

UGANDA / JUDGMENT

Tinkasimire Lawrence v Uganda

(Criminal Appeal No. 204 of 2002)

[2009] UGCA 9 (9 February 2009)

[2009] UGCA 9

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Appeal No. 204 of 2002

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\par HON. MR JUSTICE S. B. K. KAVUMA, JA.

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\par }{\i0\insrsid1731492\charrsid12472459 }{\insrsid10583901\charrsid12472459 Appeal from the
judgment of the High Court of Uganda Kabale High Court Circuit sitting at Rukungiri (Bamwine}
{\i0\insrsid10583901\charrsid12472459 J) }

\insrsid10583901\charrsid12472459 dated 7}{\super\insrsid10583901\charrsid12472459 th}
{\insrsid10583901\charrsid12472459 November 2002 in HCCSC No. 115/2000}
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October 2008 we heard the appellant\quote

s appeal and allowed it. We quashed the conviction and set aside the sentence of death. We
promised to give our reasons later which we now proceed to give.

\par }{\b0\i0\insrsid3545921\charrsid12472459

\par The appellant herein}{\b0\i0\insrsid9531416\charrsid12472459 with}
{\b0\i0\insrsid4026782\charrsid12472459 one}{\b0\i0\insrsid9531416\charrsid12472459 Onesmus
Kishaija were}{\b0\i0\insrsid3545921\charrsid12472459 }

\b0\i0\insrsid4079147\charrsid12472459 indicted for}{\b0\i0\insrsid9531416\charrsid12472459
robbery contrary to sections 285 and 286(2) of the Penal Code Act. }
{\b0\i0\insrsid3545921\charrsid12472459

It was alleged in the particulars of the indictment that the two accused persons on the 31st day of August 1996 at Rusheshe village Ruhunga in Rukungiri District robbed Byaruhanga Bernard of cash 308,000/= and immediately before or immediately after the said robbery used a deadly weapon to wit a gun on the said Byaruhanga Bernard.

Both accused persons denied the indictment. After a full trial, Onesmus Kishaija was acquitted for lack of evidence connecting him with the commission of the offence. The appellant was convicted and sentenced to death – hence the instant appeal.

The memorandum of appeal filed on his behalf by M/S Bwengye & Co Advocates contains three grounds namely:

- The learned trial judge erred in law and fact through reliance on identification by a single witness when conditions for correct identification of the appellant were unfavorable.

- The learned trial judge erred in law and fact by convicting the appellant basing on confession which was not voluntarily made.

- The learned trial judge failed to evaluate the evidence as a whole by considering

the prosecution evidence to the prejudice of the appellant.

The substance of the prosecution case is that on 31st August 1996 at around 1.00 a.m.

The substance of the prosecution case is that on 31st August 1996 at around 1.00 a.m.

.m. the appellant}{\b0\i0\insrsid7668352\charrsid12472459 and others still at large armed with a gun broke into the house of the complainant and robbed him of cash }
{\insrsid12672133\charrsid12472459 Shs}{\insrsid7668352\charrsid12472459 }}

\b0\i0\insrsid7668352\charrsid12472459 308,000/=. The complainant was shot in the course of the robbery}{\b0\i0\insrsid12672133\charrsid12472459 . He was taken to Nyakibale Hospital and later discharged. Among the people who welcomed him }}

\b0\i0\insrsid12334426\charrsid12472459 back was}{\b0\i0\insrsid12672133\charrsid12472459 one Stephen Tumwesigye}{\b0\i0\insrsid12334426\charrsid12472459 an army veteran who asked the complainant to give}{\b0\i0\insrsid6889647\charrsid12472459 him}}

\b0\i0\insrsid12334426\charrsid12472459 the spent cartridges but the complainant refused.}
{\b0\i0\insrsid15097828\charrsid12472459

\par }{\b0\i0\insrsid6889647\charrsid12472459 In the course of time, Tumwesigye became a suspect and he was arrested. On the way to the police station he attempted to escape but he was chased and arrested. He told the police that he committed the

offence with the appellant. Attempts were made to arrest him but the police }
{\b0\i0\insrsid6567299\charrsid12472459 failed }{\b0\i0\insrsid6889647\charrsid12472459 to trace him }{\b0\i0\insrsid6894403\charrsid12472459 until 2nd}{

\b0\i0\insrsid3092609\charrsid12472459 January }{\b0\i0\insrsid6889647\charrsid12472459 2000 when he was arrested. On being arrested, he implicated Kishaija}
{\b0\i0\insrsid3092609\charrsid12472459 . He too was arrested.}{

\b0\i0\insrsid5583844\charrsid12472459

\par }{\b0\i0\insrsid3092609\charrsid12472459 In the meantime Tumwesigye jumped bail and disappeared. As we pointed out earlier}{\b0\i0\insrsid5583844\charrsid12472459 ,}
{\b0\i0\insrsid3092609\charrsid12472459

the appellant was convicted on the confession he made before}
{\b0\i0\insrsid6894403\charrsid12472459 D/ASP Barutagira Stephen (P. W.4).}
{\b0\i0\insrsid4079147\charrsid12472459

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\par When the appeal came before us for final disposal Mr Mark Bwengye, learned counsel for the appellant, abandoned ground one of the appeal.}{\b0\i0\insrsid5583844\charrsid12472459

\par }{\b0\i0\insrsid9198524\charrsid12472459 In submitting on ground 2}
{\b0\i0\insrsid5583844\charrsid12472459 ,}{\b0\i0\insrsid9198524\charrsid12472459 Mr Bwengye stated }{\b0\i0\insrsid7014738\charrsid12472459 that the}{

\b0\i0\insrsid9198524\charrsid12472459 appellant was convicted on the basis of a confession which {\b0\i0\insrsid7014738\charrsid12472459 was }{\b0\i0\insrsid9198524\charrsid12472459 admitted after a trial within a trial}{

\b0\i0\insrsid7014738\charrsid12472459 . Learned counsel claimed that the confession was not made voluntarily}{\b0\i0\insrsid14038353\charrsid12472459 and the trial judg

e gave a narrow interpretation of the word torture when he held that the appellant had no physical injuries when he was examined by the doctor. He asserted that one can be tortured without physical injuries.}{\b0\i0\insrsid12874404\charrsid12472459

\par }{\b0\i0\insrsid14038353\charrsid12472459 Learned counsel pointed out that the appellant was taken to a military detach at Kanungu and was confined for more than 48 hours before making the confession.}{\b0\i0\insrsid15416748\charrsid12472459

He further submitted that the trial judge rejected the confession of Kishaija who was arrested on 3}{\b0\i0\super\insrsid15416748\charrsid12472459 rd}{\b0\i0\insrsid15416748\charrsid12472459 January 2000 and made his confession }

\b0\i0\insrsid5642853\charrsid12472459 on }{\b0\i0\insrsid15416748\charrsid12472459 9} {\b0\i0\super\insrsid15416748\charrsid12472459 th}{\b0\i0\insrsid15416748\charrsid12472459 of the same month. }{\b0\i0\insrsid6894403\charrsid12472459

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Ms Tumuheise Rose, State Attorney, represented the respondent. In her submission, she conceded that the trial court based its decision on circumstantial evidence in that when Tumwesigye was arrested he implicated the appellant and Ki

shaija as his accomplices. She went on to state that upon disclosure the arresting team went to the appellant's home and they were told that he had just }

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for Luwero}{\b0\i0\insrsid11412316\charrsid12472459 .

\par She stated that there was evidence that Tumwesigye was seen with a stranger in the village where the offence was committed but no identification parade was held to show that it was the appellant.}{\b0\i0\insrsid5642853\charrsid12472459

\par }{\b0\i0\insrsid11412316\charrsid12472459 In conclusion, the learned State Attorney submitted that the confession was not corroborated in material particulars}

{\b0\i0\insrsid13376028\charrsid12472459 and therefore it was wrong

for the trial judge to hold that it was a true confession.}{\b0\i0\insrsid11412316\charrsid12472459

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\par }{\b0\i0\insrsid5583844\charrsid12472459 We accept}{\b0\i0\insrsid6971175\charrsid12472459 the decision of the learned State Attorney not to support the appellant\rsquote s conviction as the correct one.}{\b0\i0\insrsid339789\charrsid12472459

The basis of the appellant\rsquote s conviction was a confession which he made while he w

as in police custody beyond the period of 48 hours permitted by the Constitution. The delay in recording the confession of a suspect was a subject of comment by the Supreme Court in the case of }{\i0\insrsid339789\charrsid12472459 Cpl }

\i0\insrsid7109160\charrsid12472459 Wasswa}{\i0\insrsid339789\charrsid12472459 &another}{\i0\insrsid7109160\charrsid12472459 v Uganda}{\i0\insrsid339789\charrsid12472459 Criminal Appeal No. }{\i0\insrsid7109160\charrsid12472459 48&49/99}{

\b0\i0\insrsid7109160\charrsid12472459 and this Court in the case of }{\i0\insrsid7109160\charrsid12472459 Muwanga Francis &others v Uganda- Criminal appeal No.88/99. }{\b0\i0\insrsid7109160\charrsid12472459

Both courts were of the view that the unsatisfactory }{\b0\i0\insrsid6567299\charrsid12472459 behavior}{\b0\i0\insrsid7109160\charrsid12472459 of the police in delaying the recording of the suspect}{\b0\i0\insrsid6567299\charrsid12472459 \rsquote

s confession }{\b0\insrsid7109160\charrsid12472459 per se}{\b0\insrsid11345772\charrsid12472459 }{\b0\i0\insrsid11345772\charrsid12472459 should not be sufficient grounds for rejecting a confession if it is properly proved that it was voluntarily made.}{

\b0\i0\insrsid6971175\charrsid12472459

\par }{\b0\i0\insrsid12018194\charrsid12472459

\par The appellant was arrested almost four years after being implicated by Tumwesigye who was the first prime suspect.}{\b0\i0\insrsid10893712\charrsid12472459 The complainant did not identify any of the robbers. The

only witness who identified the appellant at the trial while he was standing in the dock was Katusigye Angelas (P. W.2). This witness testified that }{\b0\i0\insrsid12995030\charrsid12472459 on 29}{\b0\i0\super\insrsid12995030\charrsid12472459 th}{

\b0\i0\insrsid12995030\charrsid12472459 August 1996 a strange man came into the area and was seen in the company of Tumwesigye. After the r

obbery they suspected Tumwesigye and his friend to be the robbers. He stated that he saw the man whom he claimed was the appellant and confirmed in court that the man he saw was the appellant. However}{\b0\i0\insrsid6567299\charrsid12472459 },{

\b0\i0\insrsid12995030\charrsid12472459 no identification parade was conducted for this witness to confirm that the person he saw in the company of Tumwesigye was the appellant.}

{\b0\i0\insrsid12018194\charrsid12472459

\par }{\b0\i0\insrsid12995030\charrsid12472459 Apart from the testimony of this witness, the other piece of evidence implicating the appellant was his confession or the charge and caution statement which he retracted. T

he learned trial judge found that the statement was}{\b0\i0\insrsid16725178\charrsid12472459 sufficiently detailed and therefore true.}{\b0\i0\insrsid12995030\charrsid12472459

\par }{\b0\i0\insrsid7621892\charrsid12472459 However, there was no corroborative evidence to confirm in material particular that the confession was true.

\par We reiterate our earlier orders allowing the appeal, quashing the conviction and setting aside the sentence.

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\par C. N. B. Kitumba

\par Justice of Appeal

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\par C. K. Byamugisha

\par Justice of Appeal

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\par Justice of Appeal

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