

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO__
CRIMINAL APPEAL NO.24/2001

**(CORAM: ODOKI, C.J., TSEKOOKO, KAROKORA KANYEIHAMBA. KATO,
JJSC).**

OKETCH DAVID:..... APPELLANT

VERSUS

UGANDA :..... RESPONDENT

(Appeal arising from the judgment of the Court of Appeal at Kampala (L.E.M. Mukasa-Kikonyogo, DCJ, G.M. Okello, A, S.G. Engwau, JJA) dated 11.05/2001 in Criminal Appeal No. 109 of 1999)

REASONS FOR THE DECISION OF THE COURT

The appellant, David Oketch, was indicted before the High Court on two counts of aggravated robbery and murder contrary to sections 272, 273(2), 183 and 184 of the Penal Code Act, respectively. He was convicted on both counts and sentenced to death. He appealed to the Court of Appeal which dismissed the appeal. He made a second appeal to this court. On 2/12/2002 we dismissed the appeal but reserved our reasons which we give now.

The brief facts of the case which were accepted by the trial court and confirmed by the Court of Appeal are as follows. On the night of 3/8/93 the deceased, Joseph Olweny and

his family were sleeping at his home at Namwendia village in the District of Tororo. Among the members of the family was his wife Sarah Amali, (PW2). There was an attack on the family by robbers. One of the attackers was a half brother of the deceased called Godfrey Onyango, who called the deceased out falsely alleging that the deceased's cattle had strayed to a neighbour's garden and were destroying his crops and that the deceased should go and collect them. As soon as the deceased opened the door, Onyango entered the house followed by two other attackers. The deceased and his wife were assaulted. The deceased was dragged out of the house and shot dead. In the process a number of deceased's property including a bicycle were carried away by the robbers. On 26/8/93 the appellant was arrested at Namulumba village in Iganga district with the deceased's bicycle which had been robbed on the night of 3/8/93. On 31/8/93 the appellant made a confessional statement to a Magistrate grade II at Tororo. In that statement he admitted having taken part in the murder of Olweny and the robbery of his property. He was charged with four other suspects, three of whom were acquitted by the trial court, but he and Onyango were convicted and they appealed to the Court of Appeal which dismissed his appeal but found Onyango a minor and his sentence was set aside.

At his trial the appellant denied ever having committed the two offences. He pleaded that on the night in question, he was at his home. Although he admitted having confessed to the commission of the offences, he was only told to admit as he was beaten at the time he was being arrested. He denied having been arrested in possession of any bicycle.

The trial judge rejected the story as told by the appellant but accepted that told by the prosecution and convicted him.

The following three grounds of appeal were presented before us, namely:

- "1. The learned Justices of the Court of Appeal erred in law and in fact when they upheld the conclusion of the learned trial judge that the confession of the appellant was voluntary after considering only the element of threat but ignoring to specifically consider the element of inducement.

2. The learned Justices of the Court of Appeal erred in law and fact when they concluded that they had specifically considered the element of inducement, whereas not, and thereby upholding the conclusion of the lower court that the confession of the appellant was voluntary.

- 3, The learned justices of the Court of Appeal erred in law and in Fact when, as a first appellate court, they failed to re-evaluate the evidence on record touching on the serious inconsistencies between the alleged confession of the appellant and the prosecution evidence; on the one hand; and the criminal liability of the appellant, thereby upholding the conviction."

Learned counsel for the appellant, Ms. Nakabuye Charity, argued grounds one and two together and ground three separately. Counsel's submission on the first two grounds had two aspects. In the first aspect the counsel argued that the appellant's confession upon which his convictions were founded was improperly admitted by the trial court as it was obtained through an inducement. It was counsel's view that the words addressed to the appellant by one of the policemen that the appellant "had suffered for nothing" amounted to an inducement which influenced his making the confession. Another aspect of Ms. Nakabuye's argument was that the magistrate who recorded appellant's statement was wrong to tell the appellant "you are now free to say what you know about this case". According to her such a remark also induced the appellant to make the confession.

On the other hand, Principal State Attorney Mr. Michael Elubu, for the State contended that there was no evidence to show that the appellant had been induced in any way to make the confession. It was the counsel's view that the remarks made by the policeman and the Magistrate did not amount to an inducement.

We would like to state from the very start that these two grounds of appeal were strongly argued in the Court of Appeal under the second ground of appeal in that court and their Lordships resolved the issue in the following way:

"Like the learned trial judge, we are of the view that 1st appellant had made his confession voluntarily with great details of an insider. Though the trial judge had not considered specifically the element of inducement, had he done so as we have done, he would have come to the same conclusion. We agree also with Mr. Byabakama that the Magistrate used wrong words during caution but we think that did not render the confession inadmissible. We are of the opinion that neither the two policemen who escorted the 1st appellant nor Mr. Dasan Openy ever induced the 1st appellant with anything before naming all the culprits".

We do not fault that finding. In our view, the remarks made by one of the policemen to the effect that the police knew that the appellant had suffered for nothing did not amount to an inducement within the meaning of section 25 of the Evidence Act. There is nothing on the record suggesting that those words influenced the appellant in admitting that he had taken part in the commission of the two offences. As for the words used by the magistrate, who recorded appellant's confession to the effect that the appellant was "free to say what he knew about the case", we consider this to have been an irregularity which did not affect the admissibility and voluntariness of the confession. We are satisfied that the two courts below correctly held that the confession was admissible. We find no merit in grounds one and two which must fail.

On the third ground of the appeal, Ms. Nakabuye complained that there were inconsistencies in the prosecution case which should have been resolved in favour of the appellant. She singled out the issue of when the bicycle was removed from the home of the deceased. According to her, the wife of the deceased, Sarah Amali, stated that the bicycle was removed before her husband was murdered but according to Cirilo Ochwo, PW5, the removal was after the deceased had been killed. She was of the view that such inconsistency affected the quality of the evidence of identification of the appellant by Amali.

On his part, Mr. Elubu, submitted that there was no inconsistency and even if it was there, it was immaterial what time the bicycle was removed. He pointed out that an allowance should be given for the lapse of time, between when the offence was committed in 1993 and the time the witnesses testified in 1997.

It is trite law that a contradiction or inconsistency in the prosecution case which is major and goes to the root of the case should be resolved in favour of the accused; but where it is minor and was not a deliberate lie intended to deceive the court, it should be ignored: (See: Alfred Tarjar -V- Uganda, Criminal Appeal No. 167 of 1969 EACA (unreported)). In the instant case the inconsistencies which are being complained of are to be found in the testimonies of Sarah Amali (PW2) and Cirilo Ochwo (PW5).

Sarah Amali (PW2) stated:

"They pulled out a bicycle and rolled it outside. I can't remember which of the assailants took the bicycle because one of them was in the process of cutting me with a sword".

Cirilo testified as follows:

"After sounding the drum we went to the house of the deceased and found his bicycle, 4 pairs of trousers and 4 gomesis and two bed sheets missing."

We see no inconsistency in these two statements, if anything the testimonies were complementing each other. PW2 is only saying that the robbers took the bicycle outside and PW5 is saying he found it missing. Even if the two statements were contradictory, which is not the case, still the contradiction would have been minor since it is immaterial whether the bicycle was taken after or before the deceased was killed. What is important

is that the deceased was killed and in the process his bicycle was robbed. The third ground must also fail.

It was for those reasons that we dismissed the appeal.

Dated at Mengo this 17th day of April 2003.

B. Odoki
Chief Justice

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

A.N. Karokora
Justice of the Supreme Court

G.W. Kanyeihamba
Justice of the Supreme Court

C.M. Kato
Justice of the Supreme Court