THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CRIMINAL APPEAL NO. 25 OF 2001

BETWEEN

HAJI MAKUBO NAKULOPA :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An Appeal from the decision of the Court of Appeal of Uganda: C.M. Kato, J.P. Berko, and Twinomujuni, J.J.A, in Crim. App. No. 25 of 2001 dated 1/10/2002)

<u>REASONS FOR THE COURT'S DECISION</u>

The appellant, Haji Makubo Nakulopa together with Sulaiman Makika were jointly tried and convicted by the High Court sitting at Jinja for murder in 1st count and aggravated robbery in 2nd count. On appeal to the Court of Appeal, Sulaiman Mukika's appeal was allowed while that of the appellant was dismissed on both counts. We heard his appeal on 3rd July 2003, dismissed and reserved our reasons for the decision. We now proceed to give them.

The appellant was a traditional medicine man who had a shrine in Bwondha village Iganga District. The deceased, an army Lt, was a client of the appellant and it appears the two engaged in some business. On 21/10/94 the deceased visited the appellant having been invited there by the appellant. He travelled in his official vehicle, Santana Reg. No.44 RA 131. He went as invited to see the appellant, his traditional medicine man who had been previously treating him. The deceased never returned to his home.

One Lt. Twinamasiko Fred, PW2, a brother-in-law of the deceased whilst travelling from Jinja to Kampala saw the deceased's vehicle parked on the roadside in Mabira Forest. When PW2 went to a deceased's home, he learnt that deceased had not returned. When he went to Mbuya, he learnt that the deceased had disappeared and that the army was arranging for a search. PW2 joined the search party. The body of deceased was discovered on 27/10/94 in the appellant's shrine at Bwondha. The postmortem on the body was performed by Dr. Wabinga of Mulago Hospital. He found that the cause of death was due to multiple injuries following gunshot wounds.

The evidence against the appellant is circumstantial inclusive of his confession. These circumstances are these. A friend of the appellant persuaded the appellant to get a gun from the deceased. The deceased came to visit the appellant after the latter had invited him by trickery. After the deceased reached appellant's home, the appellant had the deceased shot dead at his shrine. Through the effort of Lt. Twinamasiko, a brother-in-law of the deceased and information provided by the parish chief, Samuel Nambaga, PW6, a search was mounted, resulting in discovery of the deceased's dead body in appellant's shrine. Evidence established that the deceased died of gun shot wounds. The appellant was arrested along with other persons. They were charged with the murder and robbery.

After his arrest, on 2/11/94, the appellant made a charge and caution statement before PW10. Kaswa James, Magistrate Grade I. In the statement, the appellant gave details of how the deceased was killed by shooting although he himself denied shooting the deceased.

At the trial the appellant denied having killed the deceased but admitted that the deceased had visited him previously and that the deceased came to his home in the morning of

21/10/94 in a Santana. The appellant treated the deceased before the latter left at 11 a.m. and went back. On 26/10/94 soldiers and police arrested him from his home and when they searched his house, they found a briefcase, TV and Radio in his house. They tied him with ropes and tortured him, demanding to know where the body of deceased was. He became unconscious. He denied having made a statement to a Magistrate. He further denied having any shrine at all. He stated that people who said that he had a shrine told lies.

The trial judge believed the prosecution evidence and disbelieved the defence evidence and convicted the appellant on both counts. His appeal to the Court of Appeal was dismissed. The appellant has now appealed to this court against the decision of the Court of Appeal. The Memorandum of Appeal contains two grounds. The first states:

(1) The learned Justices of Appeal erred in law and fact in confirming the appellant's conviction and sentence on the basis of his extra judicial statement.

The first ground was substantially similar to ground one in the Court of Appeal and arguments made there by Mr. Kunya are same as those made before us.

The thrust of 1st ground revolves around extra judicial statement, which was admitted in evidence as Exh.P6. Mr. Kunya, counsel for appellant submitted that it was improper for the trial judge to admit it in evidence without conducting a trial within trial. Counsel submitted that failure by the trial judge to seek opinions of the appellant or his counsel if they had anything to say about the admissibility of the confession statement before it was received in evidence deprived the appellant of the benefit of a fair trial. He cited the case of ***Sewankambo & others V Uganda*** Cr Appeal No 33 of 2001 (S.C.) (unreported) to support his argument. He contended that the Court of Appeal should have held that the statement was inadmissible and therefore should not have been relied upon.

Mr. Wagona Principal State Attorney appearing for the State supported the conviction and sentence. He argued both grounds together. He submitted that although in ***Sewankambo & others case (supra)*** the Supreme Court held that it was not proper to admit in evidence confession statement on the ground that counsel for appellant has not challenged it or has conceded to its admissibility, he contended that each case should be considered at on its own facts and peculiarity. He contended that although there was nothing to indicate that the trial judge inquired from defence counsel or from the appellant whether they objected to the admissibility of the confession statement, there were reasons in the instant case to justify the reliance on that statement to uphold the Court of Appeal's decision.

He adopted the submission he made before the Court of Appeal and further submitted that the case of ***Sewankambo (***supra) was distinguishable from the present case because that case was characterised by other aspects affecting the voluntariness of the statement.

Counsel submitted that appellant's claim that he was unconscious when the statement was made is untrue because the magistrate, PW10, who recorded the statement said that the appellant was all right when he made the statement. Therefore he could not have been unconscious. He was arrested on 26/10/94 and the statement was recorded on 3/11/94. The doctor's report was dated 10/11/94 unlike in ***Sewankambo's case*** where there was no medical evidence adduced.

Although the appellant stated in his confession statement that he was beaten after his arrest, he never told the police the circumstances under which the deceased was killed. He stated that he told the police the circumstances under which the deceased was killed after the body was discovered.

Counsel submitted that there were other pieces of circumstantial evidence from which an inference of guilt could be conclusively made - e.g. such as identity card of the appellant

which he had given to John to take to deceased as testified to by PW4, the deceased's body being found between the cave and appellants shrine, the motor vehicle tyre marks seen by PW6 leading to the hills where the appellant had a shrine on the very day PW6 had seen the vehicle parked at the home of the appellant and the appellant's denial that he had a shrine despite other overwhelming evidence that he had one.

We are persuaded by the submissions of Mr. Wagona. Regarding admissibility of confession statement, we would refer to our judgment in the case of ***Omaria Chandia V Uganda Cr. Appeal No.23 of 2001 S . C .*** (unreported). Whilst dealing with admission in evidence of a confession statement allegedly made by an accused person prior to his trial, the supreme court justices stated, inter alia:

> ***"because of the doctrine of the presumption of innocence enshrined in Article 128(3)(a) of the Constitution where, in a criminal trial, an accused person has pleaded not guilty, the trial court must be cautious before admitting in evidence a confession statement allegedly made by an accused person prior to his trial. We say this because we think that an unchallenged admission of such a statement is bound to be prejudicial to the accused and to put the plea of not guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that counsel for the accused person has not challenged or had conceded to its admissibility. Unless the trial court ascertains from the accused person that he or she admits having made the confession statement voluntarily, the court ought to hold a trial within trial to determine its admissibility." See also Kawoya Joseph V Uganda Cr. Appeal No.5 of 1999 S.C. (unreported),Edward Mawanda V Uganda Cr. Appeal No.4 of 1999 S.C. (unreported) and Kwoba V Uganda Cr. Appeal No. 2 of 2000 (S.C.) unreported.***

We wish to distinguish the instant case from the above cases where we did not approve of admitting confession statements without conducting a trial within trial. We are unable to agree with counsel for appellant's submission that the trial judge erred in admitting the confession statement without conducting a trial within trial or without drawing appellant's or his counsel's attention about the implication of admitting the confession statement. We wish to point out that a trial within trial is conducted when a confession statement is objected to on such grounds as that the appellant was tortured or induced for the purpose of making the confession statement. In the instant case, the appellant stated that after his arrest on 26/10/94, he was assaulted and tortured as a result of which he became unconscious. He does not state that he made the confession statement because of being tortured. In fact, he does not state that he made any confession statement before a magistrate. In the circumstances we think that if there had been any threat caused by such torture on his arrest on 26/10/94 then any such threat caused by such torture must have been removed by the lapse of time between the time he was arrested and when he made the statement on 3/11/94.

In the result we find that the confession statement was made voluntarily and rightly admitted. Further we think that appellant's claim that because of the torture he was subjected to after his arrest he became unconscious and did not know that he went to the magistrate and recorded a statement which was admitted as Exh.P6 was rightly rejected, because the confession statement was so long and so detailed that it could not have been invented or imagined. In some aspect, the confession statement confirmed the evidence of Mrs Muhangi, the deceased's widow, to the effect that one John took appellant's identity card to the deceased to lure the deceased to visit the appellant in October 1994. Secondly, the confession statement shows that the appellant told the deceased to remove his uniform and wrap himself with a bark cloth before he smeared his body with native medicine. This confirmed. PW2's evidence that when the body of the deceased was discovered between the cave and the shrine, it was found wrapped in bark cloth.

In the result we found that the confession statement was true and was rightly admitted as having been voluntarily made. Therefore ground one failed.

The second ground of appeal complained that the Justices of Appeal erred in upholding the decision of the trial judge on the basis of unreliable circumstantial evidence against the appellant. Mr. Kunya, counsel for appellant submitted that the alleged inculpatory facts against the appellant did not irresistibly point to the guilt of the appellant. He contended that the appellant's identity card which he gave to one John to take to the deceased, the gunshots which PW **6** heard coming from the direction where the appellant had a shrine, the motor vehicle tyre marks leading to where the appellant had a shrine and the discovery of deceased's body between the cave and appellant's shrine could all be explained away because, he contended, that these did not irresistibly point to appellant's guilt.

Mr. Wagona, Principal State Attorney, on the other hand, submitted that the above circumstantial evidence coupled with the appellant's denial that he had a shrine despite the prosecution overwhelming evidence that he had it irresistibly pointed to appellant's guilt.

We found no merit in the submission made for the appellant on this ground. Both the High Court and the Court of Appeal dealt with all the inculpatory facts against the appellant raised before us on this ground and had rightly found, in our view, that they irresistibly pointed to appellant's guilt.

We found that from the evidence of PW4, one John came with identity card of the appellant to deceased's home to ask the deceased to go to the appellant's home. The

deceased, who was then sick, on seeing appellant's identity card, accepted to visit the appellant on the following day. On 21/10/94 the deceased left his home in an army uniform while driving his Santana vehicle and went to appellants home in Iganga. This was confirmed by appellant's confession statement who stated that he gave his identity card to one John in order to take to the deceased to lure him(deceased) to come to his home so that John and Ahamada could remove a gun from the deceased.

On 21/10/94 PW6, saw a man in an army uniform sitting in a Santana vehicle at the home of the appellant. When he returned from inspecting his parish, he never found the vehicle at appellant's home. However, when he moved towards Malongo hills, he saw vehicle tyre marks leading in the direction of the hills where the appellant had a shrine. Soon thereafter he heard several gunshots. This was confirmed by appellant's confession statement where he stated that by the time the deceased arrived at his home, John and Ahamada had already gone to take cover at his shrine, ready to remove the gun from the deceased and that when he arrived with the deceased at the shrine and after the deceased had removed his uniform and put on a bark cloth and went to smear himself with the native medicine, John got deceased's uniform and wore it and got the gun, corked it and shot deceased three times resulting in deceased's instant death.

On the following day of 22/10/94 when PW 6 met the appellant and asked him why his visitor was scaring people by shooting gun; the appellant never denied. Instead, he told PW6 that when his visitor comes next time, he will warn him not to do so. According to the evidence of PW2, when the dead body of deceased was found, it was found wrapped in a bark cloth lying between a cave and a shrine.

Clearly, the above incuplatory facts against the appellant were incompatible with the innocence of the appellant and incapable of explanation upon no other reasonable hypothesis than that of guilt.

It was because we were satisfied that the above circumstantial evidence and the confession statement proved the guilt of the appellant that we dismissed the appeal.

Dated at Mengo this 29th day of October 2003.

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.