IN THE COURT OF APPEAL FOR UGANDA

AT KAMPALA

(Coram: Saied, C.J., Nyamuchoncho, J.A., Ssekandi, J.A.)

CRIMINAL APPEAL NO. 23 OF 1977

BETWEEN

AMISI DHATEMWA ALIAS WAIBI ..... APPELLANT

AND

UGANDA …….. RESPONDENT

(Appeal from a conviction and sentence
of the High Court of Uganda at Jinja
(Butagira, J.) dated 12th October, 1977
in
Criminal Session Case No. 123 of 1977

JUDGMENT OF THE COURT

SSEKANDI, J

The appellant, Amisi Dhatemwa alias Waibi, was convicted on 13th October, 1977, by the High Court sitting at Jinja, of the murder of Silvesteri Kittambo on 12th October, 1975 at Mpumudde village in North Busoga District the prisoner now appeals to this Court against both conviction and sentence.

The appellant and the deceased were brothers. On the day of the murder both attended a beer party at the home of Takute (P.w.6) and drank local beer. The party started at 12.00 noon. They left the beer party at about 8.00 p.m. The following morning the body of the deceased was found lying on a path near the road to Mpumudde.

The facts accepted by the learned, trial judge in this case were that the appellant was seen that evening by Wankya (P.W.7) walking from his home carrying an axe. Wankya followed the appellant and from a distance of about 50 yards, he heard a sound of cutting and something falling down. He went near but the appellant got hold of his collar and asked him not to mention anything of what he had seen; Wankya replied that he saw nothing.

He pushed him down and ordered him to go back to his house. Wankya went back home. At night the appellant visited Wankya's home twice, Wankya refused to open for him. The following day he went to where he had heard the Sound of cutting and there he found the body of the deceased. It was on a path near a mango tree. Wankya went and informed the chiefs that he had seen the appellant the previous evening near where the body was lying. The chiefs went with him to the home of the accused but the accused was not present. The house of the accused was searched by the mutongole chief and a blood stained axe was recovered from that house. Wankya identified the axe as the one he had seen the previous evening with the accused. This axe was tendered as an exhibit at the trial.

The body of the deceased was first found by Bwamiki (P.w.5), at about 7.00 a.m. He reported the matter to the village chief and subsequently the police were called to the scene. The police took the body to Jinja Hospital. We do not know what happened after this except for a statement from the Bar by the prosecutor that the body was examined by a doctor but he could not be traced to give evidence at the trial. We think that the report could have been tendered in evidence in accordance with s.30 of the Evidence Act, if there was evidence that the doctor had left the country or that the attendance of the doctor could not be procured without an amount of unreasonable delay or expense.

The evidence relied upon by the learned trial judge with regard to the state of the body when it was found that morning was giver by Tatuke (PW 6), Wankya (P.W.7) and Detective Corporal Mugerwa (P.W.8). Tatuke testified that he learned of the death of the deceased on the Morning of 13th October, 1975 the day after the party. He went to the scene where he found the body of the deceased in a pool of blood.

It had a cut wound on the back of the head and near the right ear. Wankya testified that he saw two deep cut wounds on the head caused by a sharp weapon. D/Cpl. Mugerwa said that he saw “two large wounds near the left ear and the right ear, on the head”.

A confession alleged to have been made by the appellant to a magistrate before the trial was also tendered in evidence. This confession was admitted following a ruling by the trial court that it had been made by the appellant and that it was voluntary. The appellant objected to its admissibility on the ground that it had been prepared by the magistrate from a statement he had made to the police. He alleged that the police beat him before he made the police statement. In this statement the accused is alleged to have told the Magistrate, who recorded it, that, at the beer party the deceased initiated a quarrel with him. The quarrel was over the deceased’s daughters whom the appellant had given away in marriage. The deceased abused him and then left the party. The appellant also left the party. He found the deceased waiting for him on the way. A fight broke out and the appellant ran to his home. He picked up what he thought was a stick but which turned out to be an axe. He ran to where he had left the deceased and, in the heat of anger, he cut the deceased in the middle of the head and on the side of the ear. He then ran to his home. The following day he went back to where he had cut the deceased. He found that the deceased had already died. Out of fear he bid himself in the bush. After sometime, he went to his father’s home but his father advised him to surrender himself to the chiefs. On 15th October, 1975 the chief went and arrested him at the home of his father.

The appellant gave a short unsworn statement at the trial. He said the case against him had been fabricated, He testified that he returned from Namaganga on 13th October, 1975.

He found his young brother had already been killed. On 15th October, 1975 the mutongole chief arrested him and took him to the gonbolo1 headquarters. From there he was taken to the police. The police started beating him hut ho denied killing his brother. A blood stained axe was then produced. He told the police that the axe was his but he had used it to cut meat.

Mr. Ayigihugu who represented the appellant in this appeal Complained that the learned trial judge erred in relying on the evidence of the axe to convict the appellant especially as there was no medical evidence to prove that the injuries on the deceased were consistent with the use of an

axe. He also submitted that the confession was wrongly admitted in evidence as no proper trial was held to determine the admissibility of that confession. Mr. Ayigihugu made other complaints about the judgment generally particularly with regard to the burden of proof which we do not consider material. We are of the view that the first two grounds of appeal are the most pertinent to this appeal.

The main evidence against the appellant was essentially circumstantial. The learned trial judge relied on four main pieces of evidence. First, that the deceased was last seen alive with the appellant when they both left Tatuke's home at about 8.00 p.m. after a beer party. Secondly, that Wankya saw the appellant carrying an axe that evening and heard noise of cutting at a place where the deceased's body was found the following day with cut wounds on the head. Thirdly, that the axe seen with the appellant was recovered from his home and it was blood stained. Fourthly, that the cut wounds seen on the body were consistent with the usage of a sharp weapon and caused the death of the deceased.

With regard to the cause of death, we said earlier that there was no post-mortem in this case to prove that the deceased died from the injuries seen on the body by the witnesses. We think that where medical evidence as to the cause of death exists it must be adduced in evidence. In this case the learned trial judge was of the view that there was abundant evidence to prove that the deceased sustained deep cut wounds and that he died from these wounds. He relied on Waihi vs Uganda, (1968) E.A.278. In Waihi's case the body was exhumed for an autopsy but the doctor could not find any injuries as it was already decomposed. There was, however, abundant other evidence particularly from the confession made by the accused persons to prove that the deceased had met a violent death. The body was found buried. It was fully clothed and enclosed in a sack. There was a strip of elastic wound tightly, but knotted, round the neck and the hands were tied behind the back. The sack was itself tied with ropes. The trial court and the Court of Appeal were satisfied that the evidence pointed to n unlawful killing.

In the instant case, the prosecution was in possession of the autopsy report which was not produced for reasons we find extremely unsatisfactory. There evidence in a case exists, especially medical evidence, and the prosecution does not produce it, it may be a sign that such evidence is not favourable. We do not know what were the findings of the doctor regarding the

state of the body nor do we know what was the cause of death. We think that the decision in Waihi must be restricted to the peculiar facts of that case. The case ought not to be used indiscriminately to fill gaps in the prosecution case. In Waihi there was medical evidence albeit inconclusive.

However, there is no dispute that the person named in the indictment, Silvesteri Kittambo, is dead. His body was seen by many witnesses on the morning of 13th October, l975. It had deep cut wounds on the head. The central issue in the present case was whether it was the appellant who killed the deceased.

The chain of circumstantial evidence implicating the appellant revolved around the blood stained axe found in his home the day after the deceased was killed. Wankya testified that he saw the appellant with it at the material time the deceased is alleged to have been killed. The trial court found that that axe was used to inflict the cut wounds seen on the body.

It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial, See: R vrs— Tailor, Wever and Donovan. 21 Cr, App. R. 20. However, it in trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other e co-existing circumstances which would weaken or destroy the inference. See: Teper —vrs— P. (1952) A.C. 480 at p 489 See also: Simon Musoke —vrs— R (1958) E.A. 715, cited with approval in Yowana Serwadda —vrs— Uganda Cr. Appl. No. 11 of 1977 (U.C.A).

The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of circumstantial evidence is only as strong as its weakest link. The weak link in this case is the issue of the axe produced at the trial as the murder weapon. Considering the extent of the injuries seen on the body of the deceased by the witnesses the axe, which was used, if an axe was used at all could not but have been carried the blood of the deceased. A blood sample of the deceased appears to have been taken from the body and tested by the analyst. It was grouped ‘C’. In the

absence of the autopsy report we do not know who extracted it and that evidence was clearly of no evidential.

The axe which was produced at the trial was tested for blood by the Government analyst but the results of that test were negative. The appellant explained that the blood seen by the witnesses on the axe soon after it was found in his house was from cutting meat. There is no evidence to show that the test carried out by the analyst was for human blood or that it was for blood in general. The prosecution attempted to explain these results on the ground that since the smear on the axe was tested on 24th August, 1976, almost a year after, the analyst could not have possibly found any traces of blood. The explanation arrears to have found favour with the trial court. We are unable to support that view in the absence of expert testimony to the effect that traces of blood on an article cannot be determined effectively after a period such as the one in this case. We doubt that the negative results obtained by the Government Analyst were due to lapse to the time. The explanation offered by the appellant regarding the bleed seen on the axe by the witnesses was not, therefore, disproved. As a result, it was not proved that the axe recovered from the appellant's house and which Wankya claimed to have seen with the appellant on the evening of 13th October, 1975 was the one used to cut the deceased. The effect of all this is that the circumstantial evidence implicating the appellant with the offence charged was of the weakest kind and was, in our view, by itself insufficient to found a conviction.

We now turn to the confession statement. This statement was relied upon by the trial court to lend credibility to the circumstantial evidence. With respect, we think this statement was wrongly admitted in evidence. We agree with Mr. Ayigihugu that a proper trial was not conducted before the statement was admitted in evidence. The accused raised objection to the admissibility of statement on the ground that the magistrate who was alleged to have recorded it had merely copied down a statement extracted from the accused by the police through beating.

The prosecution called a court clerk, Musenze, who gave evidence in—chief and identified the statement. Learned counsel for the accused raised his objection to the statement before the cross —examination. This was wrong. The objection should have been raised before the witness gave his evidence. At any rate the trial judge decided at that juncture that a trial within a trial should be held. But the prosecutor stated from the Bar that the witness he intended to call in the trial

within a trial had already given evidence that is Musenze. The record shows that the court then instructed the defence counsel to cross— examine Musenze. He was cross—examined on all the material issues which the defence relied upon for its submission that the statement was inadmissible. The accused was then put on the stand. He stated on oath that he was beaten by the police and forced to make a statement before he was taken to the magistrate. When he went before the magistrate, he was only asked to thumb print the statement made to the police. The learned trial judge then made a ruling that the accused had made the statement identified by Musenze and that he made it voluntarily to the magistrate who recorded it. The statement was then produced as an exhibit by Akongo, the magistrate to whom the statement was made.

It is noteworthy that the magistrate was not called in the trial within a trial and no explanation for this omission appears on the record. The magistrate was called after the ruling admitting the statement. As a result of what happened the only witness called in the trial within the trial was the accused himself. It would therefore, appear that the burden was shifted on him to prove that the confession statement was not admissible. The situation appears to be somewhat similar, though not quite, to what happened in Rashid vrs Rep. (1969) E.A. 138 and Ezekia vrs Rep (1972) E.A. 427, where similar.

The burden to prove that a retracted or repudiated confession statement is admissible is of course on the prosecution. Such onus never shifts. Consequently, the prosecution must produce evidence to show not only that the statement was made by the accused but also that it was voluntary.

Once an accused raises objections to the admissibility of a confession, it is the duty of the trial court to carry out a full inquiry into the circumstances in which the alleged confession statement was made and to make a ruling as to its admissibility. The inquiry which the court ought to make must be in the form of a trial. The proper procedure laid down in numerous decisions of which Kinyori s/o Kiruditu—vrs- Reg. (1956) ACI 480 is just one and still the best known, was not followed in the instant case. The only difference introduced by the Trial on Indictments Decree is that the assessors need no longer retire when the trial within a trial is being held and that their opinion can now be taken with regard to the allegations of the accused that the statement was obtained through improper means.

The purported trial within a trial which was held in this case was in our view defective. The court clerk who was called to identify the statement gave his direct testimony in the main trial. We think that the evidence given by the court clerk in the main trial was not evidence in the trial within a trial. That testimony was wrongly relied upon in the ruling admitting the statement. Besides, the magistrate to whom the statement was made was not called in that trial. He was only called after the ruling holding the confession admissible. The magistrate ought to have been called in the trial within a trial to prove the confession, especially as the accused made damaging allegations against him that he did not record any statement from the accused but merely copied a statement the accused had previously made to the police.

Mr. Byaruhanga, the Senior State Attorney who appeared to justify the procedure followed by the trial court; at least, we understood him to say something to that effect. He submitted that the clerk was the right person to be called to prove the statement because he was the interpreter and the accused spoke to him and not to the magistrate, with respect to Mr. Byaruhanga, we are unable to agree with his submissions for three reasons. First, the statement tendered in evidence was recorded in English and not in the language used by the accused which we note from the record was Lusoga. Secondly, it was recorded by the magistrate and not by the court clerk although admittedly the clerk acted as interpreter. Thirdly, it is trite law that an extra—judicial statement must be proved by the person to whom it was made and it is that person who should be called to prove that it was that it was freely and voluntarily made. This rule was laid down as far back as 1938 in Rex —vrs— Jambi (l938) 5 EACA and has been followed over since. We hold the view that this rule should continue to be followed.

If the confession is excluded from the evidence, as indeed it must having been wrongly admitted, the other evidence in this case was insufficient by itself to prove the case of murder against the appellant. The remaining evidence is that of the chief who recovered the axe from the house of the appellant; Wankya who claims to have seen the appellant at the scene the night of the murder in circumstances which would tend to implicate the appellant; and Tatuke who saw the deceased last, alive, in the company of the appellant. The force of incriminating circumstances arising from the Chief and Wankya depends on the axe which alone would tend to connect the appellant with the offence charged. Once the evidence of the axe is discarded, then the link in the chain of circumstantial evidence, which was relied upon to infer guilt, is greatly weakened f not

destroyed. The most favourable view to be taken of the remaining evidence is that it casts suspicion on the appellant, but suspicion alone is not sufficient in a criminal case in the absence of other evidence pointing to guilt. Besides, it seems to us that the evidence of Tatuke that the deceased and the appellant left the party on good terms after a drinking spree of over six hours, is more favourable to the appellant, as it eliminates an possible motive for committing the crime.

The other evidence relied on in this case was the conduct of the appellant subsequent to the death of his brother. The trial court found as a fact that he disappeared from his house suddenly, after the death of the deceased, until he was arrested. Relying on the case of Terikabi —vs Uganda (1975) E.A. 60, the learned trial judge held that conduct of the appellant cast Suspicion on him and was capable of amounting to corroboration. With respect, we do not think that Terikabi is applicable in this case. The facts in that case were that the prisoner disappeared from his home soon after the deceased was killed and stayed away for over four months. The evidence here is that the appellant was arrested at the home of his father on 15th October, 1975. There is no evidence that, apart from searching for him at his house on 13th October, 1975, the chiefs even went to look for him at his father's house. We do not even know how far apart both houses were Besides, we do not think any adverse inference possibly flows from the appellant's visit to his father in the circumstance of this case, especially when the evidence upon which the prosecution relied as implicating him appears unconvincing for the reasons which we have endeavoured to give. He could have gone to his father for a host of innocent reasons. In the circumstances, we think that the exceptional conditions which led to the decision in Terikabi were not present in this case. That case must be confined to the peculiar facts. We do not think, with respect, hat it can be of universal application.

In conclusion, it is our considered opinion that the evidence in this case is not such as to produce moral certainty of guilt to the exclusion There may be reason to suspect the appellant, but we do not think it can be said that his guilt was proved beyond reasonable doubt. There is no Suggestion of any motive. The learned trial judge treated as inculpatory evidence which was not. Finally, evidence of the confession was improperly admitted which was highly prejudicial. Taking all these factors together, we do not think that it would be safe to allow the conviction to stand.

Accordingly, we allow the appeal; quash the conviction of the appellant and set aside the sentence of death passed on him. He will be released from custody forthwith unless held on some other valid sentence or charge.

DATED AT KAMPALA this 8th day of August l978.

sgd: (M. Saied)
CHIEF JUSTICE.

sgd: (P. Nyamuchoncho)
JUSTICE OF APPEAL.

sgd: (F. M. Ssekandi)
JUSTICE OF APPEAL.

Mr. P.S. Ayigihugu of M/s Ayigihugu & Co. Advocates for the Appellant
Mr. P. Byaruhanga, Senior State Attorney, for the Director of Public Prosecutions.

I certify that this is a true copy of the original

(M. Ssendegeya)
CHIEF REGISTRAR