

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CORAM: HON MR JUSTICE G.M. OKELLO, JA;
HON LADY JUSTICE A.E.N.MPAGI-BAHIGEINE, JA.
HON LADY JUSTICE C.N. B. KITUMBA, JA.**

CRIMINAL APPEAL NO.136 OF 1999

OFWONO ERINEST APPELLANT

VERSUS

UGANDARESPONDENT

**[Appeal from a conviction and sentence
of death from the high Court of Uganda before
(Kania J) at Tororo on 26.11.1999**

JUDGMENT OF THE COURT

The appellant, Ofwono Erineest, appealed to this court against the conviction and death sentence for the offence of murder, contrary to Sections 183 and 184 of the Penal Code Act, passed by the High Court (Kania J) at Tororo, on 26.11.99.

The facts were that the appellant and five others on the night of 26th/27th March 1993, at Apokoro village, in Tororo District, broke into the house of the deceased, Azalia Omella, robbed household property and in the process shot him dead.

The following morning, one of the assailants, was found nearby seriously injured. On being questioned, he revealed his name to be Sam Damba and that he was one of the assailants who had attacked Omella's house, having been brought by Ofwono and Okware. Soon thereafter, the man died.

As a result of that information, the appellant and others were arrested and charged on count one, with the murder of Azalia Omella, on count two, with the murder of Damba Sam; and on count three, with capital robbery.

The appellant and another co-accused, Omal Jawino Paskal, who has since died made statements confessing to the murder of Azalia Omella. At the trial, Omal Jawino Paskal retracted his statement, but after a trial within a trial, it was admitted in evidence. The appellant did not raise any objection to his statement being tendered in evidence, but only challenged it at the end of his defence.

The learned trial Judge convicted him on count one and acquitted him on count two. No finding was made on the third count.

He has appealed to this court on ground one only of his memorandum of appeal, that:

“1. The learned Judge erred in law and fact in basing a conviction solely on retracted and uncorroborated confessions of the appellants.”

The second ground was abandoned.

Mr. Kenneth Omoding, learned counsel for the appellant, argued that though the extra judicial statement of the appellant was admitted in evidence without objection, the appellant in his defence retracted it on the ground that he had been tortured and forced to make it. His co-accused had also made a statement which he retracted but was admitted after a trial within a trial. Mr. Omoding stated that the learned trial Judge, however, found both statements to be true and used each to corroborate the other. He contended that although the Judge was alive to the relevant law governing retracted confessions, he should not have accepted the appellant’s statement as being true. The other statement also needed corroboration so the Judge was wrong to use it to corroborate the appellant’s statement. He submitted that the conviction should not be allowed to stand and prayed court to quash it and set aside the sentence.

In reply, Ms Annet Karungi, learned State Attorney, opposed the appeal. She contended that a confession was admissible only against the maker. She pointed out that the only evidence against the appellant was his confession which was neither repudiated nor retracted. Moreover at the trial the appellant was represented by a lawyer who at the time sought an adjournment to enable him consult the appellant on his statement. After the adjournment, the appellant through his counsel never objected to the statement being tendered in evidence. Ms Karungi submitted that the learned Judge was correct to believe that the statement was true and to rely on it to convict the

appellant. The alibi set up by affidavit was also an afterthought and the Judge was right to disbelieve it. She prayed court to dismiss the appeal and uphold the conviction and sentence.

The learned trial Judge after directing himself as to the law held:

“Besides not having been retracted or repudiated, I have considered the contents of the confession of Al and the narrative of how the offence was committed and find the confession cannot be but true. It puts Al at the scene as one of the members of the gang that killed Azalia Omella in the night of March 1993.”

On 18.6.1997 when Mr. Khauka, learned State Attorney, applied to tender in the appellant's statement together with its Adhola version, Mr. Okuku, learned counsel, for the appellant applied for a ten minute's adjournment so as to be able to consult with his clients. The court acceded to his application and adjourned the case till 11.30 a.m. for further hearing.

When it resumed at 11.30 a.m., Mr. Okuku informed court that he had no objection to the statement being tendered in by the prosecution. The English version was tendered in as ExP2. In the statement, the appellant who used to be the deceased's herdsman and cashier at the deceased's grinding mill gave a minutely detailed account of his participation in the robbery in collaboration with the deceased's relatives, some of whom were his co-accused.

By way of his defence, he set up an alibi to the effect that he was at home throughout that night with his family. On his arrest, he claimed to have been tortured and coerced into signing the statement implicating his co-accused. The learned Judge disbelieved him.

In the case of **N V. Lakhani R (1962) EA 644**, where the objection to the statement was taken at the time the appellant was giving his defence, and learned trial magistrate had directed his mind to the issue in the course of his judgment, it was held on appeal that the issue of voluntariness was raised as an afterthought but that though in a suitable case it would lead to a successful appeal, in the circumstances of that particular case, the results would have been the same even if it had been an issue at the trial within a trial.

In this particular case since the appellant after consulting his lawyer did not object to the statement, we are convinced that the appellant did not have a defence and that the statement was voluntary.

We believe without hesitation that his raising it later during his defence was an afterthought. As shown above, the learned Judge found the confession to be true.

He considered the need for its corroboration and said:

“The general rule on confessions is that a confession that has neither been acted upon against author (Sic). If however it has been either retracted or repudiated, though not a requirement of law, corroboration if it must be looked for except if from the circumstances of its making and the manner in which it was retracted, the court is satisfied that could not be true.”

We are of the firm view that the learned trial judge properly directed himself regarding the circumstances of the appellant’s confession and arrived at the correct conclusion.

We accordingly dismiss the appeal, uphold the conviction and death sentence.

Date at Kampala this 13th day of December 2001.

**G.M. OKELLO,
JUSTICE OF APPEAL**

**A.E.N.MPAG1-BAHIGEINE
JUSTICE OF APPEAL**

**C.N.B. KITUMBA,
JUSTICE OF APPEAL**