THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CRIMINAL APPEAL NO. 12/2002

BETWEEN

BWIRE WYCLIFFE &
SERUNGA GEORGE WILLIAM :: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

(CORAM: ODOKI, CJ; ODER, JSC; TSEKOOKO, JSC; KAROKORA, JSC; MULENGA, JSC.)

(Appeal from the decision of the Court of Appeal at Kampala by Justices Kato, Mpagi-Bahigeine, Twinomujuni, JJA dated 24th April 2002 in Criminal Appeal No. 116 of 1999).

JUDGMENT OF THE COURT

This is a second appeal. It is from a Judgment of the Court of Appeal dated 26th April, 2002 confirming the conviction and sentence of death passed by the High Court on 16th October, 1999.

The appellants Bwire Wycliffe and Serunga George William together with Sikyomu Abdu were jointly tried on an Indictment for murder contrary to Sections 183 and 184 of the Penal Code. They were all convicted and sentenced to death as earlier on stated. The appeals of Bwire Wycliffe and Surunga George to the Court of Appeal were dismissed. The appeal of Sekyoma Abdu who appealed against sentence only was allowed on the ground that the prosecution had not proved beyond reasonable doubt that he was aged 18 years or above at the time the offence was committed. The sentence of death against him was set aside and substituted with an order that he be detained in safe custody pending the order of the Minister under Section 104(2) of the Trial on Indictment Decree. Only Bwire Wycliffe and Serunga George William have appealed to this Court as 1st and 2nd appellants respectively.

The brief facts of the case as accepted by the lower courts were that on 8th June 1996 Joseph Nkuke, the deceased, left his home and went to Kyakanyonza village in Masaka District to collect food but never returned. A few days later, Abdu Sikyomu, was found in possession of the deceased's bicycle. He was arrested. He confessed that he and five other people including the two appellants had killed the deceased and removed his body organs which they gave to one Musomesa for Shs. 150,000/=. All those who were implicated by Sikyomu were arrested. The two appellants also confessed to the murder. All six suspects were charged with the murder of Joseph Nkuke. At their trial they all denied the charge. Only the appellants and Sikyomu Abdu were convicted of murder and sentenced to death. They appealed to the Court of Appeal with the results already stated above.

The two appellants filed separate memoranda of appeal in this court.

The 1st appellant has filed four grounds of appeal, but at the hearing of the appeal his counsel abandoned the fourth ground. The remaining grounds read as follows:

(1) The learned Justices of Appeal erred in law to uphold the learned trial judge's decision admitting the 1st appellant's charge and caution statement and relying on the same to convict the 1st appellant.

(2) The learned Justices of Appeal erred in-law to uphold the decision of the trial judge to admit and rely on the charge and caution statement of A2 and A3 and to use them to corroborate the charge and caution statement of the 1st appellant.

(3) The learned Justices of Appeal erred in law to state that the charge and caution statement of the 1st appellant was enough to base on the conviction of the appellant.

The 2nd appellant's memorandum of appeal contained 2 grounds. At the hearing of this appeal, counsel for 2nd appellant abandoned the 1st ground and argued the 2nd ground, which reads as follows:

(2) The learned Justices of Appeal erred in law and fact in upholding the sentence of death against the 2nd appellant without scrutinising his age.

At the hearing of this appeal, Mr. Tayebwa, counsel for 1st appellant argued grounds one and three together and argued ground two separately. On grounds one and three, he submitted that the Court of

Appeal erred in upholding the decision of the trial judge who admitted the 1st appellant's charge and caution statement and relied on the same to convict the appellant. He contended that it was wrong to admit the statement when the appellant had denied having made it. In the alternative, he argued that if at all he made it, the appellant never made it voluntarily. Counsel further submitted that since the statement was both retracted and repudiated, the onus was on the prosecution to prove that the appellant made it and that he made it voluntarily.

We note that after conducting a trial within a trial, the learned trial judge found that not only did the appellant make the confession but that it was voluntarily made and therefore he admitted it in evidence as PE1 In his judgment, the judge referred to the part of that confession statement as follows:

> ***"In his statement, (PE1) he told PW4 how he had requested A2 to get him a worker, which A2 did by producing the deceased. That together with four other people, they took the deceased in a forest. That A2 spread chloroform on the deceased, grabbed and threw him on the ground before pulling out a knife and slaughtering him. That on his part he cut him and removed the heart, liver and lungs which things he took together with blood in a bottle to one Musomesa of Kimaaya village who earlier on pressed an order for these items from them. The Musomesa paid him Ug. Shs. 150,000/- for, as he put it, 'the work done.' That he was arrested and found his co-accused in the police cells."***

At that stage the learned trial judge carefully considered the relevant law applicable to retracted confession. After carefully considering the confessions of A2 and A3, he concluded that A1's confession statement was true. The learned Justices of Appeal carefully considered the analysis and conclusions of the learned trial judge on the law applicable to retracted confession as was set out in ***Tuwamoi V Uganda*** **(1967) E.A 84** in the following passage:

> **"We *should summarise the position thus - a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession, if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it***

is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

After quoting the above passage, the Court of Appeal proceeded to state in their judgment inter-alia that::

"Like the learned trial judge, we are fully satisfied that the 1st appellant's confession was an unequivocal admission of participation in the murder of the deceased that it was made voluntarily and that it was true. He was entitled to rely on it to convict the 1st appellant."

We agree with the above conclusion:

Although the learned trial judge permitted **PW4** to narrate the contents of the confession statement of A1 without any objection being raised by defence counsel, before a trial within a trial was conducted to determine its admissibility, which was an irregularity, we think, that the irregularity was cured when a trial within a trial was conducted after which the learned trial judge found that not only did the first appellant make the confession but that it was voluntarily made, and that it was true showing details and steps taken by all the appellants in the murder of the deceased.

In the result, we are not persuaded by submission of counsel for the 1st appellant that the lower courts erred in admitting the 1st appellant's confession statement and in relying on it to convict him. Consequently, grounds one and three must fail.

On ground two counsel submitted that the Justices of Appeal were in error when they upheld the decision of the trial judge who had admitted and relied on the charge and caution statements of A2 and A3 and used them to corroborate the charge and caution statements of the 1st appellant.

As we have already stated in the course of this judgment, we agree with the Justices of Appeal when they stated inter alia, that:-

> **"Like the trial judge, we are fully satisfied that the 1st appellant's confession was an unequivocal admission of participation in the murder of the deceased that it was made voluntarily and that it was true. He was entitled to rely on it to convict the 1st appellant. However... there was corroboration in the uncontested confessions of the 2nd and 3rd appellants. We also find that the learned trial judge could have convicted the 1st appellant on the strength of both confessions of the 2nd and 3rd appellants alone or any one of them. Section 28 of the Evidence Act provides:-'Where more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other persons as well as the person who makes such a confession'. In this case all the three confessions of the three appellants implicated the 1st appellant."**

In the result, we think that the Justices of Appeal rightly concluded that the trial judge was entitled under section 28 of the Evidence Act to consider the confession of A2 and A3 as corroborative of A1's confession. Therefore this ground must fail.

Mr. Kafuko Ntuyo counsel for 2nd appellant submitted that neither the trial court nor the Court of Appeal scrutinized evidence relating to the age of the 2nd appellant to ascertain accused's age at the time the offence was committed. He contended that under section 104(1) of the Trial on Indictment Decree 1971, the trial judge is obliged to ascertain the age of the accused person.

Counsel submitted that the 2nd appellant was medically examined on 26/6/96 when the doctor found that he was aged approximately 18 years. Counsel contended that this was opinion evidence. Yet on 20th June 1996 when the appellant made charge and caution statement, he was stated to be aged 18 years. Counsel submitted that at his trial on 29/9/99 the appellant stated on oath

that he was aged 20 years. He was not challenged in cross-examination about this. Counsel contended that therefore the prosecution had failed to prove that the appellant was aged 18 years at the time the offence was committed on 8/6/1996.

We agree with the submission of the learned counsel for 2nd appellant that the prosecution had failed to prove that the appellant was aged 18 years at the time the offence was committed on 8/6/96.

We reiterate what we stated in the case of ***James Sowabiri & Another V Uganda Cr. Appeal No. 5 of 1990*** that-

> ***"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently or palpably incredible."***

Clearly the appellant's evidence that he was aged 20 years on 29/9/99 when he testified in court was not challenged. This would mean that when the offence was committed on 8/6/96; he was below 18 years of age. Consequently we think that if the lower courts had scrutinised the evidence relating to A2's age, they would have concluded that at the time the offence was committed on 8th June 1996 he was below 18 years of age. In the result, no sentence of death would have been passed by the trial judge and confirmed by the Court of Appeal. Instead, in lieu thereof, the court would have remitted A2 to the Family and Children Court under section 104 (2) of the Children Act for an appropriate order to be made.

In the result, the appeal for 1st appellant has no merit and is accordingly dismissed. The appeal for 2nd appellant is allowed. The sentence of death is set aside. In lieu thereof, we order that the second appellant, Serunga George be

remitted to the Family and Children Court for an appropriate order to be made under section 104 (2) of the Children Act.

Dated at Mengo this 12th day of February 2003.

B. J. ODOKI
CHIEF JUSTICE

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

J. W. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

J. N. MULENGA
JUSTICE OF THE SUPREME COURT