THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPEAL NO. 282 OF 2010

(Appeal from the High Court sitting at Bushenyi Judgment (Ralph Ochan, J.) dated 24.05.2010 in criminal case No. 105 of 2009)

Beyaka Misaki :: Appellant

VERSUS

Uganda ::: Respondent

Coram: Hon. Justice Remmy Kasule, JA,
Hon Justice Solomy Balungi Bossa, JA
Hon. Justice Kenneth Kakuru, JA

JUDGMENT OF THE COURT

The appellant was convicted on four counts of murder C/S 188 and 189 of the Penal Code Act. According to the indictment the murders of Yoram Kashaija, Natukunda Loydah, Musimenta Molishia and Mugarura Duncan were stated to have been committed by the appellant on 07.02.08 at Nyamiko village, Bushenyi District.

The trial Judge found that the prosecution had proved its case beyond reasonable doubt against the appellant, convicted and sentenced the appellant to "a life sentence".

Through his lawyer, Mark Bwengye, on state brief, the appellant appealed against both conviction and sentence on the grounds that:

"1. The learned trial Judge misdirected his mind as to the law by allowing appellant's retracted confession without corroboration and inquiring into all surrounding circumstances of the case when he convicted the appellant for the offence of murder thus causing a miscarriage of justice.

2. The learned trial Judge was wrong to hold that the appellant's confession was corroborated by PW4's evidence.

Wherefore the appellant prays to this honourable Court to allow the appeal, quash the conviction and set aside the sentence. In the alternative, the appellant with leave of Court appeals for a reduction of sentence of life imprisonment".

The state, through Principal State Attorney Emmanuel Muwonge opposed the appeal.

Appellant's Counsel argued all the grounds of appeal together. He submitted that the learned trial Judge convicted the appellant on the basis of a charge and caution statement wherein the appellant allegedly admitted to committing the offences charged, but which alleged confession he had retracted at his trial. The trial Judge proceeded to convict on the basis of that retracted confession and yet there was no evidence to corroborate the same. As such the trial Judge erred to base his conviction of the appellant upon the alleged confession. Further, the trial Judge made no effort to satisfy himself that, given the circumstances of the case, the confession was true.

Counsel referred this Court to TUWAMOI V UGANDA: [1967] EA 84 and KASULE V UGANDA [1992-1993] HCB 38 and invited the Court to uphold his submissions on grounds 1 and 2 of the appeal.

On sentence Counsel submitted that the sentence imposed upon the appellant was illegal and excessive. The appellant had not been sentenced in respect of any particular count of the indictment. At

any rate, a sentence to "a life sentence" was vague and very excessive in the circumstance of the case.

For the respondent, the Principal State Attorney, Emmanuel Muwonge maintained that the appellant was rightly convicted on the basis of his confession. The confession had been admitted in evidence after the trial Court had held a trial within a trial. The evidence of PW3 corroborated the said confession.

As to sentence, the respondent's Counsel, conceded that the same was omnibus in that the same did not cover any particular count of the indictment. However, this did not affect the legality of the sentence of imprisonment for life that had been passed against the appellant. Counsel therefore submitted that the appeal ought to be dismissed.

As a first appellate Court, it is the duty of this Court to re-evaluate all the evidence adduced at trial so as to be able to determine whether the trial Judge reached the correct conclusions, and if the trial Judge did not, then this Court may draw its own conclusions and make its own inferences, bearing in mind of course, that the Court members did not have the opportunity to observe the demeanour of witness at the trial stage, which the trial Judge had: See **Rule 30 (1)** of the Rules of this Court and **BOGERE MOSES VS UGANDA, SCCA No. 1 of 1997.**

In respect of grounds 1 and 2 of the appeal, the essence of the appellant's case is that the learned trial Judge erred in convicting the appellant of murder on the basis of his retracted confession.

It is submitted for the appellant that had the learned trial Judge carefully considered all the circumstances surrounding this alleged confession, then he ought not to have put any reliance on the same. The confession had been obtained through torture and there was no evidence to corroborate it.

Counsel for the respondent maintained on the other hand, that the learned trial Judge had properly held a trial within a trial whereby he determined, on the basis of the evidence before him, that the confession had been made voluntarily and that there was other evidence to corroborate the same.

No doubt, the learned trial Judge, in coming to the conclusion that the appellant had been placed by the prosecution evidence at the scene of the crime, relied upon the appellant's alleged confession in which the appellant is said to have admitted his participation in the murder of the deceased persons. However, the appellant, at trial, asserted that he admitted the offence in the said confession statement because of his having been beaten while in police custody.

In law, a retracted statement of confession is one where the maker of the statement admits that he/she made the confession statement that was recorded, but at the trial stage the said maker recounts or takes back what he/she stated in the confession statement on the ground that he/she made the same not voluntarily, but was forced or induced to do so. The said force or inducement deprived him/her of any voluntariness in making the confession statement. This is in contrast to what a repudiated statement is, that is one where the maker denies completely that he/she ever made such a statement whether voluntarily or involuntarily. The former Court of Appeal for East Africa in TUWAMOI V UGANDA [1967] EA 84, held that:

".....a trial Court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that 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".

We now consider the facts of this case and relate the same to the position of the law as set out above.

The appellant maintained throughout the trial that the alleged confession attributed to him was got from him as a result of his being assaulted while in police custody. It is a fact that appellant was arrested and taken into police custody on 10.02.08.

According to PW5 D/SP Byekwaso Erastus then Regional CID officer, while at his office, he recorded the charge and caution statement containing the confession of the appellant on 14.02.08. He (PW5) observed the appellant at that time. Appellant had no visible injury on him. Appellant walked freely to PW5's office, did not complain of any matter and proceeded to voluntarily make the confession statement which PW5 recorded. After the statement had been recorded, the appellant was returned to police custody.

Under cross-examination PW5 acknowledged that, at the material time, there was a complaint that the Police (RRU) in Mbarara was torturing suspects especially the arrested thugs. The appellant was being kept in custody at Mbarara Central Police Station. PW5 did not inquire from the officers who had brought the appellant to him as to whether he had been tortured or not.

However, according to the Medical Examination Report on the appellant, admitted as prosecution exhibit P6, Dr. Babamba medically examined the appellant on 22.02.08, while appellant was still in police custody. The appellant was found with bruises on the right and left knees and also on the ankle. This evidence was admitted by Court as an agreed fact on 25.06.2010.

Our appreciation of the evidence adduced before the trial Court shows that since the appellant was in police custody from the date of his arrest on 10.02.08 and he had no injuries on him, at least by the 14.02.08 according to PW5 D/SP Byekwaso Erastus, then he (appellant) must have sustained the injuries found on him on 22.02.08 while in police custody. If the appellant had any injuries on him at the time of his arrest on 10.02.08 or at the time the charge and caution statement was recorded from him on 14.02.08, then those injuries would have been seen by the arresting officer, and also by PW5 who recorded the alleged confession from the appellant on 14.02.08. If the appellant sustained the injuries found on him on 22.02.08 while in police custody, then there is credence to his claim that he was subjected to torture while in police custody.

The learned trial Judge did not address his mind to this aspect of the trial at all. On our part, after subjecting the evidence of the alleged confession to fresh scrutiny, we have come to the conclusion that there was evidence to support the appellant's assertion that he was subjected to torture while in police custody during the period from 10.02.08 (the day of arrest) up to 22.02.08 (day of medical examination on appellant). It was during this period when the appellant is stated to have made the confession statement recorded by PW5 on 14.02.08. Therefore the learned trial Judge erred when he admitted, and having done so, proceeded to convict the appellant on the basis of that confession without having addressed the issue of torture of the appellant.

Since the said confession was the only evidence adduced by the prosecution to prove that the appellant committed the crime of murder of which he was charged and convicted, it follows therefore that the appellant's said conviction cannot be sustained. The conviction of the appellant for the offence of murder is therefore quashed and is substituted with an order of acquittal.

The sentence to "a life sentence" is hereby set aside. It is ordered that the appellant be released forthwith, unless he is being held on some other lawful charge.

The way grounds 1 and 2 of the appeal have been resolved would render it unnecessary to deal with the alternative ground on sentence which we have already set aside.

However, because of the way the learned trial Judge dealt with the process of sentencing the appellant we are constrained to express ourselves on the matter, at least for the sake of guidance of trial Courts.

A convict is sentenced by Court in respect of the offence set out in the indictment. In the case of the appellant he was indicted on five counts of murder. Each count related to the murder of a different deceased, though all murders were at the same place and took place on the same day and time.

In his judgment the learned trial Judge held:

"I find it necessary for completeness of Court record because given that a detailed considerations of the proof these ingredients of the offence despite the concession by the defence at the beginning of the defence, that these ingredients had been proved beyond reasonable doubt by the prosecution. In any event, prosecution having proved all 4 ingredients of the offence beyond reasonable doubt, Court find the accused guilty as charged and convicts him accordingly" (Sic).

The learned trial Judge, after conducting mitigation proceedings, then proceeded to sentence the appellant stating:

"The case against you having been found beyond reasonable doubt and a conviction obtained, I have no alternative in my mind but to a life sentence".

With respect, we find that the learned trial Judge committed a number of errors as regards the conviction and sentence of the appellant.

The trial Judge was enjoined by law to have made a finding of guilty (or not guilty) of the appellant in respect of each of the five (5) counts of the indictment to which the appellant had pleaded and had been tried of. To state, as the trial Judge did, that Court finds:

"the accused guilty as charged and convicts him accordingly" is to act contrary to Section 86(3) of the Trial on Indictments Act, Cap. 23.

It is also not clear from the Judgment of the trial Judge whether the appellant was sentenced to life imprisonment as is understood under Section 47(6) of the Prisons Act, or whether the appellant was sentenced to spend the rest of his life in prison as has been held by the Supreme Court in the decision of TIGO STEPHEN V UGANDA: CRIMINAL APPEAL NO. 08/2009 (SC).

Regardless of whatever period of imprisonment the learned trial Judge had in mind, what the trial Judge passed as the sentence upon the appellant was an "omnibus" sentence. It was a single sentence embracing convictions in all the five (5) counts. Such a sentence has been held to be illegal in law. See: **Mohamed Warsama V R [1956] 23 EACA 576,** and also

Mwakapesile V R [1965] EA 407.

Since the appellant had been indicted on more than one count, the trial Judge ought to have entered a conviction on each count, if that was the trial Judge's finding, and then the appellant should have been sentenced to a specific sentence, if the sentence was to be a term of imprisonment, in respect of each count. The trial Judge should also have expressly stated whether the sentences passed in respect of the respective counts are to run concurrently or consecutively. In case the trial Judge was to impose a death

sentence, then he should have imposed a death sentence in respect of each conviction for each count. He would then have ordered that only one death sentence in respect of a conviction is one particular count would be carried out. Execution of the rest of the sentences in respect of the other convictions for the other counts would be suspended. See: **Amos Binuge and Others V Uganda [1992-93] HCB 29 (SC).**

In conclusion, this appeal is allowed in the terms and orders already stated herein above.

Dated this ..... Day of ..... 2015.

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Justice Remmy Kasule, JA,

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Hon Justice Solomy Balungi Bossa, JA

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Hon. Justice Kenneth Kakuru, JA