THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANA

AT KAMPALA

5 **CORAM: HON. JUSTICE L.E.M. MUKASA-KIKOBYOGO, DCJ**
HON. JUSTICE C.N.B. KITUMBA, JA.
HON. JUSTICE C.K. BYAMUGISHA, JA.

CRIMINAL APPEAL NO. 233 OF 2002

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MUBANGIZI SIMON :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

[Appeal from the judgement of the High Court held at Kampala
15 ***(Lugayizi, J.) dated 27/11/2002 in Criminal Session Case***
No. 0129 of 2001]

JUDGEMENT OF THE COURT

20 The appellant, Mubangizi Simon, was convicted of defilement contrary to section 129(1) of the Penal Code Act and was sentenced to 5½ years imprisonment. He has appealed to this Court against both conviction and sentence.

The brief facts of the prosecution case were that the appellant and the victim, PW3,
25 were members of the same drama group. The appellant befriended the victim. The two had sexual intercourse on 2nd January 2001 at Nvujja Hall, Kawempe. The victim's mother, Nakayiza Kate, PW4, learnt of the love affair between her daughter and the appellant, and reported to the local authorities. The appellant was arrested and taken to the police. D/Inspector. Kauka George, PW2, recorded a charge and
30 caution statement from the appellant. During the trial the appellant objected to that statement being produced in evidence, on the ground that he did not understand its contents because it was recorded in English a language that he did not understand. The learned trial judge overruled his objection and the statement was admitted in evidence as exhibit P3. In that statement the appellant admitted having had sex with
35 the victim sometime in January 2001.

In his defence the appellant gave evidence on oath. He denied the offence and stated that he had been framed up by PW4 because of their political differences. The learned trial judge believed the prosecution case, rejected the defence and convicted the appellant. The appellant has filed his appeal in this Court on the following grounds:

> "1. **That the learned trial judge erred in law and in fact when he failed to properly evaluate the evidence on record as a whole.**
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> **2. That the learned trial judge erred in law and in fact on relying on the confession statement allegedly made by the appellant without establishing whether it was voluntarily made.**
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> **3. That the learned trial judge erred in law and in fact in relying on the evidence of PW3 without sufficient corroboration.**
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> **4. That the sentence of 5 ½ years imprisonment was harsh and excessive in the circumstances."**

Ms Annet Karungi Mutabingwa, learned counsel for the appellant, argued ground 2 separately grounds 1 and 3 together and ground 4 separately in that order. We shall also consider them similarly.

The thrust of counsel's argument on ground 2 was that the learned trial judge was wrong to admit in evidence the confession statement, exhibit P3, without holding a trial within a trial to determine whether it was made voluntarily or not. She submitted that when a confession is retracted by its maker the law requires that a trial within a trial is held to determine its admissibility. Counsel argued that PW2 admitted in cross-examination that he had not recorded the statement in the correct way. She argued that the appellant was challenging the accuracy of the confession statement and the judge erred when he relied on it to convict him.

In reply, Ms Fatuma Sendagire, learned State Attorney for the respondent, supported the learned trial judge's judgement. She argued that what was in issue was not the voluntaries of the confession but its accuracy. The appellant's complaint was that he

was made to sign an English statement whereas he made his statement in Luganda. In her view that is not covered by section 24 of The Evidence Act (Cap 6).

The law is now well settled that when the accused during the trial objects to the admissibility of a confession statement he/she made to the police during the investigations, the court must hold a trial within a trial. This was stated by the Supreme Court in **Amos Biruge and Others v Uganda Criminal Appeal No. 23 of 1989 as follows:**

> **"It is trite law that when the admissibility of an extra judicial statement is challenged then the objecting accused must be given a chance to establish, by evidence, his grounds of objection. This is done through a trial within a trial…The purpose of a trial within a trial, is to decide, upon the evidence of both sides whether the confession should be admitted."**

In the appeal before us, the appellant's case at the trial was that he did not know the contents of the statement because it was written in English. He was in fact repudiating the confession that he did not actually state all or some of what was contained therein. It is a cardinal principle of our law that where an accused person denies the charges he is entitled to a full trial of all facts in issue. See **Kawoya Joseph vs. Uganda Supreme Court Criminal Appeal No. 50 of 1999.** The statement in issue was recorded in contravention of paragraph 9 of the Chief Justice's circular of 2nd March 1973 entitled Recording of the Extra Judicial Statements .which provides that the confession must be recorded in a language spoken by the accused and then translated into English. We are mindful of the law that failure to follow the rules does not automatically result into the rejection of the confession. The discretion is with the trial judge to allow a confession recorded not in strict compliance of the rules.

Further section 24 of the Evidence Act provides:

"A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard 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."

We do not agree that this section should be given a narrow interpretation as held by
5 the judge and supported by the state attorney. Indeed, the section refers to all circumstances. It is impossible for a judge to determine the circumstances under which a confession was made without holding a trial within a trial. We are of the considered view that where the confession is recorded in contravention of the rules of procedure of recording confession the trial judge should even be more alert and
10 determine on evidence whether the departure from the rules is excusable. In this appeal, with due respect, the learned trial judge deprived himself of the opportunity to decide on evidence whether the confession statement was admissible or not. We are of the view that exhibit P3 should not have been relied upon to convict the appellant.

15 Ground 2, therefore, succeeds.
We now turn to grounds 1 and 3. The appellant's learned counsel's complaint on these grounds was that the learned trial judge was wrong to rely on the evidence of the victim which was not sufficiently corroborated. Counsel argued that PW3 was an untruthful witness who made two contradictory statements to the police. One of these
20 statements was implicating the appellant and the second one was exonerating him. She submitted that PW4's could not corroborate the evidence of PW3 because it was hearsay.

The learned state attorney did not agree. She submitted that PW3 was a truthful
25 witness. She argued that the learned trial judge considered the two statements PW3 made to the police. The judge rightly held that the witness was truthful and that she was only intimidated by some people who caused her to make the second statement to the police, exonerating the appellant. Regarding PW4's evidence, counsel submitted that it was not hearsay. When PW4 arrested the appellant he accepted responsibility.

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We have considered the evidence on record. PW3 in cross-examination stated "**I made 2 different statements saying 2 different things because my mother was not aware. They picked me from home without her. I was intimidated about what to say." ' In re-examination she states:**

The statement of 29th contradicts by 1st statement. I was forced to make the 2nd statement.'

The learned judge found that the explanation given by PW3 why she made different statements was plausible. With the greatest respect to the learned trial judge we disagree. It appears to us that the witness made the statement exonerating the appellant because her mother was not present. In her own words she said **"I made 2 different statements saying different things because my mother was not aware."**

PW3 does not mention the names or the identities of the people who took her to the police and intimidated her to make a second statement. We find it difficult to believe her. We have also had a close look at the evidence of PW4. It appears to us that PW3 was forced by her mother to say that she had sexual intercourse with the appellant. PW4 threatened to take PW3 to the police if she did not tell her where she had been. PW4 stated in cross-examination **"My daughter respects me. I do not know whether she would care to annoy me."**

It is our considered view that PW3 was an untruthful witness who was all out to make statements to please her mother (PW4).We appreciate the submissions by appellant's counsel that PW4's evidence is hearsay. According to the evidence on record PW4 never saw the appellant with PW3. She depended on spies whom she instructed to follow the appellant and PW3.

The learned state attorney has urged this Court to believe the evidence of PW4 because the appellant confessed to her that she had sex with PW3. The evidence of PW4 on the matter is that when the appellant was arrested he accepted responsibility. The agreement was made before the LCs imposing a fine on him. He failed to pay the fine and the affair continued between him and PW3. That is the reason why he was re-arrested. On the other hand PW3 testified that the LCs made an agreement warning the accused not to continue with the relationship. It appears these two witnesses identified the agreement at the trial.

However, this agreement was not tendered in court as exhibit. We do not know the exact contents of that agreement. It is not clear to us whether the appellant admitted

the offence. PW4 testified that the appellant accepted responsibility whereas PW3 said the LCs simply warned the appellant to stop the relationship. We do not even know which relationship it was. It could have been some other relationship since the appellant and PW3 were members of the same drama group. It is our considered opinion that if the learned trial judge had properly evaluated the evidence he would have given the benefit of doubt to the appellant and acquitted him.

Grounds 1 and 3 also succeeds.

As grounds 1, 2 and three against conviction succeed this disposes of the whole appeal. In the result this appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant is to be set free forthwith unless he is otherwise lawful held.

Dated at Kampala this 9th day of May 2006.

L.E.M.. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE

C.N.B. Kitumba
JUSTICE OF APPEAL

C.K. Byamugisha
JUSTICE OF APPEAL