

**IN THE SUPREME COURT OF UGANDA
AT MENGO**

Coram : Oder. Tsekooko, Karokora, Mulenga, and Kanyeihamba JJ.S.C.

Criminal Appeal No. 11 of 2001

Between

KEDI MARTIN ::::::::::::::::::::::::::::::::::::::: APPELLANT

And

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

(Appeal from judgment of the Court of Appeal (Kato. Engwau and Kitumba JJ.A) at Kampala, dated 27th February, 2001, in Criminal Appeal No. 12 of 1999.)

REASONS FOR THE COURT'S DECISION.

We heard this appeal on 18th March 2002. and dismissed it for lack of merit. We reserved our reasons for the decision and now proceed to give them.

The appellant was convicted by the High Court, for the murder of his step- father, Dongan Victor. He appealed to the Court of Appeal against the conviction. His appeal was dismissed, hence the second appeal to this Court.

The facts on which his conviction was based are brief. On 31st March 1998, the deceased went to the market and did not return home that day. The following morning, the appellant went to one Opedor. LC1 Secretary for

Defence, who gave evidence at the trial as PW2. and reported to him that he had killed his step-father the previous day. Thereupon Opedor arrested the appellant and took him to the home of the LC1 Chairman, accompanied by other LC1 officials and villagers. On receiving a report from Opedor, the Chairman, one Ajolo Emmanuel, who also wave evidence at the trial as PW3, talked to the appellant, and the latter reiterated that he had killed the deceased because he was a

wizard who had killed his (appellant's) people. He disclosed that he had way-laid the deceased on the way from the market, and had killed him by strangulation. He also described the place where he had left the body. As a result of that information, the deceased's body was discovered at the place the appellant had described. It was found in the condition, he had mentioned, notably with a broken neck. At the trial the two witnesses testified to those facts, but though the appellant had pleaded not guilty, he did not challenge the admissibility of what was clearly a confession to the crime, nor were the witnesses cross-examined on it. In the unsworn statement in his defence, however, the appellant denied killing the deceased, and asserted that after being arrested he tried to deny the offence but when he was beaten by PW2 and one Agama. he admitted it. The learned trial judge disbelieved him. and accepted instead, the prosecution evidence that he had confessed to the murder, and found that the confession was true. The Court of Appeal upheld the findings.

The appeal to this Court was on one ground, namely:-

"That the learned Appellate Justices erred in law and fact when they based their conviction on an alleged confession whereas the confession was not made as required by law and therefore should have been ignored."

The thrust of the brief submission by Ms Musoke, counsel for the appellant, was that the report made by the appellant to Opedor PW 2, and later to Ajolo PW3, amounted to a confession, and that because it was made to LC officials without compliance with the law, it ought not to have been admitted in evidence. Counsel criticised the trial court particularly for holding, that in regard to receiving confession from an accused person. LC officials were in the same position as administrative officials, rather than as police officers. She concluded that the courts below erred in basing the appellant's conviction on that confession. In reply to this, Mr. Elem-Ogwal, Principal State Attorney, conceded that an LC official is a person in authority, but submitted that the test of admissibility of a confession made before such a person, is whether or not it was made voluntarily. He contended that in the instant case the appellant's confession was clearly made voluntarily.

The basic law governing the admissibility of a confession made by a person accused of a criminal offence, as evidence in his or her trial, is contained in sections 24, 25 and 29A of the Evidence Act. Needless to say at the outset that the said law comes into play when an accused person retracts or repudiates a confession attributed to him or her. Section 24 renders inadmissible, any confession made by a person in custody of a police officer, unless it is made in the immediate presence of a magistrate or of a police officer of or above the rank of Assistant Inspector. It does not apply to a confession made by a person who is not in custody, or who is in the custody of anyone other than a police officer. See **Babvebuza Swaibu vs Uganda**, Cr. App. No. 47 of 2000, (S.C.) (unreported) which we decided in the same session. Section 25, however, applies to all confessions by accused persons wherever and whenever made, and renders inadmissible, any confession which is not shown to have been made voluntarily. Section 29A on the other hand is permissive. It renders admissible, notwithstanding of the provisions of sections 24 and 25, so much of any information, (including a confession), received from an accused person, as distinctly leads to the discovery of a material fact which is disposed to at his trial as so discovered. The ultimate objective underlying these provisions is to avoid receiving in evidence, and relying upon, false confessions. This is underscored by the provisions of section 29A whose rationale must be that the discovery of the 'fact' confirms the truth of the 'information'; see **Babvebuza Swaibu vs Uganda**, supra).

For that reason the court retains a discretion not to admit a confession in evidence, and if it admits it, not to rely on it, if it is not satisfied that it is true. Thus section 25 which excludes confessions made under undue influence, specifically refers to influences which in the opinion of the court are calculated to cause untrue confession to be made. It reads:-

"25. A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the

opinion of the court to cause an untrue confession to be made." (emphasis is added)

Even under section 24, the mere presence of a magistrate or a police officer of the stipulated rank is not sufficient to make the confession admissible in evidence. It must be proved that it was made voluntarily. For that purpose the Minister is supposed to make rules of procedure for recording statements from accused persons. Because the envisaged rules have not been made, in practice the courts have adopted administrative guidelines set out by the Chief Justice to ensure that confessions to be used in evidence, are made voluntarily. See **Festo Androa & Another vs Uganda**, Cr. App. No. 1 of 1998 (SC) (unreported).

In the instant case, the applicable provisions were sections 25 and 29A. The learned trial judge was alive to that when he said, referring to section 24:-

"That section does not apply to confessions made to other authorities like Chiefs as Police Officers. A confession made to a Chief is admissible and may be acted upon provided that it has not been promised (sic) by inducement, threat or promise in terms of section 25 of the Evidence Act."

The learned judge referred to section 29A and went on to observe and hold:-

"PW2 Opedor, PW3 Ajolo Emmanuel testified that following the confession of the accused the body of the deceased was found lying with a twisted neck at the very place where the accused had told them he had killed the deceased. In these circumstances the accused can not successfully argue, and which he did not in any event, that the confession was extracted contrary to the provisions of sections 24 and 25 of the Evidence Act. "

Substantially, that is correct. The only aspect which caused us some concern relates to case law. It is well settled that a court should not base a conviction on an uncorroborated retracted confession, but may, if it cautions itself about the danger of doing so. See **Tuwamoi's vs Uganda** (1967) EA 84. In the instant case the learned trial judge did not direct his mind to the fact that the appellant's confession was retracted. Indeed, in the notes for summing up to the assessors, he appears to allude to the confession as neither retracted nor repudiated. Not surprisingly therefore, he did not caution himself on the danger of relying on it. We had no

doubt, however, that the appellant retracted the confession when he said to the court that he admitted the offence only when PW2 and another beat him. The Court of Appeal on the other hand, appears to have taken the view that the confession was corroborated. The learned Justices of Appeal said :-

"...it was the appellant who, on his own, admitted voluntarily to both PW2 and PW3 that he had killed the deceased. He described the manner in which he killed him and the place he dumped his body to both witnesses in detail as an insider (sic). We find that the evidence of both PW2 and PW3 corroborated that of the appellant when he admitted having killed the deceased by strangling him."

With due respect, we think that the last sentence is a misdirection. The only evidence of the confession, which is the evidence that required corroboration because the confession was retracted, was the evidence of PW2 and PW3 to the effect that the appellant confessed to the crime. Corroborative evidence would be some independent evidence which tends either to confirm that the appellant made the confession, or to otherwise implicate the appellant in the commission of the offence. See **Cpl Wasswa & Another vs Uganda** Cr. App. No.48 of 1999 (SC) (unreported) and **R vs Baskerville** (1916-17) All ER Rep.38.

The finding that the body was as described to the witnesses in the confession, is not corroborative evidence as so defined. We hasten to add, however, that it speaks volumes for the credibility of the confession, on the premise that, only a person who participated in, or was privy to, the killing, could have given the details that the appellant gave to the two witnesses. That, combined with the fact that the appellant volunteered the information to PW2 without any prompting at all, leads to the irresistible conclusion that the confession was true, and to the inference of the appellant's guilt.

We were satisfied that, in the circumstances, neither the non-direction on the part of the learned trial judge, nor the misdirection on the part of the Court of Appeal, both of which we have discussed, occasioned any miscarriage of justice. It was for those reasons that we dismissed the appeal.

Dated at Mengo this 17th day of June 2002

**A.H.O. ODER,
JUSTICE OF THE SUPREME COURT.**

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, JUSTICE OF THE SUPREME COURT.