

IN THE SUPREME COURT OF UGANDA
AT MENGO

CORAM : ODER, TSEKOOKO, KAROKORA, MULENGA,
AND KANYEIHAMBA JJ.S.C.

CRIMINAL APPEAL NO. 47 OF 2000

Between

BABYEBUZA SWAIBI:..... APPELLANT

And

UGANDA:..... RESPONDENT

(Appeal from judgment of the Court of Appeal (Kato,
Okello and Berko JJ.A.) in Criminal Appeal No. 96 of
1999, dated 15th November 2000.)

REASONS FOR DECISION OF THE COURT.

When this appeal came up for hearing on 15th March 2002, we dismissed it after the submission of counsel for the appellant only. We found it unnecessary to hear counsel for the respondent because, clearly there was no merit in the appeal. We reserved our reasons for the decision, and now proceed to give them.

The appellant was convicted by the High Court for the murder of his wife, Edisa Bakyehakanira. His appeal to the Court of Appeal was dismissed. He appealed to this Court on three grounds, but at the hearing, his learned counsel abandoned the third ground, and proceeded to argue on the following two:-

(a) The learned Justices of the Court of Appeal erred in law and fact when they upheld that there was sufficient circumstantial evidence to sustain a conviction of murder.

(b) The learned Justices of the Court of Appeal erred in law and fact when they rejected the appellant's defence."

The circumstantial evidence upon which the Court of Appeal relied to uphold the conviction of the appellant is highlighted in the following passage of its judgment:-

The learned trial judge referred to at least seven pieces of circumstantial evidence. We need only to refer to just a few of the prominent ones to show that the judge was right in the findings he made.

There is evidence on record that deceased and the appellant had had domestic quarrels the last of which was resolved in the deceased's favour. The appellant was not happy when the LCs told him to leave the banana and coffee plantation and give it to the wife.

PWL 's evidence shows that the appellant wanted to get rid of the deceased. The second important piece of evidence was the deliberate lie told by the appellant about the whereabouts of the deceased when PWL inquired about her. He told PWL that the deceased had gone to Toro when he knew she was dead. There was also the attempts he made to conceal the body of the deceased and the lies he told the LC officials about where the body was. These pieces of circumstantial evidence are so strong and damaging (sic) that Mr. Kunya felt unable to challenge them.

In addition to the above, there was the concocted defence put up by the appellant at the trial. His defence was that the deceased's death was accidental. He said he collided with her when he was running away from a snake. The wife fell in a pit latrine and knocked her head against stones and sticks in the latrine. That theory was exploded by the medical evidence that all the skull bones were intact and that the deceased was strangled. That clearly negated accidental death. It also proves that there was an intention to kill, as strangulation is a deliberate act"
accidental death. It also proves that there was an intention to kill, as strangulation is a deliberate act. "

If that had been the only evidence adduced to prove the appellant's guilt, then the first ground of appeal on the insufficiency of the circumstantial evidence may well have been, at least arguable. However, we need not discuss that, because there is other evidence which, though not included by the Court of Appeal among "the prominent" pieces of circumstantial evidence, is singularly significant for pointing

to the appellant's involvement in the deliberate killing of the deceased. The evidence was adduced from three witnesses, including an LC II Secretary. It is to the effect that, after lengthy questioning by the LC officials, the appellant admitted that he had killed the deceased because he was tired of their quarrels, and he agreed to take the officials to where he had hidden her body. He led them to a spot, about two miles away from his home, where the deceased's body was discovered tied in a sack. It is possible that this evidence was omitted from the highlights we have just reproduced from the judgment of the Court of Appeal, because the learned Justices of Appeal had, earlier in their judgment, held that the appellant's confession to the LC officials was inadmissible. We shall revert to that holding later. Suffice to say here, that the evidence we have summarised was admissible under section 29A of the Evidence Act which provides:-

"29A. Notwithstanding the provisions of sections 24 and 25 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. "

had killed the deceased because he was tired of their quarrels, and that he had taken her body to the place where he led the officials, undoubtedly relates distinctly to the discovery of the appellant's body. It was therefore, under that section, rightly proved, and the learned trial judge, who appears to have believed the information to be true, rightly relied on it along with the rest of the circumstantial evidence.

The submissions before us by Mr. Kuguminkiriza, counsel for the appellant, regarding the insufficiency of the evidence, was dependent on the premise that the information which led to the discovery of the deceased's body, was not part of the circumstantial evidence that proved the appellant's guilt. He argued that the Court of Appeal having held that information to be inadmissible, it ought to have found

the rest of the evidence insufficient to prove the charge. Starting on that premise he contended that each of the other pieces of evidence was capable of explanation other than the appellant's guilt. Even then, however, he only addressed us on: (a) the lie which the appellant told to PW1 that the deceased had gone to Toro; and (b) the attempt by the appellant to escape, when the spot where the deceased had first been buried in an unused pit latrine, was discovered. In respect of the former, he argued that the statement that the deceased had gone to Toro, may have been true at the time it was made. With regard to the latter, he argued that the appellant may well have tried to escape because he was frightened by the hostility of the crowd, and not necessarily because he was guilty.

We were not impressed by counsel's submissions. First, with due respect to counsel, we are constrained to say that those arguments are entirely speculative, not supported by any semblance of evidence. They were even not consistent with the defence which the appellant put up in court at his speculative, not supported by any semblance of evidence. They were even not consistent with the defence which the appellant put up in court at his trial. Secondly, our view that the information received from the appellant which led to the discovery of the body of the deceased, was rightly admitted and relied on, deprives counsel's submission of its premise. The information amounts to a confession by the appellant, and strengthens the conclusion that he intentionally killed the deceased because of their soared relationship. Thirdly, the appellant's defence was shown to be false by independent evidence . His claim that he accidentally caused her to fall into a pit where she sustained fatal head injuries, was irreconcilable with the medical evidence that her death was due to strangulation. Fourthly, it is pertinent to observe, that in determining whether a set of circumstantial evidence proves the guilt of a person accused of a criminal offence, the court considers the evidenee as a whole, and does not evaluate each piece in isolation, as learned counsel sought to do. Accordingly,

we were satisfied that the Court of Appeal correctly concluded that the appellant's defence was unsustainable, and that the circumstantial evidence adduced in the case, was sufficient to sustain the conviction. Both grounds of appeal having failed, we had to dismiss the appeal.

For the sake of clarifying the law, to comment on the holding by the Court of Appeal, we are constrained that the appellant's confession to LC officials, was inadmissible. There are two aspects to the holding. The first is that because the confession was made while the appellant was in the custody of LC officials, section 24 of the Evidence Act rendered it inadmissible. The second is that the confession was not voluntarily made because it was induced through threats.

This is what the learned Justices of Appeal said:-

"The evidence on record shows that PW3 was Secretary' LCII in 1995 when the appellant was alleged to have confessed to him. PW3 received a letter from the Chairman LC1 reporting the disappearance of the wife of the appellant and requesting for assistance. PW3 proceeded to the appellant's home and found that he was under arrest and tied. A lot of people had gathered.....At that time PW3 was with the Chairman LCII, the Vice-Chairman and the Secretary for Defence. They interrogated the appellant. They told him he was likely to be tortured if the police came. Then the appellant, who was shaking said that he would tell them what happened. The LC executives assured him that he would be protected from the angry villagers. It was then that he allegedly confessed that he killed her because he was tired of the misunderstanding that existed between them. Clearly his confession is inadmissible. When the appellant made the alleged confession he was in the custody of the LC officials. Therefore its admission breached Section 24 of the Evidence Act. See Tumuhairwe Moses v Uganda, Criminal Appeal No. 17 of 1999 Supreme Court (unreported) and No. 7770 PC Kikwemba v Uganda Criminal Appeal No. 16/91 (unreported). Ms Lwanga, the learned Principal State Attorney rightly conceded the point.

The alleged confession was also inadmissible on the ground that it was induced as a result of a threat Therefore it cannot be said to be voluntary'."

With due respect to the learned Justices of Appeal, the holding that the admission of the confession "*breached*" section 24 of the Evidence Act, was incorrect. That section applies to confessions made by a person in the custody of a police officer,

not of an LC official. The section reads thus:-

"24 (1) No confession made by any person whilst he is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of a police officer of or above the rank of Assistant Inspector ; or a magistrate. "

Neither of the two decisions of the Supreme Court cited by the Court of Appeal is authority for the proposition that the section applies to a confession made by a person in the custody of LC officials or of any person other than a police officer. In **Tumuhairwe Moses v Uganda** (supra), the Supreme Court considered a confession of murder made by the accused person twice. First, before he was arrested, he had confessed to X, a witness who answered the alarm soon after the crime. Next, after he was arrested and was in the custody of the police and LC officials, he repeated the confession in the presence of Y. Both X and Y gave evidence at the trial, of having heard the confession separately. The Supreme Court held that the provisions of section 24 of the Evidence Act did not apply to the confession made to X; but that they applied to the confession heard by Y. The material difference was that in the latter case the accused was in custody of the police. For purposes of the application of the section, it was immaterial that he was stated to have been in custody of both the police and LC officials. As for the decision in **Kikwemba v Uganda** (supra), all we need to say is that at the time of making the questioned statement, the accused person was not in custody of LC officials. Application of section 24 of the Evidence Act was considered in that case only because the evidence suggested that he may have been in the custody of a police sergeant.

Where a confession is made to a person in authority, such as a chief or an LC official, that fact may be taken into consideration in determining whether it was a voluntary statement for purposes of section 25 of the Evidence Act, which

reads:-

“25. A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made. ”

Clearly, the evidence in the instant case, shows that the appellant's confession was induced by threats and fear. Therefore, by virtue of the provisions of section 25 of the Evidence Act, we would have confirmed the second aspect of the holding by the Court of Appeal, but for the provisions of section 29A of the same Act which override section 25. We have already discussed section 29A and need only add that the rationale for its overriding sections 24 and 25, is that the discovery of a fact as a result of information received from the accused person confirms the information to be true.

Dated at Mengo this day of 15th March 2002.

A.H.O Oder

Justice of the Supreme Court

J.W. Tsekooko

Justice of the Supreme Court

A. N. Karokora

Justice of the Supreme Court

J.N. Mulenga

Justice of the Supreme Court

J.N. Mulenga

Justice of the Supreme Court

G.W Kanyeihamba

Justice of the Supreme Court