THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CRIMINAL APPEAL NO. 25/2000

CORAM: WAMBUZI CJ, ODER, KAROKORA, MULENGA, KANYEIHAMBA, JJSC

BETWEEN

MATEO OCHIENG :: APPELLANT

VS

UGANDA :: RESPONDENT

(An appeal from the decision of the Court of Appeal at Kampala dated 7th day of February, 2000 (Kato, Mpagi-Bahigeine and Engwau JJA) in Criminal Appeal case No. 63/99)

JUDGEMENT OF THE COURT

The facts of this appeal are simple. Mary Ojok, an expectant mother, left her home in the morning of 15/11/94 to collect firewood at Labalo Okalo Chwan Village, Pabo Division in Gulu District. She did not return. The following day a search was mounted and her dead body was found on17/11/94 where she had gone to collect firewood. The body was naked and her head crushed. According

to Dr. Anywar of Gulu Hospital who conducted the postmortem examination on the deceased, the cause of death was severe internal and external bleeding, brain damage following a crushed head.

A report of the death was made to RCs and to Pabo Labala Military detach. On receiving the report of the death of a woman half a mile away from the Barracks, Sgt. Wilfred Otika (PW2) called all the soldiers to a general parade. One soldier was missing with his gun. The missing soldier was the appellant. He was arrested 2 days later at Amuru and was brought to the barracks and subsequently handed over to the police.

A charge and caution statement was taken from the appellant in which he admitted the offence and this formed the basis of his conviction for murder by the High Court sitting at Gulu, (Malinga J.). His appeal against conviction was dismissed by the Court of Appeal hence the appeal to this Court.

There are four grounds of appeal.

"1 The learned Justices of Appeal erred in law by finding that the charge and caution statement was properly administered and voluntarily made.

2 The learned Justices of Appeal erred in law by finding that the conviction was sustainable upon the appellant's repudiated confession.

3 The learned Justices of Appeal erred in fact and law in rejecting the appellant's alibi.

4 The learned Justices of Appeal failed to properly evaluate the evidence on record and as a result came to an erroneous judgment."

The appeal to the Court of Appeal was more or less on the same grounds but in relation to the trial court. The four grounds of appeal really relate to two issues, the confession of the appellant and the appellant's alibi.

In respect of the charge and caution statement, Mrs Luswata Kawuma, counsel for the appellant, submitted that the statement had not been properly taken. The caution had not been properly administered. The Police officer who recorded the statement perused the file before recording the statement. Learned counsel further submitted that the appellant was beaten on arrest, at the barracks and threatened by a soldier who had a pistol at the time of the alleged statement and that accordingly the alleged confession was wrongly admitted in evidence as it was involuntary. She critised the Court of Appeal for failing to re-evaluate the evidence which in her view would have led to the exclusion from the evidence of the confession. Learned Counsel submitted that without the confession there was no evidence to support the conviction.

Mr. Wagona, counsel for the respondent, supported the decision of the trial court, which was confirmed by the Court of Appeal. It was admitted that the appellant

had been beaten on arrest and in the barracks but learned counsel submitted that at the Police Station when the statement was recorded he was not assaulted nor threatened and that the effect of torture and threats to which the appellant had been subjected before had been removed and were not acting on his mind.

Learned counsel argued that the confession was made voluntarily and therefore was properly admitted in evidence. The Court of Appeal had so found and in learned counsel's view, the finding of the Court of Appeal was supported by the evidence.

The trial court record indicates that the appellant was arrested at Amuru and he was taken to Wilfred Otika who had sent for him after learning of his arrest. This was the same officer to whom the report of the killing had been made and who had notified other army units of the appellant's absence from his detach. This officer had visited the scene and had seen the dead body. He testified,

> "when the accused was brought from Amuru I asked him. He admitted having killed the woman. He did not know her name but he did want to have sex with her but she refused ....."

Cross-examined on the matter he said,

"When the accused was brought from Amuru he was under arrest and his hands were tied. He had been beaten in our unit. In Amuru he was just arrested. I was the second in command. The O/C gave the order to beat the accused. Accused was beaten by other askaris RPs. I was present when he was being beaten....."

Another witness for the prosecution, Walter Ocaka (PW3) testified that when the appellant was brought to Pabo his hands were tied and "had stick marks on him". To this extent, this witness contradicted Otika's evidence to the effect that the appellant was beaten only at Pabo barracks.

The appellant gave evidence on oath at the trial within a trial to determine the admissibility of the alleged confession. He alleged he was beaten on arrest at the Bus Park, he was beaten in the barracks at Pabo and he was beaten when his statement was being recorded. He also alleged being threatened with a pistol by an army Captain when his statement was being recorded.

In his ruling on the admissibility of the statement the learned trial Judge said,

"The accused admits to thumb printing some document said to be his statement at the police station. He has alleged that he was tortured. The police witness (PW4) denies that the accused was tortured. There has not been shown that the accused was tortured. I therefore find that statement

was made without torture. I therefore rule that the statement is admissible".

This ruling causes us some concern. First, although the point has not been raised by counsel, it would appear that the learned trial Judge by his statement that "it was not shown that the accused was tortured" had the effect of shifting the burden of proof to the accused to show that the statement was not voluntary. With respect the burden was on the prosecution to show that the statement was voluntary. See Kato and Another v Uganda Criminal Appeal 158/71 (unreported).

Secondly the ruling does not appear to take into account the undisputed evidence that the appellant was assaulted on arrest and at the barracks and that he confessed to the murder at the barracks. The learned trial Judge does not say anything, except impliedly, about the claim by the appellant that he was threatened with a pistol by an army officer at the time of recording the charge and caution statement.

On the issue of the admissibility of the charge and caution statement, the Court of Appeal said,

"It was the contention of the learned counsel that any impression which might have created fear in the mind of the appellant by the treatment he

had received from soldiers, had been fully removed by the time he was taken before Thomas James Ongaba for his charge and caution statement within the meaning of section 26 of the Evidence Act. We agree with the learned counsel on this point".

There was evidence that the appellant was assaulted on arrest and also in the barracks and that he confessed to the killing to the 2nd in command, Wilfred Otika, that was around 19/11/94. This army officer sent the appellant under guard to the police on 25/11/94. The appellant's alleged confession was recorded by the police 7 days after the alleged torture by army men and the confession to them by the appellant. On that evidence alone it is a question of fact whether by the time the appellant made the alleged confession the fear induced by the previous beatings had been removed. The Court of Appeal did not refer to the confession to the army men. The question which was not resolved is whether the appellant was not merely repeating to the police what he had told the army men. He claimed in his evidence to the trial court,

"I told the police that I did not know why I was arrested. Then the Captain pulled out his pistol and told me to repeat what I had stated at Pabo".

Neither the High Court nor the Court of Appeal commented on this evidence.

There are other unsatisfactory aspects about the recording of the charge and caution statement. First of all in his own evidence D/ASP Ongaba stated,

> "When the file was brought to me together with the accused, I read the file. The file was being handled by another officer. I first went through the statements of the witnesses .....".

There are a number of cases in which it has been held that it is improper for an investigating officer to record a charge and caution statement. In Njuguna and Others vs Regina 1954 EACA 316 the Court of Appeal for Eastern Africa, referred to the need to take every reasonable safeguard to ensure the voluntary character of a statement such as the interposition of a disinterested person who has not taken part in the investigations and whose knowledge of the case is probably limited to what the prisoner tells him. The Court concluded,

> "This Court has said more than once that it is inadvisable, if not improper, for the police officer who was conducting the investigation of a case to charge a suspect and record his cautioned statement".

If, therefore, the officer in the case before us, read the police file before recording the statement, he was in the same position as an investigating officer.

Also details in a statement are relevant to the question whether or not the statement was made by the accused and whether it is true. Where the person recording the statement is conversant with the facts of the case, it is difficult to dismiss off hand a claim by the accused person that he signed or thumb printed a prepared statement.

We must mention here that a conflict in evidence is relevant to the issue whether the statement is true. According to the statement of the appellant,

> "I confess on 15/11/94 at 15.00 hours I murdered Mary Ajok. I have to say this. I had left the detach, I had gone to drink 'wiri' and when I was coming back I found this woman collecting firewood near a certain garden. I went to her. As I was drank I demanded to play sex with her. She pulled her ..... I then threw away her axe. I took a piece of firewood she had collected and hit her three times. I went to the Barracks and kept quiet....."

According to the post mortem report however,

> "She had crushed head at the back. A cut wound involving the nose and upper lip. Skull was broken as was the upper jawbone. She was not lame. Cause of death was severe internal and external haemorrhage and brain damage. Sharp instrument was used".

The question is what caused the injuries? Was it a piece of wood as the appellant's statement indicates or a sharp instrument as the post mortem report indicates?

Secondly, it was irregular for Ongapa to ask the appellant if he admitted the charge. In his own words Ongapa testified,

> "I cautioned him ..... that you are charged that ..... you murdered one, Mary Ajok. Do you admit the charge? ....."

Again for an accused person who is already known to have admitted the charge to be asked if he or she admitted the charge could be tantamount to asking him or her to state what he or she previously stated.

In the guidelines issued by the Chief Justice to magistrates as well as police officers in relation to recording extra-judicial statements, referred to with approval in Beronda v Uganda 1974 EA 46, and which were also referred to by the Court of Appeal, it is suggested, and we agree, that the accused should be asked whether he or she wishes to say anything about the charge.

With regard to the second issue in this appeal, the appellant's alibi, learned counsel for the appellant submitted that the appellant's alibi was not evaluated. The appellant claimed he could not have been at the scene of crime as he was

stationed in Lubiri barracks in Kampala, which he left on 8/11/94 on a two weeks leave. He was arrested and on the alleged date of the crime, on or about 15/11/94, he was in custody. Learned counsel submitted that there was no evidence of arrest to contradict the appellant's version.

Learned counsel for the respondent supported the decision of the courts below arguing that if the confession is believed it destroys the alibi.

We are uneasy about the way the alibi of the appellant was handled in the courts below. The trial Judge had this to say,

> "The accused set up a defence of alibi. In his sworn evidence the accused stated that he was arrested on 8/11/94 and has remained in custody ever since and so he could not have committed the crime. The accused bears no burden to prove the alibi .....
>
> The prosecution led the evidence of PW2 Sgt. Otika that the accused confessed to him that he murdered the deceased. The prosecution also tendered in evidence the cautioned statement of the accused Exhibit P2A in which the accused confessed to the murder. I have already come to the conclusion that the confession was true for the reasons already given. This confession therefore places the accused squarely at the scene of the crime and therefore negatives his alibi which, I therefore reject .....".

With respect, the learned trial Judge erred to take into consideration the confession to Sgt. Otika in view of the evidence of torture of the accused.

Secondly, this Court has in a number of cases dealt with the expression "putting the accused at the scene" or words to that effect, in relation to alibis. See Bogere Moses and Another vs Uganda Criminal Appeal No. 1 of 1997 and Haji Musa Sebirumbi vs Uganda Criminal Appeal No. 10/89 (both unreported).

In this connection the appellant testified,

> "I used to reside in Lubiri in Kampala. I was a soldier of 1st Division. I was arrested at Pabo. I was on pass leave from Lubiri. I left Lubiri on 8/11/94. I was on 2 weeks pass leave. I was going to my home in Atiak. On arrival in Gulu I went to the barracks and got an army vehicle going to Bibia. I stopped at Pabo. I went to buy cigarettes and the vehicle left me there. I went to wait for a vehicle at the park. The LDU came to me. They were drunk. They asked me to identify myself. I showed them my pass leave. They arrested me. They beat me there and then at the Bus Park. One of them hit me with a magazine of ..... SMG and one ..... ammunition broke in my chin damaging one of my teeth. It was about three days after I had left Lubiri. They took me to the Barracks at Pabo. They continued to assault me as a rebel. I was there for two days. They were stepping on my chest. From Pabo I was brought to Gulu Police. I was not informed

why I was arrested. They recorded my statement. Some army people including a captain came to intervene ……".

The Prosecution led evidence of Otika (PW2), the 2nd in command at Pabo to the effect that the appellant did not appear at the general parade he called on 17/11/94. The trial court took the fact as circumstantial evidence indicating guilt.

The Court of Appeal dealt with the issue this way,

"We agree that the confession made by the appellant was properly received in evidence as it was voluntarily made. The confession, therefore, destroyed the appellant's defence of alibi. He must have lied when he denied having been at the scene of crime"

There is no evidence as to when the appellant was last seen by anyone at the barracks at Pabo either before or after the alleged disappearance from there. The appellant claimed,

"I am RA12522 Sgt. Mateo Ochieng. I am 27. I am an NRA soldier attached to the 1st Division in Kampala Lubiri barracks. On 8/11/94 I was at the Lubiri Barracks and I was given 14 days pass leave to come home. I travelled by a lorry ……"

And he ~~gives the~~ gave details of his travel and subsequent arrest. The question to ask is where was the appellant stationed at the material time, at Lubiri in Kampala or at Pabo in Gulu district?

Apart from the appellant's own evidence there is no credible evidence to resolve the issue one way or the other. The commanding officer did not say when the appellant was last seen in the barracks at Pabo before or after the incident. The possibility that the appellant was stationed at Pabo barracks only on paper was not ruled out.

There is no evidence of arrest and the possibility of the appellant having been under custody as he claims was not ruled out.

With the greatest respect to the courts below the question whether the alibi did raise a reasonable doubt was not considered. We have no doubt that had the courts below treated the alibi and the charge and caution statement as they should, they would have come to a different conclusion. In the circumstances and for the reasons given in this judgment we think that it will be unsafe to allow the conviction to stand. Accordingly the appeal is allowed, the conviction is quashed and the sentence set aside. It is ordered that the appellant be set free forthwith unless he is otherwise lawfully held.

Delivered at Mengo this 17th day of January 2001

S W W WAMBUZI
CHIEF JUSTICE

A H ODER
JUSTICE OF THE SUPREME COURT

A N KAROKORA
JUSTICE OF THE SUPREME COURT

J N MULENGA
JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA
~~L E M MUKASA-KIKONYOGO~~
JUSTICE OF THE SUPREME COURT