

UGANDA / JUDGMENT

Bwire Wycliffe and Anor v Uganda

[2003] UGSC 6 (11 February 2003)

[2003] UGSC 6

COURT

Supreme Court of Uganda

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{\f626\fswiss\fcharset161\fprq2 Tahoma Greek;}{\f627\fswiss\fcharset162\fprq2 Tahoma Tur;}{\f628\fswiss\fcharset177\fprq2 Tahoma (Hebrew);}{\f629\fswiss\fcharset178\fprq2 Tahoma (Arabic);}{\f630\fswiss\fcharset186\fprq2 Tahoma Baltic;}

{\f631\fswiss\fcharset163\fprq2 Tahoma (Vietnamese);}{\f632\fswiss\fcharset222\fprq2 Tahoma (Thai);}{\f643\fswiss\fcharset238\fprq2 Arial Narrow CE;}{\f644\fswiss\fcharset204\fprq2 Arial Narrow Cyr;}{\f646\fswiss\fcharset161\fprq2 Arial Narrow Greek;}

{\f647\fswiss\fcharset162\fprq2 Arial Narrow Tur;}{\f650\fswiss\fcharset186\fprq2 Arial Narrow Baltic;}{\f663\froman\fcharset238\fprq2 Georgia CE;}{\f664\froman\fcharset204\fprq2 Georgia Cyr;}{\f666\froman\fcharset161\fprq2 Georgia Greek;}

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{\cs40\insrsid7556549\charrsid7556549 SERUNGA GEORGE WILLIAM }

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This is a second appeal. It is from a Judgment of the Court of Appeal dated 26}
\cs40\super\insrsid7556549\charrsid7556549 th}\cs40\insrsid7556549\charrsid7556549 April,
2002 confirming the conviction and sentence of death passed by the High Court on 16
\cs40\super\insrsid7556549\charrsid7556549 th}\cs40\insrsid7556549\charrsid7556549 October,
1999.

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The appellants Bwire Wycliffe and Serunga George William together with Sikyomu Abdu were
jointly tried on an Indictment for murder contrary to Sections 183 and 184 of the Penal Code.
They were all convicted and sentenced to death a

s earlier on stated. The appeals}\cs40\insrsid7556549 }\cs40\insrsid7556549\charrsid7556549
of Bwire Wycliffe and Surunga George to the Court of Appeal were dismissed. The appeal of
Sekyoma Abdu who appealed against sentence only was allowed on the ground that the
prosecution had not proved beyond reasonable doubt that he was aged 18 years or ab
o

ve at the time the offence was committed. The sentence of death against him was set aside and
substituted with an order that he be detained in safe custody pending the order of the Minister
under Section 104(2) of the Trial on Indictment Decree. Only Bwir

e Wycliffe and Serunga George William have appealed to this Court as 1}
\cs40\super\insrsid7556549\charrsid7556549 st}\cs40\insrsid7556549\charrsid7556549 and 2}
\cs40\super\insrsid7556549\charrsid7556549 nd}\cs40\insrsid7556549\charrsid7556549
appellants respectively.

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\par }\cs40\insrsid7556549\charrsid7556549 The brief facts of the case as accepted by the lower
courts were that on 8}\cs40\super\insrsid7556549\charrsid7556549 th}
\cs40\insrsid7556549\charrsid7556549

June 1996 Joseph Nkuke, the deceased, left his home and went to Kyakanyo

nza village in Masaka District to collect food but never returned. A few days later, Abdu Sikyomu, was found in possession of the deceased's bicycle. He was arrested. He confessed that he and five other people including the two appellants had killed the d

e

ceased and removed his body organs which they gave to one Musomesa for Shs. 150,000/=. All those who were implicated by Sikyomu were arrested. The two appellants also confessed to the murder. All six suspects were charged with the murder of Joseph Nkuke.

At their trial they all denied the charge. Only the appellants and Sikyomu Abdu were convicted of murder and sentenced to death. They appealed to the Court of Appeal with the results already stated above.

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\par }\pard \s18\ql \li0\ri0\sb178\sl360\smult1\widctlpar\faauto\rin0\lin0\itap0\pararsid7556549 {\cs40\insrsid7556549\charrsid7556549 The two appellants filed separate memoranda of appeal in this court.

\par }\pard\plain \s24\qj \li0\ri0\sb62\sl360\smult1\widctlpar\faauto\rin0\lin0\itap0\pararsid7556549 \f1\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033 {\cs40\insrsid7556549\charrsid7556549 The 1}{\cs40\super\insrsid7556549\charrsid7556549 st}{

\cs40\insrsid7556549\charrsid7556549 appellant has filed four grounds of appeal, but at the hearing of the appeal his counsel abandoned the fourth ground. The remaining grounds read as follows:

\par {\pntext\pard\plain\s25 \cs40\fs35\charrsid7556549 \hich\af35\dbch\af0\loch\fs35 (1)\tab}}\pard\plain \s25\qj \fi-715\li715\ri0\sb269\sl360\smult1\widctlpar\tx715{*\pn \pnlvlbody\ilvl0\ls1\pnrnot0\pndec\pnf35\pnstart1\pnindent715 {\pntxtb ({\pntxta)}}

\faauto\ls1\rin0\lin715\itap0\pararsid7556549 \f1\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033 {\cs40\insrsid7556549\charrsid7556549 The learned Justices of Appeal erred in law to uphold the learned trial judge's decision admitting the 1}{

\cs40\super\insrsid7556549\charrsid7556549 st}{\cs40\insrsid7556549\charrsid7556549 appellant's charge and caution statement and relying on the same to convict the 1}

{\cs40\super\insrsid7556549\charrsid7556549 st}{\cs40\insrsid7556549\charrsid7556549

appellant.

\par {\pntext\pard\plain\s25 \cs40\fb35\charssid7556549 \hich\af35\dbch\af0\loch\fb35 (2)\tab}}\pard
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\faauto\ls1\rin0\lin715\itap0\pararsid7556549 {\cs40\insrsid7556549\charssid7556549 The learned
Justices of Appeal erred in-law to uphold the decision of the trial judge to admit and rely on the c
harge and caution statement of A2 and A3 and to use them to corroborate the charge and caution
statement of the 1}{\cs40\super\insrsid7556549\charssid7556549 st}
{\cs40\insrsid7556549\charssid7556549 appellant.

\par {\pntext\pard\plain\s25 \cs40\fb35\charssid7556549 \hich\af35\dbch\af0\loch\fb35 (3)\tab}}\pard
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\faauto\ls1\rin0\lin715\itap0\pararsid7556549 {\cs40\insrsid7556549\charssid7556549 The learned
Justices of Appeal erred in law to state that the charge and caution statement of the 1}
{\cs40\super\insrsid7556549\charssid7556549 st}{

\cs40\insrsid7556549\charssid7556549 appellant was enough to base on the conviction of the
appellant.

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appellant's memorandum of appeal contained 2 grounds. At the hearing of this appeal, counsel
for 2}{\cs40\super\insrsid7556549\charssid7556549 nd}{\cs40\insrsid7556549\charssid7556549
appellant abandoned the 1}{

\cs40\super\insrsid7556549\charssid7556549 st }{\cs40\insrsid7556549\charssid7556549 ground
and argued the 2}{\cs40\super\insrsid7556549\charssid7556549 nd}
{\cs40\insrsid7556549\charssid7556549 ground, which reads as follows:

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\fi\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033 {\insrsid7556549\charssid7556549

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\fi-725\li725\ri0\sb43\sl360\slmult1\widctlpar\faauto\rin0\lin725\itap0\pararsid7556549
{\cs40\insrsid7556549\charssid7556549 (2) The learned Justices of Appeal erred in law and fact in
upholding the sentence of death against the 2}{

\cs40\super\insrsid7556549\charrsid7556549 nd}\cs40\insrsid7556549\charrsid7556549 appellant without scrutinising his age.

\par }\pard\plain \s24\qj \li0\ri0\sl360\slmult1\widctlpar\faauto\rin0\lin0\itap0\pararsid7556549 \f1\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033 {\insrsid7556549\charrsid7556549

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\cs40\insrsid7556549\charrsid7556549 appellant argued grounds one and three together and argued ground two separately. On grounds one and three, he submitted that the Court of

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Appeal erred in upholding the decision of the trial judge who admitted the 1} {\cs40\super\insrsid7556549\charrsid7556549 st}{\cs40\insrsid7556549\charrsid7556549

appellant's charge and caution statement and relied on the same to convict the appellant. He contended that it was wrong to admit the statement when the appellant had denied having made it. In the alternative, he argued that if at all he made it, the app

ellant never made it voluntarily. Counsel further submitted that since the statement was both retracted and repudiated, the onus was on the prosecution to prove that the appellant made it and that he made it voluntarily.

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ial within a trial, the learned trial judge found that not only did the appellant make the confession but that it was voluntarily made and therefore he admitted it in evidence as PE1 In his judgment, the judge referred to the part of that confession state

ment as follows:

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"In his statement, (PE1) he told PW4 how he had requested A2 to get him a worker, which A2 did by producing the deceased. That together with four other people, they took the deceased in a forest. That A2 spread chloroform on the deceased,

grabbed and threw him on the ground before pulling out a knife and slaughtering him. That on his part he cut him and removed the heart, liver and lungs which things he took together with blood in a bottle to one Musomesa of Kimaaya village who earlier on

pressed an order for these items from them. The Musomesa paid him}{\cs44\b\i\insrsid7556549 }
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Ug. Shs. 150,000/- for, as he put it, 'the work done.' That he was arrested and found his co-accused in the police cells."

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 {\cs40\insrsid7556549\charrsid7556549 At that stage the learned trial judg

e carefully considered the relevant law applicable to retracted confession. After carefully considering the confessions of A2 and A3, he concluded that A1's confession statement was true. The learned Justices of Appeal carefully considered the analysis an

d conclusions of the learned trial judge on the law applicable to retracted confession as was set out in }{\cs44\b\i\ul\insrsid7556549\charrsid7556549 Tuwamoi V Uganda}
 {\cs44\b\i\insrsid7556549\charrsid7556549 }{\cs40\b\insrsid7556549\charrsid7556549

(1967) E. A }{\cs35\b\insrsid7556549\charrsid7556549 84 }{\cs40\insrsid7556549\charrsid7556549 in
 the following passage:

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 \f1\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033
 {\cs37\b\insrsid7556549\charrsid7556549 "We }{\cs44\b\i\insrsid7556549\charrsid7556549

should summarise the position thus - a trial court should accept any confession which has b

een retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is require

d

in all cases and usually a court will only act on the confession, if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fu

lly satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

\par }\pard\plain \s18\ql
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After quoting the above passage, the Court of Appeal proceeded to state in their judgment inter-alia that::

\par }\pard\plain \s28\ql
 \li739\ri0\sl360\slmult1\widctlpar\faauto\rin0\lin739\itap0\pararsid7556549
 \f1\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033 {\insrsid7556549\charrsid7556549

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\par }{\cs44\b\i\insrsid7556549\charrsid7556549 "Like the learned trial judge, we are fully satisfied that the 1}{\cs44\b\i\super\insrsid7556549\charrsid7556549 st}
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appellant's confession was an unequivocal admission of participation in the murder of the deceased that it was made voluntarily and that it was true. He was entitled to rely on it to convict the 1}{\cs44\b\i\super\insrsid7556549\charrsid7556549 st}{

\cs44\b\i\insrsid7556549\charrsid7556549 appellant."

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 {\cs40\insrsid7556549\charrsid7556549 We agree with the above conclusion:

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 {\cs40\insrsid7556549\charrsid7556549 Although the learned trial judge permitted }
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\cs40\insrsid7556549\charrsid7556549 to narrate the contents of the confession statement of A1 without any objection being raised by defence counsel, before a trial within a trial was co

ducted to determine its admissibility, which was an irregularity, we think, that the irregularity was cured when a trial within a trial was conducted after which the learned trial judge found that not only did the first appellant make the confession but

that it was voluntarily made, and that it was true showing details and steps taken by all the appellants in the murder of the deceased.

In the result, we are not persuaded by submission of counsel for the 1st

appellant that the lower courts erred in admitting the 1st

appellant's confession statement and in relying on it to convict him. Consequently, grounds one and three must fail.

On ground two counsel submitted that the Justices of Appeal were in error when they upheld the decision of the trial judge who

had admitted and relied on the charge and caution statements of A2 and A3 and used them to corroborate the charge and caution statements of the 1st appellant.

As we have already stated in the course of this judgment, we agree with the Justices of Appeal w

hen they stated inter alia, that:-

"Like the trial judge, we are fully satisfied that the 1st appellant's confession was an unequivocal admission of participation in the murder of the deceased that it was made voluntarily and that it was true. He was entit

led to rely on it to convict the 1}{\cs48\b\super\insrsid7556549\charrsid7556549 st}{\cs48\b\insrsid7556549\charrsid7556549 appellant. However... there was corroboration in the uncontested confessions of the 2}{

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appellants. We also find that the learned trial judge could have convicted the 1}{\cs48\b\super\insrsid7556549\charrsid7556549 st}{\cs48\b\insrsid7556549\charrsid7556549 appellant on the strength of both confessions of the 2}{

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appellants alone or any one of them. Section 28 of the Evidence Act provides:-'Where more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other

of such persons is proved, the court may take into consideration such confession as against such other persons as well as the person who makes such a confession'. In this case all the three confessions of the three appellants implicated the 1}{

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In the result, we think that the Justices of Appeal rightly concluded that the trial judge was entitled under section 28 of the Evidence Act to consider the confession of A2 and A3 as corroborative of A1's confession. Therefore this ground must fail.

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\par }{\cs40\insrsid7556549\charrsid7556549 Mr. Kafuko Ntuyo counsel for 2}{\cs40\super\insrsid7556549\charrsid7556549 nd}{\cs40\insrsid7556549\charrsid7556549

appellant submitted that neither the trial court nor the Court of Appeal scrutinized evidence relating to the age of the 2}{\cs40\super\insrsid7556549\charrsid7556549 nd}{\cs40\insrsid7556549\charrsid7556549

appellant to ascertain accused's age at the time the offence was committed. He contended that under section 104(1) of the Trial on Indictment Decree 1971, the trial judge is obliged to ascertain the age of the accused person.

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{\cs40\insrsid7556549\charrsid7556549 Counsel submitted that the 2}

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appellant was medically examined on 26/6/96 when the doctor found that he was aged approximately }{\cs40\expnd4\expndtw20\insrsid7556549\charrsid7556549 18 }

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years. Counsel contended that this was opinion evidence. Yet on 20}

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when the appellant made charge and caution statement, he was stated to be aged }{

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{\cs40\insrsid7556549\charrsid7556549 years. Counsel submitted that at his trial on 29/9/99 the appellant stated on oath that he w

as aged 20 years. He was not challenged in cross-examination about this. Counsel contended that therefore the prosecution had failed to prove that the appellant was aged }

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\cs40\insrsid7556549\charrsid7556549 years at the time the offence was committed on 8/6/1996.

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{\cs40\insrsid7556549\charrsid7556549 We agree with the submission of the learned counsel for 2}

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\cs40\insrsid7556549\charrsid7556549 appellant that the prosecution had failed to prove that the appellant was aged }{\cs40\expnd4\expndtw20\insrsid7556549\charrsid7556549 18}

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years at the time the offence was committed on 8/6/96.

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{\cs40\insrsid7556549\charrsid7556549 We reiterate what we stated in the case of }{

\cs44\b\i\ul\insrsid7556549\charrsid7556549 James Sowabiri & Another V Uganda Cr. Appeal No. 5 of 1990}{\cs44\b\i\insrsid7556549\charrsid7556549 }

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"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore

an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently or palpably incredible."

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{\cs40\insrsid7556549\charrsid7556549 Clearly the app

ellant's evidence that he was aged 20 years on 29/9/99 when he testified in court was not challenged. This would mean that when the offence was committed on 8/6/96; he was below }

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\cs40\insrsid7556549\charrsid7556549 years of age. Consequently we think that if the lower courts had scrutinised the evidence relating to A2's age, they would have concluded that at the time the offence was committed on 8}{

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{\cs40\insrsid7556549\charrsid7556549 he was below }{

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{\cs40\insrsid7556549\charrsid7556549 years of age. In the result, no sentence of death would have been passed by the trial judge and confirmed by the Cour

t of Appeal. Instead, in lieu thereof, the court would have remitted A2 to the Family and Children Court under section }{\cs40\expnd4\expndtw20\insrsid7556549\charrsid7556549 104}

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(2) of the Children Act for an appropriate order to be made.

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{\cs40\insrsid7556549\charrsid7556549 In the result, the appeal for }

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 {\cs40\insrsid7556549\charrsid7556549 appellant has no merit and is accordingly dismissed. The
 appeal for 2}{\cs40\super\insrsid7556549\charrsid7556549 nd}{

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appellant is allowed. The sentence of death is set aside. In lieu thereof, we order that the second
 appellant, Serunga George be remitted to the Family and Children Court for an appropriate order
 to be made under section }}

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 {\cs40\insrsid7556549\charrsid7556549 (2) of the Children Act.

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 {\cs49\b\i\insrsid7556549\charrsid7556549 Dated at Mengo this 12th day of February 2003.

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