THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CRIMINAL APPEAL NO. 04 OF 2003

CORAM: ODER; TSEKOOKO; KAROKORA; MULENGA AND KANYEIHAMBA; JJSC.

LUTWAMA DAVID : :::::::::: :::::::::: :::::::::: APPELLANT

A N D

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

(Appeal from Judgment of the Court of Appeal at Kampala before Hon. L.E.M. Mukasa-Kikonyogo, DCJ., Mpagi Bahingeine, Berko JJ.A dated 18th day of February, 2003 in Criminal Appeal No. 112 of 2001.)

JUDGMENT OF THE COURT:

This is a second appeal. It is from a judgment of the Court of Appeal which dismissed an appeal against conviction by the High Court of the appellant for the murder of Sadiya Namutebi, the deceased.

The facts of the case as accepted by the two courts below were as follows:

On 18th March 1007 the deceased, Sadiya Namutebi then aged 7 years, was returning from school with her friends. One of the friends was Christine

Nakiyimba, PW3. They met the appellant on the way. The appellant called the deceased and asked her to assist him to carry something for him, though the appellant did not have anything with him to be carried. The deceased gave her books to PW3 before she accompanied the appellant. PW3 took the books to the deceased's grand father, Mr. Kaggwa and informed him that the deceased had gone with a man.

When the deceased failed to return, a search for the appellant and the deceased was mounted. After ten days of fruitless search with the assistance of the Police, a decision was taken to seek the assistance of the Military Police. Within a short time, the appellant was arrested by the Military Police from his hiding place at Mengo Kisenyi, Kampala. The appellant was taken back to Sekiwunga village from where the deceased had disappeared. The appellant led the search party to where the body of the deceased was found hidden. The body of the deceased was taken to Entebbe Hospital and later transferred to Mulago Hospital for post mortem. Although the post mortem report was not tendered in evidence, the learned trial judge believed the prosecution witnesses who saw the body of the deceased and stated that the neck had been cut but the head remained attached to the body. The stomach had been cut open vertically, the legs were severed and the private parts, intestines and heart had been removed.

PW3 identified the appellant at an identification parade who was eventually charged with murder. In his defence at the trial, the appellant denied the murder charge and stated that he was arrested at Mengo Kisenyi by armed men who took him to Army Barracks from where he was taken to Sekiwunga village to point out where he had got firewood. While he was pointing out where he had seen bundles of firewood some villagers saw the body of the deceased. Thereupon the Military Police arrested him and assaulted him before taking him to Entebbe Police Station from where he was picked at an identification parade by a child he had seen before in the village where he used to collect firewood. He denied making a statement at Entebbe Police Station. He stated that D/lP Balikowa, PW4, asked him two questions in swahili after which he, PW4, asked if he knew how to write his name. When he (appellant) answered in affirmative, PW4 asked him to sign his name on

the statement so that he would release him. The appellant signed the statement but instead of releasing him the Police Officer charged him with the murder of the deceased.

The learned trial judge rejected the defence and believed the prosecution evidence on the basis of identification of the appellant by PW3 and his own repudiated/retracted confession in which he implicated himself. She found him guilty, convicted and sentenced him to death. His appeal to the Court of Appeal was dismissed. He has now appealed to this Court on three grounds which were argued separately:

The first ground complained that the learned Justices of Appeal erred in mixed law and fact in relying on the retracted and repudiated confession that was not properly admitted in evidence.

Ms. Owor, counsel for the appellant submitted, on 1st ground, that the Justices of Appeal erred in holding that failure to follow guidelines contained in the Chief Justice's circular was not fatal to the conviction. She submitted that the appellant's statement to PW4 ought to have been recorded in Luganda which the appellant spoke but not in English. She cited the Uganda Police Standing Orders 7th Ed (1984) Rules 20, 21 and 26 (2) (3) which inter alia require the recording officer to record the statement of suspect in the language spoken by the suspect. She submitted that this was mandatory and yet the recording officer recorded the statement in English. She contended that the issue of voluntariness of the appellant's statement was crucial and argued that the issue of voluntariness of the statement depended on the procedure adopted by the recording officer. In the circumstances, she submitted that the statement ought not to have been admitted as its voluntariness was in question. Counsel further complained that the learned trial judge never made a ruling on 1st complaint which concerned recording of the statement in English instead of Luganda. The other complaint was that the appellant signed the statement after he was induced that if he signed the statement he would be released.

Mr. Mulumba, PSA, for the respondent opposed the appeal. He submitted that the Justices of Appeal properly upheld that though the procedure in recording the charge and caution statement from the appellant breached the guidelines contained in the Chief Justice's circular, failure to follow the guidelines was not fatal to the conviction, since the recording officer cautioned the appellant in Luganda, and the appellant gave his statement in Luganda which the recording officer knew even though he recorded the statement in English. He further submitted that the Justices of Appeal properly upheld the conclusions of the trial judge on the charge and caution statement and rightly held that failure to comply with guidelines by recording officer was not fatal.

With due respect to counsel for the appellant we reiterate what we stated in the ***S.C Criminal Appeal No. 16/1997 Namubiru V Uganda*** (unreported) that the Evidence (Statements to Police Officers) Rules were revoked when the old section 24 of the Evidence Act was repealed by Decree 24 of 1971. See also our decision in ***Festo Andera Asenua and Another V Uganda S.C Criminal Appeal No. 1 of 1998*** (unreported).

The relevant Section 23 of the Evidence Act, (section 24, in 1964 Edition) provides as follows:

"(1) No confession made by any person whilst he is in the custody of a Police Officer shall be proved against any such person, unless it is made in the immediate presence of -

(a) ***a Police Officer of or above the rank of Assistant Inspector, or***

(b) ***a magistrate.***

(2) The Minister may, after consultation with the Chief Justice make rules prescribing generally the conduct of procedure to be followed by Police Officers when interviewing any person and when recording a statement from any person in the course of any investigation."

The Chief Justice in his directive Reference CJ/CB dated 2nd March 1973, to all magistrates on recording of extra judicial statement referred to that section and said :-

"This section is designed to ensure that any statement made by a person in police custody is voluntary. If, therefore, such a person is brought before a magistrate for the purpose of recording a statement from him, the magistrate must ensure that no force, threat, promise or any form of inducement is offered to or allowed to operate on the person to induce him to make a statement."

The learned Chief Justice set out the procedure to be followed and this court reproduced the procedure in the case of ***Festo Andrea Asenua*** (supra).

We would observe that the learned trial judge was alive to the question of following proper procedure when Police record charge and caution statements from accused persons. She dealt with the complaint thus:

"I would, however, remark that although there is nothing wrong with the method used by Assistant Inspector Balikowa in recording accused's charge and contain statement, a better method should have been recording the statement in the language used to communicate with the accused. Later, the statement so recorded would be translated into official language - English. The method that Balikowa used is short-cut probably designed to save time that is necessary for a busy schedule. It carries with it risks of the statement being declared inadmissible. The longer and rather cumbersome method is safer."

On the complaint that the accused was induced to sign the statement with the promise that he would be released once he had signed the statement, the learned trial judge found that the appellant told a lie. She held:-

"He cannot say that Balikowa talked to him in a language he is illiterate in (English) and he did not understand, then in the same breath tell court that he understood only that portion of their communication which tantalised him with the promise of release if he signed the statement. The accused talked with* Balikowa in *Luganda which by his admission he understands. That indeed is my finding."

After hearing evidence and arguments from both sides the learned trial judge concluded that the accused's charge and caution statement was admissible. She found that it was freely and voluntarily made and that it was not induced by threats or violence. Nor was it a product of a promise made by Balikowa (who in any case was not an investigating officer) that the accused would be released once he signed the statement. She concluded as follows:-

"I find the statement to he the correct recording (in English) of what the accused communicated to Balikowa. The statement was read back to accused in Luganda. He approved it and signed."

The learned Justices of Appeal found that the procedure adopted by the recording officer of the statement - breached the guidelines contained in the Chief Justice's Circular but held that the circular was only guideline and that failure to comply with it was not fatal to the conviction, because what was relevant for the admissibility of the confession was that it must be voluntary.

The Justices of Appeal further found that the learned trial judge, after conducting a trial within a trial, had found that the statement was freely and voluntarily made. It had not been induced by threat or violence nor that he would release him if he signed the statement.

We agree with the conclusions of both courts. In the result, ground one must fail.

The second ground complained that the Justices of Appeal was that they erred in mixed law and fact by failing to consider the poor legal defence accorded to the appellant at the High Court. Ms. Owor counsel for the appellant cited the case of ***Kawoya Joseph V Uganda SC Appeal No. 50/1999*** (unreported) and ***Lobo V Salim (1961) EA 223,*** to support her argument.

With due respect to counsel, the instant case is distinguishable from ***Kawoya's case*** (supra). Although counsel in this trial may in some aspects of the conduct of the defence have been casual, before the High Court, the appellant himself, never raised any complaint before the trial judge. In ***Kawoya case*** (supra), where Kawoya was called to defend himself and stated:-

"I will not give evidence and I have no witness to call because my lawyer is bent on my losing the case. I will not say anything."

Clearly in that case that utterance showed that counsel had acted contrary to the appellant's instructions.

In the instant case, the appellant did not complain before the High Court against counsel's conduct of his defence. Furthermore, the issue was not raised in the Court of Appeal, to warrant a complaint that it was wrongly decided. Rule 81(1) of the Rules of this Court provides as follows:

"81(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative; the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make. "

Therefore, in our opinion the criticism against the Justices of Appeal that they erred in mixed law and fact by failing to consider the poor legal defence accorded to the appellant at the High Court is unjustified. The issue was never raised for consideration by the Court of Appeal. In the result this ground must fail.

The third and last ground complained of is that the learned Justices of Appeal erred in law by failing to subject the entire record to fresh scrutiny and evaluation thereby occasioning miscarriage of justice. Ms. Owor submitted that the Justices of Appeal failed to re-evaluate the evidence on record. On the other hand, Mr. Mulumba, P/SA submitted that the Justices of Appeal properly subjected the entire record to scrutiny and came to the right decision.

The Justices of Appeal re-evaluated the evidence concerning the circumstances of how the appellant came to be arrested, his extra judicial statement and his identification by a single identifying witness and concluded that:

"Although identification of an accused person can he proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness regarding identification, especially when the conditions favouring correct identification are difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can be reasonably concluded that the evidence of identification can safely be accepted as free from possibility of error. The true test is not whether the evidence of such witness is reliable. The true test is whether the evidence can be accepted as free from the possibility of error. See Tomasi Omukono & Another V Uganda Cr. Appeal No. 4 of 1977 reported in (1977) HCB 61."

They also cited with approval the case of ***Abudalla Nabulele & Others V Uganda Cr. Appeal No. 9 of 1979 reported in (1979) HCB 77*** and considered the finding of the trial judge on identification of the appellant where she held inter alia:

"I have carefully considered Nakiyimba's evidence of identification of the accused. I am satisfied that she observed the accused on the 18/3/97 when the accused took

Namutebi. She was sharp enough to report her observation to Kaggwa, Namutebi's grand father.

Nakiyimba later saw the accused at a bush in Sekiwunga as he led people to Namutebi's body. She later correctly identified the accused at Entebbe Police Station. 1 believe that in identifying the accused Nakiyimba was not assisted by anybody."

The Justices of Appeal found that although the learned trial judge had properly directed herself and the assessors to the danger of reliance on the evidence of PW3 alone to connect the appellant with the offence, they were unable to agree that in the circumstances of the case, PW3's evidence of identification would rule out any mistake on her part, because the appellant was a complete stranger to her when she said she saw him (appellant) take the deceased. Secondly, although the incident happened during day time, there was no evidence regarding length of time she took in observing the appellant. Thirdly, PW3 being young, due allowance for her immaturity had to be taken into account. Fourthly, they attached less importance to her identification of the appellant at Sekiwunga village where the body was found since the appellant was the suspect brought to the scene. Fifthly since the appellant was the man in the hands of Police some ten days earlier at Sekiwunga village, the identification parade at Entebbe Police -Station was valueless. The Justices of Appeal however concluded as follows:

"In the circumstances, with respect, we think that the learned trial judge should not have placed any evidential value on the evidence of PW3 regarding identification parade and her identification of him in the bush. In our view, the condition were not favourable for correct identification. Consequently other evidence was necessary which would point to the guilt of the appellant and from which it could reasonably be concluded that PW3's evidence of identification was free from a possibility of error. Such evidence was available on the record and we think the learned trial judge was right to rely on it to conclude that PW3's evidence of identification was free from possibility of error.

We need only to refer to few of the circumstantial evidence the learned trial judge relied on. The first was the sudden disappearance of the appellant after the incident from

Sekiwunga village where he had been a regular visitor. The second was the discovery of the body of the deceased not so long after the arrest of the appellant. The evidence on record shows that the villagers started to search for the girl soon after PW3 reported to Kaggwa, the deceased's grand father. Kisubi Police joined in the search on 19/3/97. When the combined search party made up of the Police, villagers were not getting any results, the Military Police was brought in on 28/3/97. The appellant was arrested on the same day. The following day on the 29/3/97 the body was found. It was not a matter of coincidence that the body was found in the bush where the appellant used to collect firewood. The judge was right to reject the appellant's claim that it was the villagers who found the body. There is also his charge and caution statement, Exh. P1, which implicates him in the murder of the deceased.

In our view, the evidence of identification supported by the other evidence we have alluded to above destroyed the appellant's alibi. The judge was right in so finding. "

In our view, the Court of Appeal cannot be faulted in its re-appraisal of and conclusion on the evidence as indicated in the above passage. Therefore ground three must tail. In the circumstances this appeal must fail. It is accordingly dismissed.

Dated at Mengo this: 30th day of November 2004.

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

J.W.N TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURTS

J.N. MULENGA
JUSTICE OF THE SUPREME COURTS

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT