THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL NO. 0189 OF 2017
(Arising from High Court of Uganda at Masaka Criminal Session Case No. 0064 of 2014.)

1. **SSELUWAGI EWUSTAKIO ALIAS MATOVU LAWRENCE** :::::::::::::::::::::: **APPELLANTS**
2. **TAMALE HASSAN**
3. **NTEGE JAMIL SSENYOMO**

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::::::: **RESPONDENT**

(An appeal from the decision of the High Court of Uganda at Masaka before Zeija, J. delivered on 5th June, 2017 in Criminal Session Case No. 0064 of 2014)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF THE COURT

Brief Background

This is a first appeal against the decision of the High Court of Uganda in which the appellants were convicted of Murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 and were sentenced, to 80 years imprisonment.

They were duly charged, committed and tried before Zeija, J. in the High Court of Uganda at Masaka on an indictment containing the offence of Murder. The facts as accepted by the learned trial Judge were that the three appellants, had, on the 27th day of October, 2013 at Kakuuto Village in the Rakai District unlawfully caused the death of Lubega Bosco. At the commencement of the trial, the appellants had pleaded not guilty. When asked to enter their defences, the 2nd and 3rd appellants exercised their

legally guaranteed rights to keep quiet, while the 1st appellant gave a sworn statement denying any involvement in the said offence. Regardless, the learned trial Judge found them guilty, convicted them and imposed the sentence indicated earlier. Being dissatisfied with the decision of the High Court, the appellants lodged this appeal on grounds which were set forth in their joint memorandum of appeal as follows:

> **"1. The learned trial Judge erred in law and fact when he relied on the 1st appellant's charge and caution statement which is not on court record thereby wrongly convicting the appellants.**
>
> **2. The learned trial Judge erred in law and fact when he imposed an illegal sentence of 80 years in prison against the appellants."**

Representation

At the hearing of the appeal, Mr. Tusingwire Andrew, learned Counsel represented the appellants, who were in Court, on State Brief, while, Ms. Joanita Tumwikirize, learned State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. Counsel for each side made oral submissions.

Appellants' case

Ground 1

It was the case for the appellants that the charge and caution statement which was relied upon by the learned trial Judge to convict them was not on the Court record. In counsel's view, the absence of that charge and caution statement, which was said to have been taken from the 1st appellant and which was further said to have implicated the appellants in the murder of the deceased, from the Court record was fatal to the conviction of the appellants.

This was his only submission on ground one.

Ground 2

Counsel submitted that the trial Court had passed an illegal sentence which should be interfered with by this Court. He elaborated that in imposing the sentence of 80 years imprisonment against the appellants, the learned trial

Judge omitted to take into account the period each of the appellants had spent on remand contrary to the Constitutional requirement in **Article 23 (8)** of the 1995 Constitution. He then asked this Court to set aside the illegal sentence and exercise its powers under Section 11 of the Judicature Act, Cap. 13 to impose a sentence of 18 years imprisonment on each of the appellants for the murder in question.

Respondent's case

Ground 1

The respondent opposed the appeal. Counsel submitted that the absence of the hard copy of the charge and caution statement from the court record is not fatal to the conviction of the appellants. This was because the proceedings from the trial Court showed that it was tendered in as an exhibit after an elaborate process. The 1st appellant had denied making the said charge and caution statement which prompted the trial Court to hold a trial within a trial. Following the trial within a trial, where it was established that the 1st appellant indeed made the said statement, the same was admitted as part of the Court record.

Counsel contended that its mysterious disappearance from the court record was not fatal to the conviction of the appellants. This was because it was held in **Ssekitoleko Yuda Tadeo & 2 others vs. Uganda, Supreme Court Criminal Appeal No. 0033 of 2014** that a Court can base the conviction of an accused person on a retracted and/or repudiated confession alone even without corroboration, if it is satisfied after considering all the material factors surrounding the circumstances of the case, that the confession cannot but be true. Counsel further contended that in the present case, the appellants did not contest the truthfulness of the confession recorded in the 1st appellant's charge and caution statement. As such, the absence of the hard copy of that charge and caution statement is not fatal to the appellants' conviction since the contents of the 1st appellant's confession are readily available on the court record.

She asked this Court to consider that the presence of the charge and caution statement in issue on the list of exhibits in the trial Court supported the view that it was tendered in evidence and rightly relied upon by the trial Court.

Ground 2

Counsel conceded that the sentences imposed on the appellants were illegal because they had been imposed without taking into consideration the period spent by each of the appellants on remand. She agreed with the submissions for the appellants that those sentences should be set aside and proposed 40 years imprisonment for each of the appellants.

Counsel prayed that the appeal is allowed in relation to sentence only.

Resolution of the appeal

We have carefully considered the submissions of counsel for each side, the court record as well as the law and authorities cited, and those not cited, which are relevant in the determination of the present appeal. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with our own inferences. **See: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.**

In **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997** it was observed that:

> **"...on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses."**

See also: Bogere Moses & Anor vs. Uganda, Supreme Court Criminal Appeal No. 001 of 1998

We shall bear the above principles in mind as we proceed to determine the present appeal.

On the night of 27th October, 2013, the deceased's youthful life was taken in barbarous fashion. Those who took it had assaulted him and inflicted deep cut wounds on his head, thumb and middle fingers. Afterwards, they had tied the deceased's body with sisal ropes in a very sadistic manner which PW3 described as follows; "The body was tied with sisal ropes. They had tied the neck, arms and the legs. They bent him almost to the shape of a ball."

The deceased was of the youthful age of 22 years. He was in very good physical shape at the time with not even a scar on his body according to the post mortem report. Like with any of the pre-meditated murders, the perpetrators of those ghastly acts vanished into thin air. No one was able to identify them. Apparently, the assailants wanted to steal the deceased's motorcycle. For some reason, however, they did not succeed and it was discovered abandoned at the scene of crime. The body of the deceased was taken to Kalisizo Hospital for a post mortem.

The next day, Police Officers from Katovu Police Station went back to the scene of crime to exhaust their investigations into the incident. At the scene of crime, they recovered a new panga which appeared to be stained with blood. They suspected it to have been the murder weapon.

Subsequently, all the three appellants were arrested in connection with the murder of the deceased starting with the 2nd appellant who was arrested on 1st November, 2013. He was arrested near Kasasa Police Station where he was initially detained until he was later transferred to Rakai Police Station. While there, the 2nd appellant is said to have confessed to PW4, Restetuta Charles, a Police Officer at that Police Station about his involvement in the murder of the deceased person. The 2nd appellant also mentioned that the

1st and 3rd appellants had participated in the said murder. The 2nd appellant then led those Police Officers to the arrest of the 1st appellant. The latter was arrested at Mutukula. The 3rd appellant was arrested at a later date by the Flying Squad, a unit of the Uganda Police Force.

A charge and caution statement was recorded from the 1st appellant in which he confessed to participating in the murder of the deceased jointly with the 2nd and 3rd appellants. The said statement was recorded by PW5 D/IP Turyakira Michael, a police Officer qualified to record the same. At the trial, the 1st appellant objected to the admission of that charge and caution statement on grounds that he never made it and that on the 12th November, 2013 when it was allegedly made, he had already been sent to prison on remand for the murder of the deceased person. The 1st appellant also stated that there were two charge and caution statements allegedly recorded from him, on 5th and 12th November, 2013 respectively. He denied ever making the latter statement and only accepted the former in which he denied participating in the murder of the deceased.

At the behest of the trial Court, the prosecution obtained prison records which established that the appellant had been initially remanded to prison on 8th November, 2013 but he had thereafter escaped from custody. He was later rearrested on 11th November, 2013 and taken back to Rakai Police Station where he recorded the charge and caution statement in issue on 12th November, 2013. Thereafter, he was charged with escaping from lawful custody and sentenced accordingly.

On the basis of the information obtained by the prosecution about the 1st appellant's escape from prison and his subsequent detention at Rakai Police Station, the learned trial Judge admitted the charge and caution statement recorded from the 1st appellant as P.E.6. He relied on it in convicting the appellants.

The appellants contended in ground 1 of this appeal that their conviction, which was entered in reliance on the 1st appellant's charge and caution statement should be quashed because there was no copy of that statement

on the court record. The respondent disagreed saying that its absence from the court record cannot be said to have caused a miscarriage of justice which would justify the actions proposed by the appellants.

During the hearing of this appeal we were disquieted with what seemed like evidence of the increasing trend of interfering with court records whereby vital pieces of evidence are unlawfully taken off the record. The aim of such actions can only be to pervert the administration of justice and we strongly condemn it.

In the present case, there is no doubt that the missing hard copy of the charge and caution statement in issue was tendered in as an exhibit during the trial. To suggest otherwise would be to accuse the learned trial Judge of invention of evidence. The proceedings in the trial Court indicate that the charge and caution statement in issue was tendered in by PW5 Turyakira Michael, a Detective Inspector of Police, who had recorded it.

We shall adopt the general position which was espoused in **Christopher Kasolo vs. Uganda, Supreme Court Criminal Appeal No. 0015 of 1978** to the effect that where the judgment of the trial Court is so clear, it may be relied on by the appellate Court to reevaluate the evidence in circumstances where there is a missing record. In the present case, although there is no copy of the 1st appellant's charge and caution statement on the record, its contents were considered in detail in the judgment of the trial Court. At page 42 of the record, the learned trial Judge observed that:

> **"Cogent evidence is that of Turyakira Michael (PW5) who obtained a charge and caution statement from Eustakio Seruwagi. He stated that Eustakio informed him that Tamale hired a motorcycle from Kakuuto stage. He ordered the cyclist to take him to where the rest were in hiding. Eustakio had taken cover with his friend Kakooza and Isma Ssenyomo and Hamza. When he reached where they were hiding, Tamale grabbed the motorcycle and they fell down. Kakooza, Isma Senyomo and Hamza grabbed the motorcycle. Eustakio started rolling the Motorcycle and Tamale rushed to buy fuel leaving the three holding the deceased. Kakooza had brought a rope and a panga. As Eustakio was**

rolling the motorcycle, he heard an alarm. He threw away the motorcycle and run away. They later converged in Mutukula and started discussing the mission. The rest informed him that they left the deceased tied with ropes."

The criticism levied on the learned trial Judge that he considered a charge and caution statement which was not on record is, therefore, without merit. The amount of detail in the judgment on the contents of that charge and caution statement cannot have been arrived at as a result of creative innovation of the trial Court. Moreover, the charge and caution statement was indicated as P.E6 in the list of exhibits at page 47 of the record.

We, therefore, make a finding that the 1st appellant's charge and caution statement was at the disposal of the learned trial Judge who relied on it to reach his decision.

We find that ground 1, has no merit and must fail.

Ground 2

There was consensus between counsel for both parties that the sentence imposed on the appellants was illegal and is liable to be set aside. While imposing the relevant sentence, the learned trial Judge had this to say at page 36 of the record:

> **"A1 presented himself as a serious criminal. He had the audacity to escape from prison. His charge and caution statement shows that this was a jacket (sic) that had executed a series of robberies with precision. Their luck run out on the last one.**
>
> **In the result, I sentence them to 80 years in prison. They need to be kept away from circulation and protect the bodaboda country that is now vulnerable and a series of attacks by the robbers."**

Clearly, the learned trial Judge omitted to take into consideration the period which the appellants had spent on remand contrary to the requirement in **Article 23 (8)** of the **1995 Constitution**. The ensuing sentence was therefore illegal and we hereby set it aside. Further we observe that the

learned trial Judge imposed an omnibus sentence on the appellants to serve 80 years imprisonment without specifying the exact period of imprisonment imposed on each of the appellants. It is trite law that criminal liability is personal and therefore the consequences of a conviction have to be borne by each convict personally. An omnibus sentence is not envisaged under the law and such a sentence as was passed by the learned trial Judge is therefore illegal.

We shall now proceed to determine an appropriate sentence for the appellants pursuant to **Section 11** of the **Judicature Act, Cap. 13** which gives this Court the powers of the High Court for purposes of determining an appeal. Specifically, we shall exercise the powers to determine an appropriate sentence.

It is now trite that the mitigating factors and aggravating factors shall be taken into account before any Court imposes a sentence. In mitigation, it was stated that the appellants were all of youthful ages and were capable of reforming if given a chance through a shorter custodial sentence. It was also stated that the 2nd and 3rd appellants were first offenders.

The aggravating factors were stated to be that; the appellants killed a young man of 22 years who was still in his productive years; the appellants had murdered the deceased with premeditation given that they had tricked him into thinking that they were clients for his boda boda business and then leading him to an isolated spot where they killed him; the appellants had inflicted grave injuries on the victim; the appellants were habitual criminals who had participated in several robberies prior to killing the deceased; the appellants had treated the victim's body in a callous manner when they rolled his body like a ball before tying him up with sisal ropes.

We have considered the above mitigating and aggravating factors and also considered the need to maintain consistency in sentencing involving cases of a similar nature. The following sentences were imposed for murder in previously decided cases.

In **Mutatina Godfrey & another vs. Uganda, Supreme Court Criminal Appeal No. 0061 of 2015**, the Supreme Court declined to interfere with a sentence of 36 years imprisonment which had been substituted by the Court of Appeal for a sentence of 40 years which the trial Court had imposed on the appellant upon conviction for the offence of Murder.

Further, in **Wafula Robert vs Uganda, Supreme Court Criminal Appeal No. 0042 of 2017,** it was held that the sentence of 25 years was a proper exercise of discretion by the trial Judge in a case of murder. The appellant in that case had killed his grandmother.

We note that the facts of this case would attract the higher end of sentences because of the manner in which the deceased was murdered, and thereafter treated like an animal. After the deceased was murdered, the appellants bent his body in the shape of a ball and tied it with sisal ropes.

The 1st appellant's circumstances are further aggravated because he was a repeat offender who had previously been charged with escaping from prison. Further, all the three appellants were habitual offenders who often committed robberies in their region. Accordingly we shall sentence them as follows:

The 1st appellant shall serve a term of imprisonment of 35 years. He was of the youthful age of 26 years but the offence in question, whose commission he participated in was executed in a barbaric manner and we disapprove of his conduct. Moreover, he was a repeat offender which has further influenced our decision to impose the above indicated sentence.

The 2nd appellant shall serve a term of imprisonment of 20 years. He had just crossed into adulthood at the age of 19 years when he participated in the murder of the deceased. He still has a chance to reform and therefore we shall spare him the ultimate death sentence. However, he had played the role of leading the deceased to his cruel death which we must hold him accountable for. We shall also take into account that if he had committed the offence some months or a year earlier, he would have been sentenced

as a child and given a maximum sentence of 3 years. He was barely an adult and such young persons are gullible and easily influenced. It was established that the 1st appellant had lured him into crime with a promise of earning good money which supports our view that he was acting under the bad influence of the 1st appellant. This has influenced our decision to sentence him as we did.

The 3rd appellant shall serve a term of imprisonment of 35 years. He was of the youthful age of 29 years at the time of commission of the offences in question. He was also a first offender but he had participated in the gruesome murder of the deceased for which this Court feels only abhorrence.

Due to the above analysis, ground 2, is entitled to succeed as indicated above.

This appeal is disposed of accordingly.

We so order.

Dated at Masaka this ....20th.......... day of ....Nov.......... 2019.

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Elizabeth Musoke

Justice of Appeal

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Ezekiel Muhanguzi

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal