

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MBARARA

CRIMINAL APPEAL NO. 101 OF 2011

1. DUNIA REMIGIO

2. TUKWATSIBWE MUBARAK :::::::::::::::::::: APPELLANT

VERSUS

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

(Appeal arising from the decision of the High Court of Uganda at Rukungiri before Hon. Justice Andrew K Bashaija delivered on 29th day of April, 2011 in Criminal Session Case No. 206 of 2009).

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

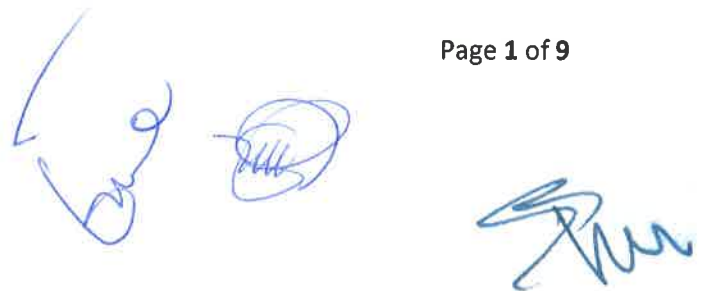
HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF COURT

The appellants were charged and convicted of the offence of murder c/s188 and 189 of the Penal Code Act, Cap 120 and sentenced to death. The appellants filed this appeal against conviction and sentence on the following grounds;

1. The appellants did not have a fair trial because they were represented by the same advocate in circumstances where there was a conflict of interest in relation to their respective defences which caused a miscarriage of justice.
2. The learned trial Judge erred in law and fact when he allowed evidence of the first appellant purported confession to be



admitted as evidence against both the appellants and hence coming to a wrong conclusion which caused a miscarriage of justice.

3. The learned trial judge erred in law and fact by the imposition of the death sentence which was manifestly harsh and excessive in the circumstances of the case. (Sic)

Background

On the 16th of March 2009, the deceased, who was a motorcyclist, went missing and as a result, his colleagues reported to Rukungiri police station. A search was conducted and it was discovered that the 1st appellant had attempted to sell a numberless motorcycle to a mechanic named Kasozi. The search party inquired from Kasozi and he informed them that the 1st appellant had tried to sell a motorcycle to him but he declined to buy it because the 1st appellant had no documents pertaining to it. The 1st appellant left the garage but left the cushion seats with agreements in them. The said agreements were used to trace for the 1st appellant's home and when they got there, the 1st appellant's father informed them that the 1st appellant had left home in the morning with a motorcycle. A search was conducted at the premises and a number plate UDG 235J, belonging to the deceased's motorcycle and the deceased's body were recovered in the compound.

Representation

At the hearing of the appeal, Mr. Bruno Muhanguzi appeared for the appellant while Ms. Nabisenke Vicky, appeared for the respondent.

Appellant's submissions

Counsel submitted that it was a misdirection for both appellants to be represented by the same advocate at the trial. The 1st appellant revealed that the 2nd appellant tied a rope around the neck of the deceased but the 2nd appellant denied responsibility for the killing. It was therefore not proper for both appellants to be represented by one and the same advocate.



Counsel further submitted that although the confession stated that the deceased died as a result of a rope being tied around his neck, there was no medical evidence from the doctor to prove that fact. The medical evidence on record was that the deceased died as a result of a blow on the head and amputation of the hands. Counsel argued that there was a contradiction between the confession of the 1st appellant and the medical evidence. In addition, that the confession could have been made under coercion from the police. There was no post mortem evidence that the deceased was strangled to death

Counsel submitted that the death sentence meted on the appellants was harsh and excessive and based on a wrong principle. Counsel relied on the decision in **Ogalo s/o Owuora Vs R Criminal Appeal No. 175 of 1954** in which the court held that an appellate court should only interfere with a sentence imposed by the trial court if the trial court acted upon a wrong principle or if the sentence passed was so high or so low so as to cause a miscarriage of justice.

Respondent's submissions

In reply, counsel for the respondent submitted that the 1st appellant retracted his confession and denied the offence of murder and therefore was innocent until proven guilty. The appellants did not show any dissatisfaction with their advocates and were accorded a fair trial. Counsel argued that the case of **Tumusiime Henry Vs Uganda Criminal Appeal No. 85 of 2010** is distinguishable from the present case because in that case, the co-accused transferred liability to the appellant and yet they were represented by the same advocate. In this case the 1st appellant retracted his confession and the prosecution had to prove its case against both appellants.

Counsel argued that the learned trial Judge evaluated the evidence surrounding the repudiated confession of the 1st appellant and found it succinct in details of the events leading to the killing of the deceased. The 1st appellant implicated himself as well as the 2nd appellant and as such, the confession met the requirements under section 27 of the Evidence Act. Further, that there was corroborating evidence that pointed to the guilt of the appellants.

Regarding the sentence passed by the learned trial Judge, counsel argued that the offence of murder carries a maximum sentence of death which was appropriate and suitable in the circumstances of this case. That the trial Judge considered both the aggravating and mitigating factors and properly passed a death sentence on the appellants.

Resolution of the appeal

This is a first appeal and this court takes cognisance of the established principles regarding the role of a first appellate court. The cases of **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No. 10 of 1997** and **Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997** in essence have established that a first appellate court must review/rehear the evidence and consider all the materials which were before the trial Court, and come to its own conclusion regarding the facts, taking into account that it has neither seen nor heard the witnesses; and in this regard, it should be guided by the observations of the trial court regarding demeanour of witnesses.

Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10 is also relevant. It provides that;

30. Power to reappraise evidence and to take additional evidence

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) Reappraise the evidence and draw inferences of fact; and

(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

For one to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

Ground 1

The appellants complained that they were represented by the same advocate at the trial and therefore did not have a fair trial in circumstances where there was a conflict of interest in relation to their respective defences. The 1st appellant had made a confession in his charge and caution statement implicating both appellants but he retracted it and a plea of not guilty was entered. Both appellants went through a full trial being represented by one and the same advocate and did not, at any point through the trial, show dissatisfaction with the said advocate. There is no evidence on the record to show that the said advocate acted in any way that prejudiced any of the appellants at the trial. Their conviction was based on the whole evidence adduced at the trial.

We agree with counsel for the respondent that the case of **Tumusiime Henry Vs Uganda Criminal Appeal No. 85 of 2010** is distinguishable from the facts of the present case. In that case, Tumusiime had been indicted for murder together with one Rose Mpairwe and at the time of Rose Mpairwe giving her defence, she implicated Tumusiime. Since they were both represented by the same advocate, Tumusiime had no opportunity of cross examining Rose Mpairwe, particularly with regard to implicating Tumusiime in the commission of the offence, which occasioned a miscarriage of justice to Tumusiime's case.

In the present case, both appellants pleaded not guilty at the trial and as such had no conflicting interests regarding their defences. We



therefore find that no prejudice was occasioned to the respective cases of the appellants. Ground one accordingly fails.

Ground 2: Admissibility of the confession

The 1st appellant recorded a charge and caution statement implicating himself and the second appellant. However, at the beginning of the trial, both appellants pleaded not guilty to the murder charges.

The law with regard to retracted and repudiated confession was restated 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....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 the instant case, it is trite law that a court can convict on a retracted or repudiated or both retracted and repudiated confession alone, without corroboration, if that court 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)** where the court held that:



“On the ingredient of the accused persons’ participation, there appears to be no direct evidence by the prosecution to link them to the killing. There is, however, very strong circumstantial evidence that tends to establish the linkage.

PW1, Kansime-Ruhanga told court that he last saw the deceased on 16th March, 2009 taking A1 and another man he could not know, on a motorcycle. That it was in the evening time. This ties in well with the charge and caution statement of A1 admitting complicity in the killing of the deceased and implicating Mubarak (A2). The statement was admitted in evidence after court was fully satisfied that it had been made freely and voluntarily.

Court is alive to the requirement that where the accused repudiates, it attracts his statement which, though later is admitted by court, there is need to act with great caution to be fully satisfied that in the circumstances, it was true before relying on it.”

From the foregoing, the learned trial Judge evaluated all the evidence on record and the 1st appellant’s confession and came to a correct conclusion that the appellants committed the offence of murder. Whereas the confession was repudiated, there was strong circumstantial evidence placing the appellants at the scene of crime.

PW1 testified that the deceased’s motorcycle had disappeared and the number plates were discovered at the home of the 1st appellant. The 1st appellant led the police to the home of the 2nd appellant and the deceased’s motorcycle was recovered from there. PW1 also testified that he last saw the deceased on the 16th of March 2009 taking the 1st appellant and another man on his motorcycle. These facts were stated in the confession and thus added truthfulness to it. The post mortem was done after the body was exhumed from the home of the 1st appellant’s father in a rotting state. Under these circumstances, the doctor could not find any external scars other than the missing hands and deformed head. We therefore find no reason to interfere with the learned trial Judge’s finding of guilt for both appellants. Ground two also fails.

Ground 3.

Review of sentence

It is trite law that an appellate court should not interfere with the discretion of a trial court in imposing a sentence unless the trial court acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of Justice. See: **Kyalimpa Edward v. Uganda SC Cr. App No. 10 of 1995, and Kyewalabye Bernard v. Uganda: Criminal App. No. 143 of 2001 (SCU).**

The learned trial Judge sentenced the appellants to death being the maximum sentence for murder. The murder was committed in a very gruesome manner having cut off the deceased's hands and half of his penis and the left side of the head being deformed. This case is similar to **Kalyamagwa Samuel Vs Uganda C.O.A Criminal Appeal No. 189 of 2012** where the appellant had robbed the deceased of his motorcycle and after killing him decapitated and dismembered the deceased's body and buried him in a shallow grave behind the appellant's home. The deceased in that case was a motorcycle rider like in the present case. This court upheld a death sentence meted on the appellant by the trial court and held that:

"The decapitation ad dismembering of the body of the deceased outrages humanity. After taking the life of the deceased, the appellant violated the dignity of the deceased even in death.... We find no reason to interfere with the sentence imposed by the learned Judge. The decision is consistent with previous decisions of this court. The learned trial Judge took into consideration the mitigating and aggravating factors.... Without proof that the discretion was abused or that the Judge acted on wrong principle or ignored some relevant factor, this court would have no lawful reason to interfere with the decision of the court below..."

In this case, the learned trial Judge sentenced the appellants to death in the manner prescribed by law. The act of murder in the instant

case was brutal and savage. The appellants who were known to the deceased lured him into A1s home and proceeded to kill him in a grisly and barbaric manner. They not only strangled him but they dismembered the body by cutting off his hands and bruised his head leaving it deformed. They took the deceased's motorcycle and tried to sell it off. Therefore these circumstances were grave enough to justify the death sentence passed by the learned trial Judge. We find no reason to interfere with the sentencing order of the learned trial Judge. This appeal is accordingly dismissed.

Dated this 13th day of October 2020



Hon. Justice Elizabeth Musoke, JA



Hon. Justice Stephen Musota, JA



Hon. Lady Justice Remy Kasule, Ag. JA