# REPUBLIC OF UGANDA

## IN THE SUPREME COURT OF UGANDA
## AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, AND KANYEIHAMBA, JJSC.)

## CRIMINAL APPEAL NO. 50 OF 1999

BETWEEN

KAWOYA JOSEPH---------- APPELLANT

VERSUS

UGANDA----------RESPONDENT

*(APPEAL from the decision of the Court of Appeal before KATO, BERKO and KITUMBA JJ.A at Kampala dated 28th July 1999 in Court of Appeal Criminal Appeal No. 22 of 1998)*

**JUDGMENT OF THE COURT:** On 9th July, 1998, Kagaba J., convicted the appellant Kawoya and his co-accused called Mulunyanja, of the murder of Paulo Kajubi on the first count and sentenced each of them to death. The learned judge also convicted the two of the offence of manslaughter of Kevina Nakafero on the second count and of simple robbery of the deceased's property on the third count, but made no order regarding sentence in respect of the last two counts. The appellant and Mulunyanja appealed to the Court of Appeal which, on 28th July, 1999, dismissed the appellant's appeal but allowed the appeal of Mulunyanja, and quashed his conviction. The appellant Kawoya has now appealed to this court.

Because of the decision we have reached, we will not go into the details of the facts and the evidence thereon. The following background will suffice.

The appellant's conviction on the three counts was based on the following pieces of circumstantial evidence. The first is that on 4th April 1995, the appellant was seen in the company of others going towards the home of Paulo Kajubi at Kibonji village in Rakai District. The following day Paulo Kajubi and his wife Kevina Nakafero were found dead in their home, and their household property was missing. The body of Kajubi which had sustained mulitple cut wounds, was found inside the house. Nakafero's body, which was bleeding from one ear, was found in their banana plantation. The second piece of evidence is that sometime after the incident the appellant took to the home of his sister, Matilda Nakabuye, at Busujju, Nakalama, in Mubende District, some household goods which were subsequently identified as part of what was stolen from the home of the deceased. The third piece of evidence is that on 7th May 1995 Kawoya was found in possesion of an old bicycle which was also identified as late Kajubi's property. The fourth piece of evidence was a charge and caution confession statement (exh.P.7) which Kawoya made to D/AIP Kiwanuka after he had been arrested, implicating himself and others.

We note that, when the trial opened, the appellant and his co-accused persons denied the three charges. So a plea of not guilty

was entered. The evidence of seven prosecution witnesses was admitted under section 64 of the Trial on Indictments Decree, 1971 (TID). This evidence included that of Dr. Watima who had performed the postmortem examination. And even though when he was arraigned the appellant pleaded not guilty to the three counts, his confession statement was admitted in evidence apparently without objection by the appellant and or his counsel. After the end of the prosecution case during the trial, the appellant refused to give evidence in his defence because, to use his words, "my lawyer is bent on my losing the case. I will not say anything". We shall revert to this matter later in this judgment.

The other co-accused gave their defence but the appellant refused. The trial judge eventually convicted the appellant and Mulunyanja who appealed to the Court of Appeal as already stated. We are dealing with the appeal of the appellant.

After reviewing the evidence on the record, the proceedings of the trial court and of the Court of Appeal, and the arguments made before us by counsel for both sides, we have decided to consider the second ground of appeal only.

The complaint in the second ground of appeal is that the Justices of Appeal erred in mixed law and fact by failing to consider the poor legal defence accorded to the appellant at the trial.

Ms. Maureen Owor, counsel for the appellant, in effect argued that the defence counsel, who was assigned by the trial court under legal aid to defend the appellant, exhibited shortcomings, and did not defend the appellant diligently . She relied on Regulations 1(1) and 10 of the Advocates (Professional Conduct) Regulations 1977, (S.I. 1977 No. 79) and the case of A.P.C. Lobo vs. S. Salim (1961) EA223 . Mr. Elubu, the State Attorney, who appeared for the state, argued that Ms. Owor's submissions are not backed by the contents of the trial court record, contending that the record shows that the appellant did not complain about his advocate and that the conviciton of the appellant was based on the evidence adduced against him and not on the weaknesses in the defence case. Learned State Attorney submitted that in any event, notwithstanding professional shortcomings on the part of the defence counsel, there was no miscarriage of justice.

Regulation 1(2) relied on by Ms. Owor requires an advocate to conduct the work of a client with due diligence. In our view, Regulation 10 appears irrelevant. But according to Reg.11, it is the duty of every advocate to advise his clients in their best interest.

Although Lobo vs Salim (supra) is a civil case, the passage at page 229 referred to by Ms. Owor, is instructive. There, the E.A. Court of Appeal observed that an advocate who appears for a client in a contested case is retained to advance or defend his clients's

case. This he must do strictly upon instructions and with scrupulous regard to professional ethics.

We do not, with respect, accept Mr. Elubu's argument that the trial court record does not show that the appellant complained about his advocate. The appellant did raise a complaint by what he said after the closure of the prosecution case. At the trial the appellant was the accused number four (A4) .The record of the trial court reads as follows:-

"Defense----------

A2-A3----------

A4. I will not give evidence and I have no witness to call because my lawyer is bent on my losing the case. I wil not say anything" .

It is our view that this was a complaint. These utterances by the appellant clearly show that the appellant was dissatisfied with the services of the defence counsel who had been assigned to defend him.

We have considered the whole record anxiously and have formed the opinion that the trial was not fair. This view is based on a combination of two failures, namely failure by the defence counsel to conduct the defence diligently or at all, and failure by the trial court to intervene and prevent the trial degenerating into a mistrial. We

think that both the defence cousel and the trial court owe an accused person a duty. The former owes a duty to the client to conduct the defence diligently and in the best interest of the client. The latter has an overriding duty to ensure that an accused person before it, even when he is represented by counsel, gets a fair trial.

Our concern in the instant case is based on the remarks the appellant made at the trial that his counsel was bent on his losing the case, suggesting not only that counsel was not deligent, but that he had thus far conducted the defence against the client's interests and probably contrary to instructions. We think that *the curiosity of the trial judge ought to have been aroused* when the appellant having pleaded not guilty, his counsel did not in any way challenge, through cross-exmiation and/or objection, the damning evidence of the confession statement, and that of recent possession of stolen property. If the trial court had intervened to ascertain whether the accused understood the implications of the omissions, the apparent conflict, or crisis of confidence, between counsel and his client may well have surfaced at that time, when it would have been practical to substitute counsel.

Article 28(1) of the constitution states that:-

"In the determination of ----------any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court -------".

The provisions of Clause (3) (e) which are pertinent read as follows:-

"(3) Every person who is charged with a criminal offence shall:-

(e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the state".

These provisions are part of what is normally described as fair trial or fair hearing. Paragraph (e) directs the state to provide legal representation to an accused person who is charged with a capital offence such as those with which the appellant was charged in the instant case. The obligation on the state to provide legal representation to an accused person charged with such an offence, must be intended to ensure that there is a fair trial of an accused person who cannot afford an advocate at his own expense. A fair trial is a constitutional entitlement to any accused person. If the basic assumption in providing legal aid is that because of the gravity of the offence an advocate assigned to the accused person is to do his work diligently, that advocate is expected to prepare the defence and conduct it to the best of his ability and in the best interest of the accused in accordance with the relevant law of evidence and of procedure. On the other hand the trial judge is under an obligation to ensure that an accused person receives a fair trial in accordance with that law. In a case where an accused person denies the charges upon arraignment, he is entitled to a full trial of all facts in issue. If

prejudicial or incriminating evidence is tendered and is not challenged, the court should not permit its reception without ascertaining that the accused person is aware of the consequences of its reception.

At the trial Mr. Nyanzi, who represented the appellant, was casual. He was causal during the tendering in evidence of the charge and caution confession statement. He does not seem to have cared about the identification and admissibility in evidence, as exhibits, of the various items of property. The learned trial judge appears not to have appreciated the consequences of the admission of the statement and property as exhibits within the context of the whole trial. We would expect that in this particular case the trial judge should have been put on inquiry about the defence counsel's conduct of the defence at that stage and we also expect that the judge should have found out what it was that made the appellant at the close of the prosecution case to say that his counsel was bent on spoiling his case. In these circumstances we cannot say that the provisions of article 28(1), and 28(3)(e) were properly complied with. In other words we are not satisfied that the trial of the appellant was conducted fairly.

Ground two must therefore succeed.

The success of ground two disposes of this appeal, which is hereby allowed. The conviction of the appellant is quashed and the

sentence of death is set aside. Because there was a mistrial, we order that the appellant be tried de novo before another judge. He should be assigned another advocate to defend him. Meantime he is to be remanded in custody pending his retrial, which should be expedited.

Delivered at Mengo this 22nd day March 2001.

A. H. O. ODER.
Justice of the Supreme Court.

J. W. N. Tsekooko.
Justice of the Supreme Court.

A. N. Karokora.
Justice of the Supreme Court.

J. N. Mulenga.
Justice of the Supreme Court.

G. W. Kanyeihamba
Justice of the Supreme Court