

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CASE NO. HCT-00-CR-SC-0070-2002.**

UGANDA:.....PROSECUTOR

VERSUS

MAJOR GENERAL YUSUFU GOWON}.....ACCUSED.

AND OTHERS. }

BEFORE: HONOURABLE MR. JUSTICE MOSES MUKIIBI:

RULING:

AISU VICTOR (PW8) was giving his evidence in chief as the eighth prosecution witness in the main trial. He identified a statement written in Lugbara language which was attributed to Nasuru Gille (A2). The learned Counsel for the state Mr. Byakama Mugenyi applied to have the Lugbara statement tendered in evidence as an exhibit. Mr. Nyakaana, learned Counsel on State Brief for Nasuru Gille (A2) objected. He submitted that the Lugbara statement was not voluntarily made by Nasuru Gille (A2). He submitted that it had been obtained after exerting force and threats to Nasuru Gille (A2). He submitted that the accused had signed a Pre-prepared text. This Court decided to hold a trial – within a trial to determine the voluntariness and admissibility of the said statement.

For the trial within a Trial the prosecution called four witnesses, namely:
No. 28059 D/CPL. Waigo Williams (PW1);

D/SP AISU Victor (PW2); D/IP Draku Awuziya Kazimillo (PW3) and Dr. Nsereko – Mukasa, a police Surgeon (PW4). On the other hand Nasuru Gille (A2) gave affirmed evidence.

I have considered the provisions of Section 24 of the Evidence Act. I have also perused an English Translation of the Lugbara statement which was admitted in evidence in the main trial as Exhibit P2. I did so because it is necessary for purposes of the provisions of S. 24 of the Evidence Act to determine whether or not the inquiry and caution statement in question amounts to a confession.

A confession connotes an un equivocal admission of having committed an act which in law amounts to crime, and must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.

See: Uganda V. Yosamu Mutahauzo (1988-90) HCB 44.

The true test is whether the statement is such that in the absence of any explanation or qualification, and in the Particular circumstances, it points clearly to the guilt of the maker.

See: ALLI V.R (1971) E.A 75 (CA) at P.76 “H” – “I”.

The accused is indicted jointly with two others for:

- (i) Murder contrary to section 183 of the Penal Code Act; and

Alternatively,

Kidnapping with intent to murder contrary to Section 235 (1) (a) of the Penal Code Act.

A perusal of Exhibit P.2 – the English Translation, showed that the statement covers facts which are essential for proving elements of the offences for which the accused was indicted.

In my view the statement passes the test for a confession. Consequently, the provisions of Sections 24 and 25 of the Evidence Act apply to it.

In my view it is not in doubt that the Lugbara statement was made whilst Nasuru Gille (A2) was in the custody of a police officer. Nor is it in dispute that Draku Awuziya Kazimillo (PW3) was an Inspector of police and therefore qualified under S.24 of the Evidence Act to handle a confession statement.

I now turn to consider the Provisions of Section 25 of the Evidence Act.

The issue in every case where the admissibility of a statement or confession is in question, whether taken by a magistrate, or by a police officer, is whether the statement was voluntary in the sense that it has not been obtained by force or threats or hope of advantage exercised or held out by a person in authority.

See: *Nayinda s/o Batungwa V.R (1959) E.A 688 (CA)* at P.692 “F”.

No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement.

See: *R.V.VOISIN (1918) I.K.B. 531 At P.537 (Court of Criminal Appeal)*.

The onus is always on the prosecution to prove the admissibility of any statement by an accused person. Such onus never shifts to the accused. The prosecution has to prove the admissibility of the accused’s statements beyond reasonable doubt.

See: *RASHID AND ANOR. V.R (1969) E.A 138 (CA)*.

In the instant case *NASURU GILLE (A2)* gave affirmed evidence to this effect:-

He was arrested on 21.4.2001, a Saturday, at 9.00am. He was arrested by CPL. Waigo and Alfred Olijabo.

When he was being arrested he was told the reason for his arrest. He was detained in police cells at Arua Police Station. Nothing happened to him. From Arua police station to the Airfield he

was placed under a seat on the pickup. Police sat on the seat while he was made to lie underneath. While he was waiting for the plane Olijabo told him to speak the truth. Olijabo threatened him that if he did not he would be killed. He was feeling very hungry. At Entebbe he asked D/CPL.Waigo to allow him to ease himself. Waigo told him to wait for Olijabo. He was made to ease himself with the handcuffs on.

They were picked by Muhumuza's vehicle. He was brought to CID Headquarters on Sunday, 22/4/2001. CPL. Waigo took him to Aisu's office. In the office there was Alfred Olijabo, Muhumuza and Aisu. Aisu started talking to him. Olijabo urged him to speak the truth. Aisu ordered that he should be detained. He was taken to Jinja Road Police Station. He was detained in police cells. He was still very hungry.

On 23/4/2001 he was brought back to CID Headquarters. D/CPL.Waigo took him to Aisu's office. There was Muhumuza, Olijabo and Aisu. Aisu ordered him to sit on the floor. Aisu asked him about the allegations. He did not respond. Olijabo told him to speak the truth. He said that it was not him (Nasuru Gille) whom they wanted; it was GOWON. He (Nasuru Gille) went to Draku Awuziya's office with Alfred Olijabo and CPL. Waigo. Draku Awuziya asked the other people to leave the office. Three people remained: Nasur Gille, Olijabo and Draku Awuziya. Draku Awuziya pulled out a file and he started reading what was in the file. Draku Awuziya read in English. Olijabo translated into Lugbara. Draku Awuziya gave him papers to sign. Olijabo said that he (Nasuru Gille) should not take the matter lightly; that the person who had died was related to the President. Olijabo threatened that if he did not sign he would die. He pulled out a pistol. Nasuru Gille was still hand cuffed. One hand was freed for him to sign.

In response to Cross-examination Nasuru Gille (A2) testified as follows:

He knew Olijabo. Olijabo was working in State Research. He was coming from Terego. He (Nasuru Gille) came to know Olijabo in 1971. Olijabo told him that he should admit. Draku Awuziya never talked to him (Nasuru Gille) about the statement. He just gave him a statement to sign. He signed Nine times.

Both Counsels invited me to look at the English Translation – Exhibit P.2. They referred to a date appearing there in towards the end of the statement. I now quote the sentence:

“From that day, it was only on 23/4/2001 at the CID headquarters when I was told that I had been accused of murder and made me to make this statement”.

In my view the above statement would appear to agree with the testimony of the accused that he was taken to CID Headquarters on 23/4/2001. The accused said that they left Arua on 22/4/2001. I believe the accused on this point.

This would in consequence make D/CPL. Waigo a liar: about the date when he went to ARUA and when he brought Nasuru Gille to Kampala. D/CPL.Waigo lied about Mr.Aisu offering the suspect (Nasuru Gille) a chair. Aisu (PW2) told court that the suspect was seated on the floor. D/CPL Waigo told court that he left Aisu alone with the suspect. Aisu (PW2) told court that he was in the company of D/CPL.Waigo when he talked to Nasuru Gille. Nasuru Gille (A2) testified that he found in the office (of Aisu) Muhumuza, Olijabo and Aisu. He said that later Waigo was summoned to come and take them to Draku Awuziya’s office. This would imply that D/CPL. Waigo had not been present when Aisu was interviewing the accused. Why then, should Aisu have said that he was in the company of D/CPL. Waigo?

On the other hand why would the accused say that D/CPL.Waigo was summoned if he had been in attendance all the time?

In my view, Aisu was not alone in his office. He would have easily said so. The accused and D/CPL.Waigo have said that the latter was not present. This leaves a mystery as to who was with Aisu.

D/CPL.Waigo lied when he said that after Draku Awuziya (PW3) had finished writing the statement he called him on intercom. Draku Awuziya told court that after the statement he escorted the suspect to the office of D/CPL.Waigo, and that he handed over the suspect and the police file. The accused also said something to this affect. It was not until D/CPL. Waigo was Cross-examined that he disclosed that he had traveled with Olijabo to Arua. However, he said that he did not go with Olijabo to trace Nasur Gille, the suspect. The accused told court that he came to know Olijabo in 1971. By 2001 the accused had known Olijabo for 30 years. I do not think that he could have mistaken Brian Atibu for Olijabo. D/CPL.Waigo told court that he came

back from Arua on the plane with Olijabo. Aisu Victor told court that police sources such as Olijabo were not employees of Uganda Police.

The question which remains unanswered by the prosecution is this:

If Olijabo was not required to trace and arrest Nasuru Gille why did D/CPL Waigo have to go with him to ARUA?

Who met the bills for Olijabo's travel?

The accused told court that when he asked D/CPL.Waigo to allow him to go and ease himself he (Waigo) told him to wait for Olijabo. In my view Alfred Olijabo was powerful during the Police investigations and he played a role which the prosecution witnesses were not willing to disclose

D/CPL.Waigo told court that from Entebbe they travelled in the complainant's vehicle up to CID Headquarters. The accused testified to the same effect. The question is:

Where did Olijabo and Muhumuza go when they reached the CID Headquarters?

The accused said that they went to Aisu's office. D/CPL. Waigo and Aisu contradicted each other on who was in Aisu's office. I prefer the accused's evidence on this point.

The accused told court that Olijabo told him to speak the truth; that it was not him (Nasuru Gille) whom they wanted but GOWON. Learned Counsel for the state Mr. Byabakama Mugenyi had this to say during his submissions:

"If it was true that the accused was told that the police only wanted to get Gowon through him, and if it was believable, it would amount to inducement". Counsel invited court to look at the body of the statement. He posed the questions:

"Is it credible that the accused is being used to get to Gowon? Is it thinkable that he could put himself in the thick of things? Would the accused implicate himself if he was not involved?"

At this stage the court is not required to asses whether or not the confession is true. That stage comes much later.

The court has to consider if the inducements to which the suspect/accused was subjected were made in such circumstances and were of such a nature as to be likely to cause an untrue admission of guilt to be made.

The accused told court that he went to Draku Awuziya's office with Alfred Olijabo and Waigo. He said that Draku Awuziya asked other people to leave the office and only three people remained:

The suspect (accused), Olijabo and Draku Awuziya. I should point out that it did not come out from the prosecution witnesses: Aisu Victor (PW2) or Draku Awuziya (PW3) that it was the accused's idea and offer to confess. Aisu told court that he spoke to Nasuru Gille for about one hour. Nasuru Gille was seated on the floor. Aisu said that it was a sign of police authority. It was Aisu who instructed D/CPL.Waigo to take the suspect to Draku Awuziya (PW3) to record a charge and caution statement. On the other hand Draku Awuziya did not record anywhere on the statement the preliminary steps which he took to satisfy himself that the suspect did not have anything working on his mind.

Draku Awuziya (PW3) told court that D/CPL.Waigo handed over to him a police file. In response to cross-examination the witness said:

"D/CPL.Waigo told me that Gille was one of the suspects in the case of Anyule. I recorded Anyule's statement. I knew what Anyule had told me. I knew that Anyule had mentioned Gille in his statement. I knew what Anyule had said about Gille".

In his evidence – chief Draku Awuziya (PW3) told court that the suspect signed below the inquiry and caution. Then he said:

"After that Gille told me the full story of what happened. He told me all what he knew about the death of Laki. I listened to what he told me first, and thereafter I recorded a statement of what he had told me. I heard the full story. Thereafter, we sat down together and started writing".

Commenting on this evidence Mr. Byabakama Mugenyi said:

"He did it in a very Un Orthodox way. He heard the story first. Then they went back and he started recording the statement. ----- The proper way is that Draku Awuziya should have recorded the story sentence by sentence as the suspect narrated it to him". Then learned Counsel posed the question: "Does the statement contain Draku Awuziya's words or the accused's words?"

Learned Counsel for the State then submitted as follows:

“If Draku Awuziya is to be believed he said that he recorded what the accused told him. Later he read the statement back to the suspect.”

Draku Awuziya (PW3) testified as follows:

“I read back to him in Lugbara what I had recorded. I asked him whether he understood what I had read back to him-----”.

The English translation (Exhibit P.2) has the following statements:

“I have read this statement and it is correct as stated.

I have recorded this statement myself and the person who has made this statement has read it and signed here under”.

In my view the two positions are inconsistent and I consider the inconsistency to be major.

Learned Counsel for the State posed the question: “Was the accused made aware of the contents of the statement before he signed?”

The accused testified as follows:-

“Draku Awuziya brought before me some papers to sign. He did not tell me what was in those papers. He told me not to worry; that he was a Lugbara like me; he could not make me sign something bad”.

I now pose the question:-

In what way was the accused made aware of the contents of the statement before he signed it?

The answer to this question is found in the contradiction between what Draku Awuziya testified in court and what he wrote in the statement itself. I find it very difficult to believe Draku Awuziya in those circumstances.

The prosecution has to prove the admissibility of the accused’s statement beyond reasonable doubt. Such onus never shifts to the accused.

In this case I am of the view that the Lugbara statement in question was not properly recorded. Learned Counsel for the State referred to the manner in which it was recorded as Un Orthodox. I find it difficult to say with certainty that these are the accused’s words but these are Draku Awuziya’s words. In my view the statement was rendered open to inclusion of foreign matter at

the instance of Draku Awuziyya (PW3). On this ground alone I should reject the statement. I also find that Alfred Olijabo played a clandestine but important role in the police investigations, and particularly in the arrest and bringing of the accused to Kampala. Since the prosecution witnesses did not on their own come out clean to disclose Olijabo's exact role a lot is left as to conjecture.

A lot of doubts are left as to his role in bringing the accused to record the Lugbara statement. I cannot determine with certainty what Olijabo did not do. The prosecution witnesses have not assisted in clearing the doubts raised by the accused's evidence. I hold that the prosecution has failed to discharge the onus of proving that the Lugbara statement was voluntary. I uphold the objection by learned Counsel Mr. Nyakaana. In the result I reject the Lugbara statement and order that it should be excluded.

MOSES MUKIIBI

JUDGE

20/8/2003.

20/8/2003 at 4.30 pm.

Mr. Byakama Mugenyi for State.

Mr. Nyakaana- on SB for A2 and also holding brief for Mr. Alaka for AI.

Mr. Katongole on SB for A3.

AI, A2 and A3 are in Court.

Both Assessors are in Court.

Swahili and Lugubara Interpreters are in Court.

Ngobi: Court Clerk/Interpreter.

Court: The Ruling is delivered in Open Court.

MOSES MUKIIBI

JUDGE

20/8/2003.