2. THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 33/ 2014.

[Arising from a decision of the Court of Appeal in Criminal Appeal No. 127/ 2012 dated 31. 10.2014]

1. SSEKITOLEKO YUDAH TADEO
2. MWESIGYE MAIKOLO
3. NAMULI ROSE

......................................APPELLANTS
....

VERSUS

UGANDA::RESPONDENT.

(Coram Hon. Justice Bart M. Katureebe, CJ;
Hon. Justice Arach-Amoko: Hon. Justice A.S. Nshimye, Hon. Justice Opio-Aweri, Hon. Justice Faith Mwondha, JSC).

JUDGEMENT OF THE COURT.

INTRODUCTION

This is an appeal from the decision of the Court of Appeal which dismissed an appeal against conviction and sentence by the High Court for murder contrary

to Sections 188 and 189 of the Penal code Act.

BACKGROUND

The 1st appellant. 3rd appellant and the deceased were siblings. The three had a land dispute and a family grudge over witchcraft. The said grudge forced the 1 st appellant to abandon his ancestral home and settle elsewhere

begrudgingly. The 1st and 3rd appellant together then hatched a plan to kill the

deceased. The 1[51] appellant contacted the 2nd appellant to do the needful. The three appellants met at the home of the 3rd appellant where all the arrangements to kill the deceased were finalized. The 2nd appellant was showed around the home of the deceased for acquaintance.

The second appellant went to the home of the deceased at around 2 pm pretending that he was looking for land to buy. He was holding a black polythene bag (commonly known as kavera) with unknown contents. The 2nd appellant and the deceased left to drink at a nearby trading center at Makole at around 3pm.They both returned at around 3:00am in the night each with a bottle of beer and the second appellant still had his polythene bag. Using a paraffin lamp (locally known as tadooba), PW1 (deceased's daughter) said she saw them go to the deceased's bedroom and sleep on the same bed. In the morning, PW1 heard a loud snore from the deceased's bedroom and she immediately went and called her cousin brother Katumba (PW3) who came and found the deceased's face covered with a blanket. On uncovering the face, pw3 found the head of the deceased had wounds and was bleeding. The deceased later died on his way to hospital. They reported the matter to the police.

As Abwara Peter (PW5) was reporting to the scene, he found the 2nd appellant under suspicious circumstances. The 2nd appellant stated that he was looking for a vehicle to take him to Ibanda. When he was questioned about the hammer he was holding in the polythene bag, he replied that it was for his defence. The 2nd appellant was arrested and put in police custody.

The 2nd appellant was later identified by PW1 as the person who had been at their home and the same person who left with the deceased, returned with him and went to bed together. Upon his arrest, the 2nd appellant still had the black kavera which upon inspection was found to contain shoes and a hammer. The shoes were later identified to have belonged to the deceased.

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PW6 carried out a post mortem examination vide Police Form 488 on the deceased and established that the deceased had a crushed skull fracture. He stated that the cause of death was brain contusion hemorrhage and shock owing to being struck on the head by a blunt weapon. His opinion was that a blunt round weapon must have been used to kill the deceased.

All the three appellants denied the offence.

The 1st appellant made a charge and caution statement where he stated that he was the one who collected the 2nd appellant to kill the deceased. He sold his bike to raise money to transport the 2nd appellant and promised to pay him shs. 600,000/= for killing the deceased.

The 2nd appellant also made a charge and caution statement before PW4 (Kyaligonza) in which he confessed to have been hired by the 1st appellant to kill the deceased and was promised to be paid Uganda shillings 600,000/=. He explained how the deceased was killed and that he picked the deceased's shoes and the murder weapon (hammer) as evidence of fulfillment of the mission. After taking those items to the 3rd appellant, he was given shs 10,000/= and a bottle of waragi and the 3rd appellant assured him of being paid the 600,000/= later by the 1st appellant.

The 1 st and 2nd appellants retracted and repudiated their confessions.

The appellants were examined vide Police Form 24 and all were found to be normal and had no bruises.

The trial judge conducted a trial within a trial to establish the propriety of the charge and caution statements and it was found that the statements were made voluntarily and were properly admitted in court as evidence. The trial judge believed the evidence adduced by the prosecution pointing to the guilt of the appellants.

On the 10th day of May 2012. the appellants were convicted and sentenced each to 28 years imprisonment.

Being dissatisfied with the decision of the trial Court. the appellants appealed to the Court of Appeal against both conviction and sentence. The Court of Appeal disallowed all the grounds of appeal. and confirmed the decision of the High Court.

The appellants still dissatisfied with the decision of the Court of Appeal. lodged an appeal in this Court on the 29th day of March 2016..

The memorandum of appeal contained the following grounds;

1. That the learned Justices of Appeal erred in law in upholding conviction on the basis of the un-corroborated charge and caution statements of A 1 and A2.

3. That the learned Justices of Appeal erred in law in upholding the trial Court's finding that the 3 appellants had a common intention and were joint offenders .

3. That the learned justices of appeal erred in law in confirming the sentence of 28 years imprisonment.

The appellants thus prayed this honorable court to allow the appeal. quash the conviction and set aside the sentence or in the alternative. reduce the sentence of 28 years as shall be judiciously determined by court.

Representation.

The appellants were represented by Henry Kunya whereas the respondent was represented by Principal State Attorney, Okello Richard.

Submissions of counsel.

Both counsel filed written submissions

Grounds one and two.

Counsel for the appellants argued grounds 1 and 2 together since they both hinged on the alleged participation of the appellants in the said murder. Counsel contended that much as the charge and caution statements were recorded from A 1 and A2, the same were not corroborated to the requisite standards. He submitted that there was no credible evidence to prove common intention let alone being joint offenders as alluded to by the lower courts.

Counsel contended that the Justices of Appeal while re-evaluating the evidence on record, were not alive to the fact that both charge and caution statements of A 1 and A2 were recorded by the same police officer. Counsel submitted that this offended the well laid down principles as stated in the case of Sewankambo Francis v Uganda, Supreme Court Criminal Appeal No. 33 of 2001. The court held that it is irregular for one police officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. Court further opined that the temptation on the part of the police to use the contents of the statement to record a subsequent statement could not be ruled out.

Counsel contended that the said confessions were not on all fours with the evidence on record which contends with the wording in the case of **Tuwamoi V UG (1967) E.A.84**: where Court was of the view that for such confession to be deemed acceptable for purposes of founding a conviction, the trial court must be fully satisfied in all circumstances of the case that it was true.'

Counsel further argued that there was no evidence to prove the following:

- That A2 went back to the deceased's home at night and more so slept on the same bed with the deceased as alleged by PW1.
- That A2 went back to the house of A3 with the deceased's Nigina shoes as proof of having accomplished the mission.
- That the retrieved hammer had any traces of the deceased's blood.

- That the appellants met in the house of A3 to plan the execution of the said offence as to lay a strong basis for the alleged common intention and being joint offenders.
- That PW2 was not privy to any ongoing conversation between the appellants nor did she get to hear what was being discussed, so she could not safely assert that they were busy planning execution of the said plot.

Counsel submitted that the appellants were and remain mere suspects as the obtained circumstantial evidence did not irresistibly point to their guilt besides linking them to the said offence. Counsel concluded by inviting court to allow both grounds one and two.

In reply, counsel for the respondent agreed to the fact that the case was greatly pegged on the charge and caution statements extracted from A 1 and A2. He however argued that the prosecution had adduced sufficient evidence to corroborate the contents of the charge and caution statements to the required standards. He argued that the entire evidence looked at together, was credible enough to prove common intention on the part of the appellants and the fact that they were joint offenders as was rightly found by both the trial court and the first appellate court.

On the issue of the propriety of the charge and caution statements, counsel argued that the fact that both statements obtained from both A 1 and A2 were recorded by the same police officer did not in any way occasion a miscarriage of justice because the statements were recorded 3 days apart, and one after another. Therefore, the police officer could not have memorized what he had written 3 days earlier. He added that the same did not offend the laid down principles in the case of Sewankambo (supra) because of the following;

- That in the Sewankambo case, the police officer who recorded the charge and caution statements had to use a luganda interpreter and at times English which the appellants did not understand while in the

instant case, the officer used the appellant's local language without need for interpretation, so he could not have missed out on anything the two appellants narrated to him during the exercise.

- The allegation of assault did not arise in the instant case therefore the charge and caution statements were rightly admitted as evidence in the trial court and the Court of Appeal justices were right to treat it as such.

Counsel further contended that it was not true that A2 categorically denied ever going back at night as stated by PW1 during her testimony but rather he denied going back to A3's home. He also did not rebut the evidence by PW1 that he returned late at night with the deceased to their home and that the two had spent the night in the same room and on the same bed.

Counsel concluded by urging court to consider A 1 and A2' s charge and caution statements in totality so as to properly get a complete narrative of what they intended to convey.

On the issue of corroboration, counsel for the respondent agreed that according to the Tuwamoi case (supra), it is not prudent for a trial court to act upon a statement which has been retracted in the absence of corroboration except in circumstances where the confession must be true.

Counsel submitted that because of the sensitivity involved in the planning process, A 1 and A2 could not afford their plan to be discovered so court had to believe their statements without corroboration.

Counsel however contended that the statements were corroborated by PW2 and PW5s' evidence. Counsel submitted that the prosecution had led evidence of PW2 that had brought A3 on board. Pw2 testified that A3 had a secret meeting in A3's bedroom and the fact that A 1 and A3 had a grudge with the deceased but she did not know why.

Counsel invited this court to disallow grounds one and two.

Resolution of ground 1 and 2.

The appellants' complaint is that it was an error on the part of the trial judge and the Justices of Appeal to convict them based on the charge and caution statements which were not properly admitted as evidence and uncorroborated statements extracted from the same. The Court of Appeal agreed with the trial court that all the appellants with malice aforethought and a common intention planned and caused the death of the deceased. These two grounds deal with 3 major issues which are the propriety of the charge and caution statement, corroboration of the charge and caution statements and proof of common intention.

Propriety of the charge and caution statement

The appellants claim that the charge and caution statements were recorded by the same officer which was greatly prejudicial to the appellants since the recording officer could use facts from one statement to fabricate the other.

The propriety of a confession is provided by Section 24 of the Evidence Ad which provides as follows:-

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

The above section was interpreted by the Supreme Court in the case of Walugembe VS Uganda, Criminal Appeal No. 39 of 2003.

Where an accused person objects to the admissibility of the confession on grounds that it was not made voluntarily, the court must hold a trial within a trial to determine if the confession was or was not caused by any violence,

force, threat, inducement or promise calculated to cause an untrue confession

to be made. In such trial within a trial, as in any criminal trial, the onus of proof is on the prosecution to prove that the confession was made voluntarily. The burden is not on the accused to prove that it was caused by any of the factors set out in S. 24 of the Evidence Act. See **Rashidi VS Republic (1969) EA 138**.

We agree with the appellants' submission that according to the case of **Sewankambo Francis V Ug (supra**) it is irregular for one police officer to record alleged confession statements from two suspects charged with the same offence arising from the incident. We however find the above case distinguishable from the instant case. In the instant case, much as PW4 recorded both statements in question, they were recorded 3 days apart. So he could not have memorized the facts of the case in a bid to fabricate evidence unlike in the Sewankambo case where the statements were recorded on the same day.

We also agree with the respondent's submission that unlike in the cited case where the recording officer was not well conversant with the local language of the appellants and needed an English interpreter, in the instant case, the recording police officer was well versed with the local language of the appellants and so could not have fabricated any fact in the statement due to misunderstanding the language. The trial judge carried out a trial within a trial in which he established that the confessions were found to be true, made voluntarily and most importantly were signed by the appellants voluntarily.

The Court of Appeal had this to say:-

> *"We have studied the judgment of the trial judge and the considerations he had on the repudiated and retracted confessions of the first and*
>
> *second appellants .....· .....we are satisfied that the learned trial judge followed the law and procedure on admission of the charge and caution statements which were retracted and repudiated. He properly handled a trial with in a trial for each of the confession statements. He properly cautioned himself and the assessors on the admissibility of the*

statements. We find that he admitted them into evidence in compliance with the law after due consideration and caution … "

We find that the learned justices of appeal rightly upheld the admission of the charge and caution statement after due consideration and the fact that a trial within a trial was conducted correctly. There is no evidence that 1st and 2nd appellants were compelled to make the charge and caution statements. Although the statements were recorded by the same officer, the two statements as recorded by pw4 were independent of each other but were complimentary of each other as they both state in details how the death of the deceased was planned and executed by the three accused persons. Hence, there was no prejudice even though the said confessions were recorded by the same police officer. For the above reasons we cannot fault the findings of the Court of Appeal on this point.

Corroboration

The appellants' argument was that the learned justices of appeal and the trial judge convicted the appellants based on uncorroborated evidence extracted from the charge and caution statements. The law with regard to retracted and repudiated confession was re-stated in the case of **Tuwamoi V UG (1967) E.A.84; as follows;**

"a trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all 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 court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering all material points and surrounding circumstances that the confession cannot be but true .. · .. · .. " (emphasis ours).

The court held further that "In assessing a confession, the main consideration at this stage will be is it true? And if the confession is the only evidence against the accused, then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a criminal case."

In a nutshell, it is trite that court can convict on a retracted or repudiated or both retracted and repudiated confession alone (without corroboration) if it is satisfied after considering all material factors and surrounding circumstances of the case that the confession cannot be but true: see Matovu Musa Kassim VS Uganda CR. Appeal No. 27/2002 (sc)

In dealing with this point the Court of Appeal had this to say:- *"……We also find that the admitted confession statements were corroborated by the evidence on record. The first appellant was seen by PWI when he came to the home of the deceased at 3pm.. He went out with him to return at night and slept on the same bed in the same room. After the killing of the deceased to which he confessed, he reported to the third appellant and was given 10,000/= and 'enguli'. He was assured by the third appellant of the payment of the agreed fee of 600,000/= by the second appellant. He had kept the shoes of the deceased and the hammer that was bought in Kasambya in Mubende. He was arrested with the hammer in a black kaveera that he had when he came to the deceased's home that afternoon. He was also found with the deceased's shoes which he had kept as proof of fulfillment of the agreed mission of killing (he deceased. He was arrested by PW5 that night immediately after the deceased had been killed ……."*

In our view, the learned Justices of Appeal were alive to the law regarding the admissibility of retracted and repudiated confession and were right in their conclusion that the confession statements of the accused were not only true but were well corroborated by the evidence on record.

Apart from confession of the 1[51] and 2nd appellants implicating each other and the 3rd appellant, there were other evidence which corroborated the confession statements. These were the evidence of PW1, PW2, PW4 and PW5. The whole of that evidence established the fact that the 2nd appellant went to the home of the deceased at 2:00pm. The two negotiated a land transaction. Later they went to drink together at the nearby trading centre. The two returned each with a bottle of beer.

The two went to bed together, later in the night the deceased was heard snoring only to be found that he had been attacked. Before the incident, 2nd and 3rd appellants were seen together holding a meeting in the bedroom of the 3rd appellant. After the matter was reported to the authorities, the 2nd appellant was found near the scene under suspicious circumstances.

He was found with a black kavera which contained a hammer and two pairs of shoes. The 2nd appellant was later identified as the person who was last seen with the deceased and had returned with two battles of beer. The hammer was found to be containing blood while the pairs of shoes were found to belong to the deceased. The two bottles of beer were found in the bed where the 2nd appellant and the deceased had slept. In the premises we have no reasons to fault the Justices of the Court of Appeal on the point of corroboration.

Common intention

The argument here is that there was no evidence to prove common intention and treating the appellant as joint offenders as alluded to by the lower courts. The lower courts misdirected themselves on the law governing common intention.

The law governing common intention is laid down in section 20 of Penal Act provider- The Supreme Court in the case of Charles Komwiswa **V Ug [1979]** HCB **86** stated that;

"where several persons are proved to have combined together for the same illegal purposes, any act done by one of them in pursuance of the original concrete plan and with reference to common object in the contemplation of law, is an act of the whole, each party is the agent of the others in carrying out the object of the conspiracy he renders himself a principal offender"

In dealing with the above point the learned justice of Appeal observed as follows:-

"The killing was in fulfillment of an agreement between the three appellants. The evidence on record clearly illustrated the role of each of the three appellants in effecting the killing of the deceased was as per arrangement.

The learned judge considered this evidence and made a finding that the three appellants had formed a common intention to kill the deceased and they play a role in effecting the plan of killing"

We accept the above conclusion. The confessions made by the 1st and 2nd appellants coupled with the corroborative evidence from the testimonies of pw1, pw2, pw4, and pw5 implicated all the appellants as having participated in the murder of the deceased. The 1st appellant was implicated by his confession and the 2nd appellant's confession. The 2nd appellant was implicated by his confession, and the confession of the 1st appellant, the testimony of PW1 as the person who came to their home, left with and returned with the deceased. There is the testimony of PW5 who arrested him in possession of a black polythene bag which contained the murder weapon and the deceased's plastic shoes. Then PW2's testimony who stated that she saw the three appellants at the 3rd appellant's home. The 3rd appellant was implicated by both confessions of the 1st and 2nd appellants. There is also the testimony of PW2 who stated that the three appellants met at her home in her bed room and that she had a grudge with the deceased. Pw3 was in the company of pw5 when the 1st appellant was arrested and found with black

kavera containing a hammer and some property belonging to the deceased.

The hammer had blood stains,

The whole of the prosecution evidence was to the effect that all the three appellants participated in the plan to kill or killed the deceased. The main actors were the 1st and 3rd appellants. They hired the services of the 2nd appellant. Although it was the brother of the 1st appellant who eventually hit the deceased with the deadly weapon, the 2nd appellant remained implicated because it was his hammer which was used to kill the deceased in his presence. Moreover he took the hammer to the 3rd appellant to confirm that the mission had been a success, The evidence of the prosecution witnesses discredited the defence case and clearly demonstrated in the murder of the deceased beyond reasonable doubt. We accordingly conclude that there was overwhelming evidence implicating all the appellants in the commission of the murder. We find that there was common intention by all the appellants to kill the deceased.

GROUND 3

Counsel submitted that on account of the apparent flaws regarding admission of the charge and caution statements of A 1 and A2 coupled with the lack of independent corroborative evidence in support thereof, the sentence was manifestly excessive as to amount to an injustice. Counsel further submitted that had the Court of Appeal properly re evaluated the evidence before them, they would have ultimately considered the said sentence as being harsh and manifestly excessive.

Counsel prayed court to substantially reduce the sentence of 28 years so as to meet the ends of justice.

In reply, counsel for the respondent submitted that the Justices of Appeal exercised absolute lenience considering the fact that the offence in question

carries a maximum sentence of death. He prayed that this court disallow the appeal in its entirety.

A clear reading of this ground implies that the appellants are challenging the severity of the sentence imposed by the trial court and confirmed by the Court of Appeal.

The Learned justices of Appeal on the sentence held as follows;

" .....*the principles upon which an appellate Court should interfere with a sentence imposed by the trial court were considered by the* Supreme Court *in the case of* ***Kyalimpa Edward V Vg, Criminal Appeal No. 10 of 1995*** *to which counsel for the respondent referred to us. The Supreme Court referred to* ***R V De Haviland*** **(1983) 5** ***Cr. App. R(s) 109*** *and held as follows:*

':.4n appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive so as to amount to an injustice. ***Ogalo s/o Owura V R. (1954021 EA.C.A 270 and R V Mohamedali Jamal(1948) 15 E.A.C.A12****6." The maximum sentence for murder for which the appellants were convicted was death. We find that the learned trial judge exercised his discretion with all due consideration and sentenced the appellant to* 28 *years. "*

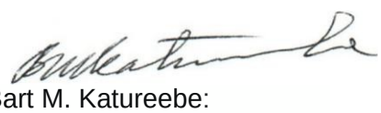
The scope of appeals permitted to this Honorable Court regarding sentence is stipulated in Section 5(3) of the Judicature Act which provides;

"In case of an appeal against sentence and an order other than one fixed by law, the accused may appeal to the Supreme Court against the sentence or order on the matter of law, not including severity of sentence.

This means that this court has no jurisdiction to hear appeals regarding severity of sentence. However the exceptional circumstances are founded in the Kyalimpa case (supra) which are that the sentence has to be illegal or manifestly excessive in the circumstances. In the instant case, we accept the respondent's submission that the offence in question is murder and the maximum sentence is death. We therefore do not find any reason to interfere with the sentence.

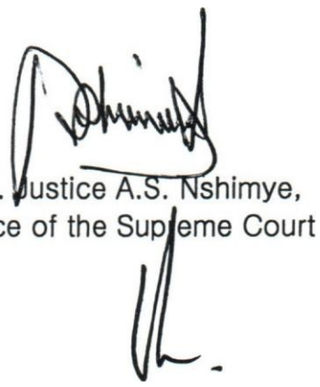
Consequently, ground three also fails. In the result the appeal against conviction and sentence is dismissed.

Dated at Kampala this .....~6th.....day Of .. April.....2017



Hon. Justice Bart M. Katureebe:
Chief Justice/Justice of the Supreme Court.

Hon. Justice Arach-Amoko:
Justice of the Supreme Court



Hon. Justice A.S. Nshimye,
Justice of the Supreme Court

Hon. Justice Opio-Aweri,
Justice of the Supreme Court

Hon. Justice Faith Mwondha;
Justice of the Supreme Court.