

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

CRIMINAL APPEAL NO. 141 OF 1999

**CORAM: HON. MR. JUSTICE C.M. KATO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA**

OMIAT JOSEPH:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

**[Appeal from a conviction and sentence
of the High Court at Soroti
by Mr. Justice Kania dated 18/11/99
in Criminal Session case No. 20 of 1999]**

JUDGMENT OF THE COURT:

The appellant, Omiat Joseph, was jointly indicted with another on three counts of murder, contrary to sections 183 and 184 of the Penal Code Act. At the close of the prosecution case the co-accused was acquitted on the ground that a prima facie case had not been established against him. The trial against the appellant continued. He was convicted on all the three counts and was sentenced to death on each count. He has appealed against the convictions and sentences.

The facts which were accepted by the learned trial Judge are that on November, 1995 at around 8.00 p.m at Kaswii village Soroti District, the home of Levi Epou, who is the father of Opolot Simon Peter, PW1, was attacked and Epou made an alarm. When PW1 answered the alarm, he found his father's house on fire. The bodies of Iitu and Eninau who are the subjects of counts 1 and 2 were lying in the compound. As PW1 was frightened, he hid himself in the bush until the following morning. In the morning he returned to the scene and found the body of Epou Simon, the subject of count 3, lying in "mabati" house. The body had been shot in the palm. The body of Iitu had gunshot wounds in the legs, arm and chest. The body of Eninau had been shot in the

back and had an exit wound in the chest. PW1 reported the matter to the police. The police visited the scene and gave permission to bury the bodies. PW1 was present at the burial.

The appellant was arrested and taken to Soroti Central Police Station. On 6/12/1995 DIP Eric Opus, PW2, recorded a charge and caution statement to from the appellant in Ateso, Exhibit P1. Later he translated the same into English, Exhibit P.2. In that statement, the appellant made a confession admitting taking part in the three murders. During the trial, the appellant objected to the admissibility in evidence of the statement on the ground that he did not make it. The learned trial Judge admitted the statement in evidence after holding a trial within a trial.

In his defence the appellant set up an alibi. He testified that at the material time he was at his home sleeping. The learned trial Judge rejected the defence and convicted him as charged.

There are two grounds of appeal namely: -

- 1. "That the trial Judge erred in accepting a retracted and repudiated statement of the appellant that had not been read over to him before the appellant is alleged to have thumb printed the same.**
- 2. In view of the denial by the appellant that he thumb printed the retracted and repudiated statement the trial Judge ought to have held that it was the duty of the prosecution to prove by expert evidence that the thumb print was that of the appellant. Since the prosecution failed to discharge that duty the trial Judge ought to have held in favour of the appellant to disregard the alleged statement of the appellant."**

The complaint in the two grounds of appeal is that the charge and caution statement was not made by the appellant and he did not thumb print it. We shall therefore handle both grounds together.

Mr. Sengooba, learned counsel for the appellant, contended that the charge and caution statement was not made by the appellant because it was not read back to him. The thumb print affixed thereto was not that of the appellant.

Counsel submitted that the trial Judge was wrong to find that the omission by PW2 to indicate on the statements exhibits P1 and P2 that they had been read over to the appellant was a mere irregularity.

In reply Mr. Elem-Ogwal, learned Principal State Attorney, supported the conviction and sentence. He submitted that PW2 read the statement back to the appellant as he testified but only omitted to indicate on the statement Exhibit P1 that he had done so. He argued that the learned trial Judge who had the opportunity to observe PW2 and the appellant during the trial rightly concluded that PW2 was a credible witness. He dismissed the argument by counsel for the appellant that PW2 was an erratic witness, as in his view, such a witness could not record the detailed statement, Exhibit P1 unless he was an insider.

In his judgment the learned trial Judge found that the only evidence implicating the appellant was his retracted or repudiated confession. The learned trial Judge directed himself on the law relating to repudiated and retracted confession and relied on **Tuwamoi v Uganda (1967) E.A 84.**

He stated that as a matter of practice corroboration is required before a conviction can be based on a retracted or a repudiated confession. However, a court can convict on such a confession after warning itself of the danger of convicting on the uncorroborated confession, if the confession is true.

The learned trial Judge found that the appellant's confession though retracted was voluntary and true, as PW2 who was not an investigating officer could not, therefore, make up a statement of the facts relating to the commission of the offence. He observed that the Ateso statement, Exhibit P1, bears the thumb print of the appellant. He concluded that failure to indicate on the statement that it had been read back to the appellant was a mere irregularity. We agree with the learned trial Judge's statement of the law and his findings on the facts. The confession complained of is as follows:

"I do here by state that some time back I was a rebel and later I surrendered and came back to dig and I kept an SMG rifle. I dug it inside the hole. One day Ejibu asked me at the market (f I still had the gun I told him yes I still have. After one day Ejibu came and I removed the gun and we proceeded to Aswi village where Eriaku told me that he had a problem with Epou who had bewitched his people and he wanted me to kill him also. I hid my gun in the bag and on 29/11/95 I went with Eulu, Erabu Ejibu and Eriaku to the home of Epou we got him when they were having supper inside the house. Epou closed the do (sic) and ordered his children not to open the door so I got

my gun and killed three people Iran away and Eriaku paid me 10, 000 and added another 20,000/= for my good job. I went to Serere the next day and after some time I was arrested and I agree that I was the one who shot at the three people.”

We find that the confession was corroborated in some respects by the evidence of PW1. He testified that he heard gun shots and when he answered the alarm he saw two people going away from the scene of murder. On the following day he saw gunshot wounds on the bodies of the victims which corroborate the appellant’s confessional statement that he had killed the three deceased persons by shooting. Both grounds must fail.

Before we take leave of this appeal, we have observed that the ruling of the learned trial Judge in respect of a trial within a trial is missing from the record of proceedings. The learned trial Judge according the record must have ruled in favour of the prosecution, otherwise the confession would not have been admitted in evidence. The original Ateso version was tendered and marked exhibit P1, while the English translation was marked exhibit P2. This omission in our view does not prejudice the defence case. We find no merit in this appeal. It is accordingly dismissed.

Dated at Kampala 27th day of February 2001.

C.M. KATO, JA.

JUSTICE OF APPEAL.

S.G. ENGWAU, JA

JUSTICE OF APPEAL.

C.N.B. KITUMBA, JA.

JUSTICE OF APPEAL.