the clothes he was wearing on the day he disappeared.

A postmortem examination on the body of the deceased revealed that the cause of death was open head injury.

The second appellant made a charge and caution statement to Inspector Tindigarukayo, PW4, in which he implicated himself and his co-accused. The statement was admitted in evidence at the trial without objection from counsel who represented the second appellant.

In their defences both appellants totally denied the offence.

The first appellant testified that on 31st November, he left the deceased at the bar. He went home alone and did not see the second appellant on that day. The second appellant testified that he did not know the deceased and how he met his death.

5 The learned trial judge believed the prosecution case, rejected their defences, convicted them and sentenced them to suffer death.

Dissatisfied with the judgement of the learned trial judge they have filed their joint memorandum of appeal in this Court on the following grounds: -

"1. That the learned trial judge erred in law and fact when he admitted and relied on
10 ***the charge and caution statement of A2 to convict the appellants.***

2. ***That the learned trial judge erred in law and fact when he failed to adequately evaluate the evidence adduced at the trial and hence reached an erroneous decision."***

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They prayed court to allow the appeal quash the conviction and set aside the sentence. In the alternative and in mitigation, they prayed court in case the conviction is upheld to vary the sentence and substitute it with an appropriate one as the court would determine.

20 Mr. Henry Kunya, learned counsel for the appellants, argued both grounds of appeal jointly. Mr. Andrew Odit, learned Principal State Attorney, made his reply in the same manner. In this judgement, we shall handle ground I first, followed by ground 2.

On ground one counsel for the appellant complained that the second appellant's charge and
25 caution statement was not voluntarily made. The second appellant had been in police custody since 7th June and the statement was recorded on 11/6/2001.

The medical examination of the second appellant on police form 24 showed that the second appellant had wounds on his body.

According to counsel, the second appellant must have been tortured to make the confession.

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Counsel argued further that the charge and caution statement was improperly admitted in evidence by the learned trial judge as he did not inquire from the second appellant whether he objected or not to its admissibility. In support of his submission, he relied on the authority of **Sewankambo Francis and 2 Others Vs Uganda, Appeal No.33 of 2001. S.C.**

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The Principal State Attorney did not agree. He submitted that the confession by the second appellant was voluntarily made. He argued that the medical examination report contained an explanation how the second appellant had sustained the injuries and that they were, therefore, not due to torture. He further submitted that counsel for the second appellant told court that he

10 had no objection to the charge and caution statement being admitted in evidence. Since the second appellant was represented, the judge had no duty to make any further inquiry from the second appellant whether he objected to the admissibility of charge and caution statement or not.

15 We have perused the police form 24 on which the examination of the second appellant is recorded. According the superficial examination report by the police the explanation is given for the injuries .i.e. scars on the head and knees is ***"He says got them while by falling down when he is drunk. Fresh injury on the head as a result of assault case Vide SD/53/2/6/001."*** The medical officer recorded that the second appellant had three heeling wounds on the right

20 elbow which were 5cm x 2 cm. There was a healing wound on the scalp, on the left forearm and on the armpit.

The doctor recoded the appellant's explanation as follows:

"He tells me they occurred before his arrest. He was in the bar when someone pushed him and he fell on the ground."

25 This explanation tallies with one of the police. It appears to us that the appellant got the injuries on 2/6/2001 before his arrest in an assault case recorded as SD 53/2/6/2001.

The above notwithstanding, we are not comfortable with the state of affairs regarding the charge and caution statement. In the case of **No.RA 78064 CPL Wasswa and Another Vs Uganda, Criminal Appeals No.48 and 49 of 1999 S.C.,** the Supreme Court disapproved of

30 unexplained delay by the police to record a charge and caution statement from the appellant who had admitted the offence and was already in custody.

In that case the delay was for two days as the appellant was arrested on 7/12/1993 and the statement was recorded on 9/12/1993.

In the appeal before us the second appellant was arrested on 7th June 2001. According to the evidence of the arresting officer at that time, he admitted participation in the offence and showed him the axe they had used. However, the charge and caution statement was not recorded until 11th June 2001. This was a delay of five days for which no explanation is given. Though this does not make the statement inadmissible per se it is not quite correct.

The submission by the appellant's counsel that the trial judge was duty bound to inquire from the second appellant whether he accepted the charge and caution statement being admitted in evidence is correct. That is the current state of the law on admissibility in evidence of a charge and caution statement which amounts to a confession.

The Supreme Court has held in a number of authorities quoted in **Sewankambo Francis and 2 Others Vs Uganda** (supra) that where the accused has pleaded not guilty, a confession statement should not be admitted in evidence simply because his counsel has not objected to the same. The trial court is duty bound to hold a trial within a trial to determine its admissibility. In case his counsel does not object to the statement's admissibility, the judge is duty bound to inquire from the accused whether he too does not object and understands the consequences of its receiption. This is so because of the requirement of a fair trial especially the doctrine of presumption of innocence which is enshrined in Article 28 (3) (a) of the Constitution.

In the appeal before court only one witness was called by the prosecution during the trial within a trial. After his evidence in chief and the cross examination his counsel stated –

> ***"I have no objection to the statement being submitted."***

After that the Runyankole statement was admitted in evidence as exhibit P.VI and its English translation as exhibit PV.

The argument by the respondent counsel that the second appellant admitted the statement because he did not refer to it in his defence is not at all tenable. In the case of **Kawoya Joseph Vs Uganda Criminal Appeal No. 50 of 1999 (SCU),** a confession statement was admitted in

evidence because the appellant's counsel did not object to it. In his defence the appellant just kept quiet because as he put it ***"my lawyer is bent on my losing the case. I will not say anything."*** He was convicted on the strength of the confession.

This Court upheld the conviction by the High Court but on second appeal, the Supreme Court, held that the confession was wrongly admitted in evidence. The trial was held to be a mistrial.

With due respect, the learned trial judge wrongly admitted in evidence the charge and caution statement by the second appellant. He was, therefore, wrong to base the appellants' conviction on it.

Ground 1, therefore, succeeds.

We now turn to ground 2, in which the complaint by appellants' counsel is that the learned trial judge did not evaluate the evidence properly.

Appellant's counsel contended that a part from the charge and caution statement, there was no other evidence to sustain the conviction. He submitted that the body which was discovered six months after the disappearance of the deceased was not proved to be his, as it was not identified by an expert.

The radio which was found with one Enos was hearsay evidence and could not be the basis for conviction of the appellants.

The Principal State Attorney supported the learned trial judge's evaluation of the evidence. He submitted there was enough circumstantial evidence to prove the offence.

Firstly, the body of the deceased was properly identified by PW1 from a gap in his teeth and the clothes he was wearing.

Secondly, the testimony of PW2 proved that it is the appellants who murdered the deceased.

We are a first appellate court and as such we have the duty to re-evaluate the evidence and come to our own conclusion whether or not the finding of the trial court can be supported by the evidence on record. We have to take into account the fact that we neither saw nor heard the witnesses testifying. See. **Pandya Vs R [1957] 336 and Bogere Moses & Another Vs Uganda Cr. Appl. NO.1 of 1997 SC.** (unreported).

In his judgement the learned trial judge found that the body was properly identified as that of the deceased by Joy Twongyeirwe (PW1). That she recognized the remains to be that of the deceased because of the gap in the lower teeth which was similar to that of the deceased, the grey pair of trousers, the black belt and the green T. Shirt, he wore on the day he disappeared.

5 A part from the evidence of PW1, there is other evidence on record which proved that the body which was exhumed by D/SGT/ Katokere (PW5) was that of the deceased.

According to his testimony during his investigation, he came, a cross a decomposing body buried in shallow grave. It was at the home of the appellants' father. He exhumed the body in presence of one Bamugeya Gaburieri (PW4) who was the chairman of the Local Council I,

10 Bwegiiragye cell and other people. The body had on its body a sweater and a green T-shirt inside the sweater. The sweater and T-shirt were exhibited at the trial as exhibits P.VI. He arrested the second appellant and his mother and took them together with the decomposing body to Ishaka Police Station, where it was identified by PW1.

Nuwamanya Pision (PW2), who saw the deceased at the bar on the evening he disappeared,

15 testified that he was wearing a green T-shirt.

In our view, it can not be a coincidence that the decomposing body, which PW5 found in shallow grave had on it similar clothes as those, PW1 and PW2 saw Mujuni Remagio, wearing on the day he disappeared.

It is our considered opinion that the decomposing body that was found by PW5 and identified

20 to the doctor by PW1 was that of Remigio Mujuni, the deceased.

We, therefore, entirely agree with the finding of the trial judge that the body of the deceased was properly identified as that of the deceased, as the evidence on record was sufficient to prove so.

25 In order to prove that it is the appellants who killed the deceased, there are the following pieces of evidence.

When PW5 arrested the second appellant after discovering the body at their home, he told him that the first appellant hit the deceased with an axe on the head and the deceased died instantly.

30 Then he took him to the place where they had hidden the axe and he recovered it in the neighbourhood where it was buried.

In this statement the second appellant implicated himself as well as the first appellant. He led PW5 to where they had hidden the axe. The statement was a confession and it led to discovery of fact. It was properly admitted in evidence according to section 29 A of the Evidence Act. Additionally, Niwamanya Pision (PW2) testified as follows.

5 ***"I know both accused persons. I know the names of Sirasi (A1) and Nuwamanya (A2). They are from my home village. Mujuni Remigio, I saw him in 2000. I found him at a bar. I had gone there to see the two accused. Remigio was selling in a bar belonging to Joy. This was at about 11 p.m. I do not recall the date.***

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A2 came and told A1 that the goat they had was not well. He said they should go to the village and slaughter it. I went with the two accused and another man called Pascal. We were with the deceased also. My friend and I went ahead of them we heard some sound. Deceased and accused persons were behind us.
15 ***There was a distance of 10 metres between us and those behind. It was dark. When I looked behind us, I saw someone had fallen. It was the deceased Mujuni. A1 and A2 were nearly beating deceased. I heard the sound but I did not see how deceased was being beaten. A1 was the one beating deceased. I did not see what A1 used to beat deceased. I knew he was beating him because I***
20 ***heard that sound of hitting. A2 chased us away using a stick. We had a torch. The torch was on. I do not know why he chased us away. He chased me and Paskari. The stick was I metre long roughly. Then we went home.***

In the morning A1 came to our village Bwegiragye and said that he would kill
25 ***me if I disclosed anything. He did not want me to disclose that he had beaten Mujuni. I kept quiet."***

To us PW2 was an eye witness who saw the appellants hitting the deceased. He and his friend were chased away. The following day the first appellant went to his home and warned him not
30 to tell any one what he had witnessed, otherwise he would also be killed. In our view, this is irresistible circumstantial evidence pointing to nothing else but the guilt of the appellants.

We do not appreciate the argument by the appellant's counsel that the fact that PW2 did not tell anybody about what had happened for six months makes his evidence incredible or suspect. The witness was threatened that he would be killed in case he revealed to any body what he had seen the previous night. He had seen the deceased being assaulted and that deceased was longer seen in the village. He must have taken the threat seriously and kept silence so as to preserve his own life.

When Mujuni Remigio disappeared the first appellant told Joy Twongyirwe (PW1) that he had heard a rumour that the deceased wanted to go to his village and get married.

That he had seen him buying dry cells and could have taken PW1's radio to the village.

However, later on when the radio was found, the first appellant claimed it to be his own. This very radio was identified by PW1 as her radio which went missing on the day, the deceased disappeared.

All these were lies and in our view coupled with their defences which were also lies corroborated the prosecution case.

There was sufficient evidence to convict the appellants of the offence of murder. We, therefore, uphold their convictions for the offence of murder.

Counsel for the appellants submitted alternatively and in mitigation of sentence. He prayed court that in case the conviction of murder is upheld the sentence of death should be set aside and substituted with a custodial sentence. He submitted that the appellants were first offenders. The first appellant was aged 29 years and the second appellant 40 years old and had a child.

Mr. Odit prayed court to maintain the sentence.

We listened to submissions of both counsel in mitigation and perused the record. We are of the view that the appellant brutally murdered the deceased and planned this heinous murder. They deserve no mercy. We find no good reason to vary the sentence of death that was passed by the learned trial judge.

In the result, this appeal is devoid of merit.

It is accordingly dismissed.

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Dated at Kampala this 6th day of August 2009.

S.G.Engwau

JUSTICE COURT OF APPEAL

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C.N.B Kitumba

JUSTICE COURT OF APPEAL

15 **A.S.Nshimye**

JUSTICE COURT OF APPEAL