THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: TSEKOOKO, J. S.C., KAROKORA J. S.C., MULENGA J. S.C,
KANYEIHAMBA J S.C., AND KIKONYOGO J. S.C.)

CRIMINAL APPEAL NO: 16/97

BETWEEN

NAMULOBI HASADI ……. APPELLANT

VERSUS

UGANDA …….RESPONDENT

(Appeal against the decision and judgment of the Court of Appeal of Uganda at KAMPALA)
(Manyindo D.C.J., Okello, J.A., Twinomujuni, J.A.) dated 21st Nov, 1997 In Criminal Appeal No: 48 OF 1996)

JUDGMENT OF THE COURT

This is a second appeal from the decision of Court of Appeal case which originated from the High Court. Namulobi Hasadi who is the appellant in this case was indicted for murder of Wilson Kasozi contrary to sections 183 and 184 of the Penal Code. The appellant was tried by the High Court sitting at Mukono and convicted and sentenced to death. He appealed to the Court of Appeal which dismissed the appeal and confirmed both conviction and sentence. Appellant now appeals against judgment of the Court of Appeal.

The facts which gave rise to the charge and conviction of the appellant may be briefly stated as follows: on 26th March, 1994, (at about 3.00 p.m.), the deceased, one Wilson Kasozi, aged about 70 years old was found dead in his house in Buzu village by his son Edward Wantante (PW8) The post mortem, carried out on his body by Dr. Nyombi (PW1) showed that the cause of death was suffocation occasioned by strangulation. He was buried on 29th March, 1994.

On 30th March, 1994 when the deceased's relatives were identifying and verifying his property they noted that some of it which was previously in his house was missing. They also discovered

the appellant's photographs which had been wrapped in white paper placed on top of a mat on the floor in the deceased's bedroom. The appellant was a well known resident and porter in the same village. He became a suspect in the hunt for the person who murdered the deceased. Accordingly, a search for him was mounted. On 5th April, 1994 he was found in Mbale and arrested. At the time of his arrest, the appellant was found in possession of various items of property of the deceased which the relatives had noticed missing from the deceased house, following the discovery of his body.

Following his arrest, the appellant made a confessional statement to Detective Assistant Inspector of Police Donald Bosco Obitre (PW9). He also confessed to two other witnesses, namely, Mohammed Kagiri (PW3) and Mustafa Teffe Ismail (PW7). At his trial the appellant denied being involved in the offence of murder of which he was charged but the assessors and trial judge did not believe him. He was subsequently convicted of murder and sentenced to death. He appealed to the Court of Appeal which dismissed the appeal. Hence this appeal. At the commencement of the hearing of this appeal, Counsel for the respondent objected to the form and contents of the Memorandum of Appeal which he submitted were not in conformity with the Rules of this Court. Leave to amend the memorandum was orally sought from and granted by this Court.

The following grounds of appeal were then formulated for decision by this court.

1- 'The learned appeal court justices erred in law and fact in confirming the trial court's decision which had erred in law relying upon a confession which was repudiated and which was in law inadmissible.

2- "The contradictions in the prosecution's case rendered the burden of proof on the prosecution undischarged since in capital charges the required standard of proof ought to be not only beyond reasonable doubt but clearer and stronger in the capital charge than was the case."

It is to be noted that even the second ground as amended is still not in conformity with rule 61 (2) of the Rules of the Court. However, we allowed the appeal to proceed. The Memorandum, of Appeal was drafted by a firm of experienced advocates. It was apparent on the face of the

grounds of appeal, that the Memorandum of Appeal clearly offended Rule 61 (2) of the Rules of this court. The rule reads as follows:

“The Memorandum of Appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative the grounds of objection to the decision appealed against, specifying

On the other hand, the Memorandum of Appeal, prepared and in this court by Mr. Zagyenda, learned counsel for the appellant, was couched in the following words:

“1- The learned Appeal Court judges erred in law in confirming the trial Court where the Court had erred in law in relying upon a confession which was repudiated during the trial which confession had been so improperly, recorded that it did not show any signature of the Appellant as alleged and which shows apparent insertions of the name ‘Nambwere’ decticive women Constable which suggests a pre-written statement of confession rather than a voluntary statement of the Appellant and therefore inadmissible.

2- The same confession if any was obtained after torture beating, violence and other unlawful acts practiced on the Appellant by persons in authority including those who arrested the Appellant and police officers as indicated by the length of detention in police (over one week) and as indicated by admission of such threats from the evidence of the defence and of pw3 and as contrary evidence by the prosecution is contradictory among the witnesses who testify on the circumstances of obtaining the confession i.e., pw9 pw8 and pw3 and it was therefore unreliable and inadmissible and the Court of Appeal ought to have reversed the lower court decision or holding on this.

3- The Contradictions in the prosecution’s case rendered the burden of proof on the prosecution undischarged since in capital charges the requisite standard of proof ought to be not only beyond reasonable doubt but clearer and stronger than is required in less criminal charges.

4- The learned Trial Judges erred to hold that there were no defence raised by the defence was raised whereas it is not correct by implication at least defence e.g. alibi were raised and learned judges of the Appeal Court in law erred not to reverse the decision.

Mr. Ogwal-Olwa contended that, the Memorandum of Appeal contravened Rule 61 (2).

It is our view that Mr. Ogwal-Olwa was correct. The issues which could have been set forth as distinct and separate grounds of appeal were jumbled up together. The memorandum was narrative and argumentative. We were surprised that Mr. Zagyenda proceeded to defend, at length, this Memorandum of Appeal which he saw as perfectly clear and within the rules of court. It was with some reluctance that he eventually agreed to amend it.

We now deal with the first ground of appeal. In her judgment, the trial judge dealt with the issue of the confession thus,

'I found that there were a few irregularities in recording the confession, for example the office where the recording took place was occupied by other people but these were busy doing their own duties. However, this is understood and sometimes there is not enough accommodation for the recording officer to be alone with the suspect. This I found did not occasion any miscarriage of justice as the accused never complained about it and had no adverse effect on his statement. Although it may have been better to record the statement in Luganda and then translate into English later, the recording officer decided to use an interpreter. This is fine as long as the accused is made to understand what has been recorded.

As to whether the accused was beaten. Wantante, PW8, testified that he was arrested with the accused and that they were not beaten while in police custody. I believe his evidence because since they were all suspects in the same case, there was no reason why they should have beaten the accused and left out Wantante and others. I therefore found that the statement was made voluntarily".

In the Court of Appeal, Mr. Michael Akampurira, who appeared for the appellant, criticised the judgment of the trial judge for relying on appellant's confession to Inspector Obitre, which was not recorded according to law. Counsel pointed out that rule 7(a) of the Evidence (Statements to Police Officers) Rules S. 1 43-1, (Cap. 43) requires that a confessionary statement should be recorded in the language understood and spoken by its maker and there after it shall be translated into English so that if such a confession was to be put in evidence both versions of the statement would be presented. He cited Aloni Safari vs. Uganda, Criminal. App. No. 40 of 1996

(unreported), in support of that proposition. Mr. Charles Ogwal-Olwa, principal State Attorney, counsel for the respondent, in the same court submitted that the law does not prohibit the method used in recording the confession of the appellant in this case so long as it is read back to him so as to ascertain its accuracy and he signs it, as was done. He submitted that the method adopted in recording the appellant's confession was not fatal to the prosecution's case. He further submitted that there was other overwhelming evidence to support the appellant's conviction. The Court of Appeal agreed that the kind of recording reported in this case was permissible under sub-rule (b) of rule 7 of the Evidence (statement police Officer) Rules – S l 43-1 made under section 24 (2) of the Evidence Act (Cap. 43) . After reviewing law applicable in this respect including the case of Aloni Safari vs. Uganda, (supra), the Court of Appeal held that the confession was properly recorded. With respect, it is our view that decisions of both the trial judge and the Court of Appeal regarding confessions were made per incuriam. In Beronda s/o Rwaruturu versus Uganda Crim. Appeal No. 117 of 1973, (1974) EA 446, the Court of Appeal for East Africa observed,"

"Reference was also made in the High Court to the Evidence (Statements to Police Officers) Rule (S.l.43-l). We are quite satisfied that those rules were revoked by the repeal of section 24.

During these sessions, we determined another appeal in which a confession had been recorded (Criminal) Appeal No. 131 of 1973. In that case, a charge and caution statement was taken by a magistrate in open court, with at least two police officers present. For the reasons we have given, we regard that practice as undesirable.

We would add that we have seen administrative instructions dated 2nd March, 1973, entitled "Recording of Extra— Judicial Statements" and issued to all magistrates by the Chief Justice, which we think, with respect, admirably sets out the procedure that should be followed"

We therefore wish to point out that The Evidence (statements to Police Officers) Rules were revoked when the old S. 24 of the Evidence Act under which the rules had been made was repealed by Decree No. 25 of 1971. The rules were not saved by the Decree nor were they reinstated by the Evidence (Amendment) Act 1985. However, under S. 24 (2) of the Evidence Act as amended by the Evidence (Amendment) Act, 1985, the Attorney General is empowered to

make regulations governing confessional statements of accused persons. These need to be made expeditiously but until they are made such confessions should be governed by the Judges' Rules.

Mr. Zagyenda argued that both the trial judge and justices of appeal were wrong in law and fact in basing their findings on a defective confession which they should have held inadmissible. He contended that the appellant having claimed that he had been beaten up for many days, the trial judge and Court of Appeal should have satisfied themselves that the confession was indeed voluntary. Indeed, both courts did observe that the manner of recording the confession had not conformed with the law. In addition, Mr. Zagyenda, submitted that the record of proceedings of the trial shows that the appellant denied that he had confessed claiming that he was forced to *sign a* statement he did not understand and because of the beating he had received at the hands of the police, he did not know what he said at the time of the alleged confession. Counsel for the appellant cited the case of Edong s/o Etat V.R., (1954) 21 EACA 338 in which the Court of Appeal for East Africa held that a confession which was improperly obtained and which conflicted with other evidence in the same case was unsafe to rely upon as the basis of a conviction and in particular counsel relied on the holding that

"If there is a good reason to think that the chain of events leading up to the confession was started by physical violence to the person of the prisoner, it would be a valid exercise of a trial judge's discretion to reject the statement'.

At p. 340 their Lordships in that case observed,

"On the l0th January the Inspector arrested the appellant and charged him with murder. No statement made by the appellant when charged was put in evidence, but it would seem from his extra-judicial statement made to the magistrate on the 13th that when arrested he denied being concerned in the murder. The appellant was kept in custody from the lath to the 13th of January and, on the morning of 13th was taken by the inspector back to Mr. Simpson's farm where he picked up piece of iron (exhibit 1) and also pointed out a knife (exhibit 2) . As already mentioned, both these objects had already been seen by the police in the appellant's presence on the occasion of the previous visit on the 7th January.

According to the Inspector's evidence, the appellant also said that he had thrown two spears into the river, but, although the river was searched, the spears were not found. On the afternoon of the same day, the 13th the appellant made the statement (exhibit 4) to Mr. Purves, a Magistrate. The inspector explained, "I think something happened in the accused's mind to make him want to see a Magistrate."

The court proceeded to review other evidence in that case which contradicted the alleged confession of the appellant and then held that the judge had failed to direct himself properly on the involuntary nature of the confession and its admissibility. They therefore allowed the appeal. Mr. Zagyenda concluded that as the facts and circumstances were similar in this case, the appeal should be similarly allowed.

Mr. Ogwal-Olwa supported the conviction and sentence of the appellant and adopted his arguments in the Court of Appeal. Learned Principal State Attorney further argued that the appellant had to show that the trial judge and the justices of the Court of Appeal had so misdirected themselves as to deprive the appellant of a reasonable chance of acquittal. Indeed, this was the ratio decidendi in the Edong's case (supra). It was Mr. Ogwal's opinion that the appellant had failed to do so. He pointed out that in the Court of Appeal, the question of torture or involuntariness of the confession were not in issue. What was argued there was the improper recording of the confession by the police. In fact, involuntary confession as a ground of appeal in the Court of Appeal was abandoned by the appellant and therefore the justices of that court cannot be faulted on that ground.

Mr. Ogwal submitted that even if that ground had been raised in the Court of Appeal, it is his view that it could have been rejected for a number of reasons. Firstly, the reasoning of the trial judge on the confession was faultless. She considered all the aspects of the complaint that it was involuntary and that it was improperly recorded. We have already dealt with this aspect of her judgment and we agree that she cannot be faulted. The Court of Appeal agreed with her also.

Mr. Ogwal argued that Edong's case cited by counsel for the appellant was easily distinguishable from the present case. The accused, in the Edong's case made two statements. In the first one he denied any knowledge or involvement in the murder. Three days later he made another one in

which he is said to have volunteered to give a statement of how he had committed the murder. This was certainly a sudden and unexplained change of mind, and when he later denied the confession and claimed that it had been obtained through coercion, the Court of Appeal for East Africa agreed. At no time in this case, did the appellant deny the statement. Secondly, in the Edong's case, the appeal was allowed because the confession was virtually the only evidence on which the conviction rested. In the instant case, there is other overwhelming evidence on record. There was the dispute over the Uganda shs.5000 between the appellant and the deceased which the appellant had failed to account for. He was found with the deceased's property after he was arrested in Mbale where he had fled to. Photographs of the appellant were found at the scene of the murder that is on the mat in the bedroom of the deceased. No explanation was offered for the presence of the photographs. This is a room where the appellant did not reside at all or ordinarily visit. The proper inference is that the photographs were dropped there during the murder. He also made confessions to prosecution witnesses, namely, Mohammed Kagiri (PW3) and Mustafa Teffe Ismail (PW7) and, not simply to the police. He personally volunteered information as to the whereabouts of some other items of property removed from the deceased's house which no one else including the police could have found without appellant's guidance. Mr. Ogwal submitted that if ever there was a strong and compelling case for a conviction for murder this was one, for, on the evidence presented there was no basis on which a court could acquit the appellant. Counsel further contended and, we agree, that even if the appellant's confession had been expunged, the court would still have convicted him on the other evidence. We are persuaded by the submissions of counsel for the respondent that courts below were correct in their conclusions.

We find no fault in the manner both the trial court and justices of Appeal dealt with the confessions of the appellant nor their findings on the facts and circumstances of this case. Indeed, in Edong's case (supra), the court observed,

"In the circumstances in which the statement of Mr. Purves was made, what was required by way of corroboration was something which could not have been known to police or to the appellant except on the hypothesis that he was present at the time of the murder The appellant's description of the three injuries does not exactly correspond with the injuries found by Dr. Clarke."

In this particular case, the appellant's admissions and behaviour simply indicate the knowledge of someone who was implicated in the murder of the deceased. Therefore the first ground fails. We now come to the second ground of appeal that the contradictions in the prosecution's case rendered the burden of proof on the prosecution undischarged since in the capital charges the requisite standard of proof ought to be not only beyond reasonable doubt but clearer and stronger in the capital charge than was in this case. Mr. Zagyenda, counsel for the appellant, argued this ground briefly. He submitted that the trial court found that there were contradictions in the prosecution's evidence. Mr. Zagyenda based his argument mainly on the assertions of the appellant's denials and of his own versions of events. Counsel concluded that these denials and assertions conflicted with the testimony of prosecution witnesses, and that appellant should be acquitted on the grounds that the standard of proof exhibited in these contradictions was not high or clear enough in such a grave offence as murder. He cited such authorities as Hornal v. Neuberger Products, Ltd (1956) 3 ALL E.R.p.970, Bater v. Bater (1950) 2 ALL E.R. 458 and Obonyo V.R. (l962) EACA 542 and Kenny's Outlines of Criminal Law, (16th edn) (1952) in support of his proposition. In the last book of authority the learned author asserts at p. 416,

'A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a preponderance of evidence in favour of the successful party, whereas in criminal cases the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt But in criminal cases the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is required and the more heinous a crime the higher will be this minimum of necessary proof. The progressive increase in the difficulty of proof, as the gravity of the accusation to be proved increases, is vividly illustrated in an extract from Lord Brougham's speech in defence of Queen Caroline. "The evidence before us", he said 'is inadequate even to prove a debt-impotent to deprive of a civil right - ridiculous for convicting of the pettiest offence - scandalous if brought forward to support a charge of any grave character - monstrous if to ruin the honour of an English Queen".

Lord Brougham made his speech at a period in England when the use of the hyperbole and colourful language was quite fashionable, but in our view, the learned noble Lord is saying nothing more and nothing less than that in proving a debt or ruining the honour of an English

Queen (unless it be treason), in civil cases, a party will win a case on a balance of probabilities while in the pettiest of offence or a most serious criminal charge, the onus is always on the prosecution to prove the case beyond reasonable doubt. There can be no test higher than proof beyond reasonable doubt even though in accepting that proof one should take much greater care when faced with graver offence. We believe that that is What Lord Denning, L.J. (as he then was) meant when he said in Bater v. Bater (2) (1950 2 ALL E.R. - 458 at p. 459.

"The difference of opinion which has been evolved about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard".

There may be degrees of proof but each degree is only proof beyond reasonable doubt. As we have held in our judgment in this session in Kamese Moses v. Uganda, Crim. App. No 8/97 (unreported) , in the proof of criminal cases, no offence is so grave as to require a higher degree of proof and none is so minor as to require a lower degree of proof, than the well established standard of proof beyond reasonable doubt.

We agree with counsel for the respondent that the pages cited from Hornal v. Neuberger products, Ltd, (supra) Bater v. Rater, (supra) and Obonyo's case, (supra) are insufficient to alter the law which has stood the test of time. In our view, both the trial judge and the justices of Court of Appeal correctly held that the prosecution had proved the case beyond reasonable doubt. Consequently, ground 2 of the memorandum of appeal also fails.

For the reasons we have given, this appeal fails and it is dismissed.

Before leaving this appeal, there are two issues on which we wish to comment. The first relates to the evidence in the trial court of Mr. Mohammed Kagiri, PW3. He was allowed to testify and attack the character of the appellant. Thus, during cross-examination at p.36 of the record of proceedings, the same witness volunteers this information;

“The accused is a trained thief. The proof we went to school together, he was stealing pens at school. He has been breaking into houses. He broke into my sister’s house. He was imprisoned at Kanga for stealing matooke but the witnesses were not there and he was acquitted”.

This kind of evidence was wholly irrelevant unless the character of the appellant had been an issue which it was not. It should not have been admitted. The learned trial judge should have excluded it even if there was no objection to its admissibility. Secondly, the court has also noticed that in a number of cases, counsel who represent appellants appear before it unprepared and often give the impression of not having read the case files they are holding in court, let alone researched into the relevant law and authorities appended thereto. We urge advocates who appear both in this court and other courts to always prepare their clients’ cases before appearing in court.

DELIVERED AT MENGO THIS 13TH DAY OF JULY 1998

J.W. N TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA
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L.E.M. MUKASA -KIKONYOGO
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