THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO.149 OF 2010

1. TUMUSIIME OBED
2. NUWAMANYA EDWARD ::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

(An Appeal Arising From Decision Of Hon V. T. Zehurikize J At High Court Mbarara Dated The 21st July 2010)

CORAM:

HON.MR. JUSTICE KENNETH KAKURU, JA

HON.MR.JUSTICE BYABAKAMA MUGENYI SIMON, JA

HON.MR.JUSTICE ALFONSE C. OWINY- DOLLO, JA

JUDGMENT OF THE COURT

[1] Both appellants were on 21st July 2010 convicted of murder contrary to sections 188 & 189 of the Penal Code Act and Aggravated Robbery contrary to sections 285 and 286 (2) of the Penal Code Act by the High Court at Mbarara presided over by Hon. Justice Vicent Zehurikize J and sentenced to 16 years and 14 years imprisonment respectively on each count.

[2] Being dissatisfied with the said decision they appealed to this court on the following grounds:

1. *The learned trial judge erred both in law and fact when he convicted the appellant without evaluating the evidence properly.*

2. *The learned trial judge erred both in law and fact when he did not consider the defence evidence hence reaching at a wrong decision.*

3. *That the sentence of 14 years was harsh.*

[3] At the hearing of this appeal Mr. James Bwatota appeared for the both appellants on state brief while Ms Rose TumuheisePrincipal State Attorney appeared for the respondent.

[4] Mr. Bwatota abandoned the last ground of appeal on sentence and argued the remaining two grounds together.

He submitted that the only issue in contention in this appeal was the participation of the appellants in the commission of the crimes, they were charged with, to wit, *murder and aggravated robbery.*

He contended that the only evidence relied upon by the trial judge to convict the appellants was their own confession statements. Counsel submitted that each of the appellants had repudiated and retracted their confession rendering the both confessions of little evidential value, too weak to sustain a conviction.

He contended further that the learned trial judge erred when he used the repudiated and retracted confessions to corroborate each other.

Counsel submitted that there was no other independent evidence adduced by the prosecution to corroborate the said retracted confession and or lend credence to them. On their own, Counsel argued they were too weak to sustain any conviction.

He asked the court to quash the conviction and set aside the sentences.

[5] MsTumuheise opposed the appeal and supported the convictions. She argued that the trial judge had properly evaluated the evidence before him and had come to the right conclusion. She submitted that the learned trial judge had held a trial within a trial in respect of each of the appellants repudiated confession and found that both appellants had made the confessions and had done so voluntarily. Having held so, Counsel submitted, the judge could upon warning himself, could convict on the basis of such confessions without corroboration. Counsel submitted further that once the trial judge is satisfied that considering all the circumstances of the case the confession cannot but be true a trial judge may convict without corroboration. She relied on **Tuwamoivs Uganda [1967] EA 84**

Counsel submitted further that in their confessions both appellants had implicated themselves and also implicated each other to the same extent.

The judge, Counsel submitted, had first warned himself and the assessors of the danger of convicting on such evidence.

In the circumstances Counsel argued the trial judge was justified when he convicted both appellants on the two counts, set out above. She asked court to uphold the convictions and confirm the sentences.

Resolution of Issues

[6] We have carefully studied the court record and we have also listened to the submissions of both Counsel.

As a first appellate court we have a duty to reappraise all the evidence adduced at the trial and to come up with own inferences of all issues of law and fact. See **Rule 30 (1) of the Rules of this court and KifamunteHenry vs Uganda SCCA No.10 of 1997** *(unreported)*

[7] The only issue in contention in the trial and in this court is the participation of the appellants in the commission of the crimes of murder and aggravated robbery.

The evidence adduced at the trial by the prosecution was circumstantial. However, that evidence did not directly implicate any of the appellants in the commission of these crimes. What directly linked them to the crimes are two confession statements that each made separately and individually to the police.

[8] Counsel for the appellants strongly argued that the confession statements having been both retracted and repudiated could not have been sufficient to sustain the convictions in the absence of any other corroborating evidence.

He contended that the only corroboration could be found only in those statements as each of them tended to corroborate the other.

The law regarding retracted and repudiated confessions was well set out in by the Court of Appeal for East Africa, the Predecessor to our Supreme Court in **Tuwamoivs Uganda 1967 EA 84** as follows;

> *"The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."*

[9] The position of the law as set out by the above has not changed. However before a trial judge admits in evidence any confession that has not been admitted by the maker, he or she must be satisfied that the confession had been voluntarily made by that accused person.

In this appeal before us, both appellants contested their respective confessions contending that they had not been obtained voluntarily.

The trial judge held a trial within a trial in which in his ruling he concluded as follows:

> *" I have considered the evidence on record on trial within a trial. It is clear to me that the officer followed the proper procedure in recording the charge and caution statements. The particularity and uniqueness of the statements and their detailed nature could not have been imagined by TW1 so as to force the accused person to just sign them. The two accused persons tried to mislead court on allegation that he tortured them."*

With all due respect to the learned trial judge we are unable to agree with him that the right procedure had been followed in recording the charge and caution statements for both of the appellants. Firstly the two charge and caution statements of the appellants were recorded by the same Police Officer PW1 D/ASP Kwezi Joshua, on the same day. This was irregular in that there is always a likelihood of a recording officer to import into the second statement contents which he recorded in the past statements.

Indeed the 2nd appellant whose statement was recorded later in his testimony assented that the recording Police Officer was writing much more than the accused now appellant was stating and that he had with him another document from which he appeared to be recording the information from. This testimony appears very credible

to us in view of the fact that the two statements contained strikingly similar facts as observed by the learned trial judge himself in the excerpt of his ruling reproduced above.

Secondly the second appellant stated in his defence that he had been tortured, as follows:

> *"Then a policeman came with Tweheyo. They had a stick. That policeman gave evidence in this case. They were three policemen and one Special Police Constable. One covered me with a black kavera on the head. They tied my hands using a rope. Then they started beating me. They were using sticks and one cut me with a piece of timber on the head. They beat me on the knees and ankle using an old hoe (akafuni). Then they tied my testicles. Then the OC of the Post hit me on the testicle and one of them was destroyed. It is the right testicle which was destroyed. I fell unconscious which I gained when at Rushere Police Station."*

This testimony again appears to be very credible as it is corroborated by the evidence of the Police Specialist Pathologist set out in Police Form 24 dated 30/5/2006, where upon examining the 2nd appellant the Doctor he found that both his ankles were swollen and he had bruises on both his hands. PW1 Kwezi in his testimony states that he recorded the statements at 4:30 pm on 30/5/2006 the same day the doctor examined the 2nd appellant.

[10] We find that the procedure for recording the second appellant's statement was illegular, as the recording officer had already recorded a statement from a co-accused at the time he recorded 2nd appellant's statement. Secondly we find that the second appellant had been tortured immediately before the statement was recorded from him, as the evidence of the medical doctor who examined him indicates the swollen legs around the ankles, swollen feet and hands. This lends credence to the 2nd appellant's own testimony that he had been beaten around the ankles, which we have partially reproduced above.

[11] Accordingly we find that the confession statement of the 2nd appellant was inadmissible in evidence.

The same may not be said of the 1st appellant's statement as it was the first to be recorded.

Secondly his testimony that he was tortured before making the said statement is rebutted by the medical examination report Police Form 24 which indicates that upon physical examination, no physical injuries were seen. He was examined on 2/06/2006 three days after the statement had been recorded from him.

We find that the judge correctly admitted the first appellant's confession statement.

[12] Be that as it may, we find that there was independent evidence to corroborate the repudiated and retracted confession of the first

appellant. Dr. Mugerwa who carried on the post-mortem on the deceased's body, found that the deceased had cut injuries, through the skull borne. There was exposed brain matter and the arm was cut. These wounds were consistent with the confessionmade by the 1st appellant in whichhe detailed how they had cut the deceased with a panga on his head twice and had also hit him with a stick. The confession also state that the deceased had died instantly which may also be inferred from the wounds he sustained.

Further the confession also states how the appellants and others had dragged the deceased to a maize garden from where they killed him. Indeed his decapitated body was recovered from that maize garden not far from his home.

[13] Among the exhibits recorded and tendered in court was a blood stained panga. The blood on that panga matched that of the deceased. This corroborates the statement of 1st appellant that the deceased had been cut with a panga. A stick was also recovered from the place where the deceased's body was recovered. This also corroborates the 1st appellant's statement that the deceased had been beaten with a stick moments before he died. Indeed the post-mortem report indicated that the deceased had sustained internal injuries, which we find could not have been inflicted by a sharp object like a panga but rather by a blunt object such as a stick.

Although we have disregarded the statement of the 2nd appellant, we find that the contents of the statements of the 1st appellant implicated

him and the second appellant to the same extent. It also contains details of what happened that fateful nigh, which no one other than a participant in that crime would have known. We find that his confession statements alone was sufficient to link the 1st appellant to the crimes and was sufficient to sustain the conviction against him. Although it implicated the 2nd appellant it is insufficient as to sustain a conviction against him in absence of other evidence relating to his participation in the crime.

The said appellant's appeal is hereby allowed his conviction quashed and sentence set aside.

He is to be released forthwith unless he is being held on other lawful charges.

We also find that the confession rebutted the defence put forward by the 1st appellant, having found his confession was true.

We therefore find no merit in the 1st appellant's appeal which we hereby dismiss. We find merit in the 2nd appellant's appeal which is hereby allowed.

[14] The 1st appellant's appeal therefore fails and is hereby dismissed.

His conviction is hereby upheld and the sentences confirmed.

[15] Before we take leave of this appeal we observe that the appellants were sentenced to 14 years and 16 years respectively on both counts.

Both sentences were to run concurrently.

In the circumstances of this case in respect of the offence of murder in which the murder was premeditated, and was compound with aggravated robbery, the sentences are inordinately too low and amounted to a miscarriage of justice.

Had the issue of severity of sentence been raised by either party to this case we would have been inclined to unhance the sentences in respect of murder to at least 35 years imprisonment.

Dated at Mbarara this ...7th... day of December 2016

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HON. MR. JUSTICE KENNETH KAKURU, JA
JUSTICE OF APPEAL

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HON. MR. JUSTICE BYABAKAMA MUGENYI SIMON, JA
JUSTICE OF APPEAL

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HON. MR. JUSTICE ALFONSE C. OWINY-DOLLO, JA
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