

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

5 CORAM: BYAMUGISHA, KAVUMA & NSHIMYE, JJA

CRIMINAL APPEAL NO.09/08

BETWEEN

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TAREMWA ASAPH:.....APPELLANT

AND

15

UGANDA:.....RESPONDENT

[Appeal from conviction and sentence of the High Court of Uganda held at Mbarara (Mwangusya J) dated 4th February 2008 in HCCSC No.22/05]

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REASONS FOR THE DECISION.

On 10th December 2012 we ordered for the immediate release of the appellant and promised to give our reasons later which we now give.

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The appellant was indicted for murder contrary to sections 188 and 189 of the Penal Code Act. it was alleged by the prosecution that on or around 21st November 2003, at Nshwere Empango cell, Rushere Parish, Kenshunga Sub-county, in Mbarara District, he murdered one Bishanga David.

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The appellant was tried, convicted and sentenced to life imprisonment on 4th February 2008.

The facts as found and accepted by the trial judge are that the deceased lived with his family. On the day in question he left home at about 7.30 p.m. he told his wife that he was going to a nearby town. He did not return home.

The following day his body was found lying along side a path leading to his
5 home.

There were signs that he had been assaulted and the postmortem examination of the body revealed that externally, he had a deep cut wound on the head, bruises on the interior chest and the chest bones were fractured.

The cause of death was established as internal chest bleeding.

10 The matter was reported to police and investigations commenced. The appellant and his uncle, one Ntungire Wilson were arrested and charged.

The appellant made an extra judicial statement before His Worship Rutagyengwa in which he confessed having murdered his father. At the trial he retracted the said confession and pleaded not guilty to the indictment.

15 The learned trial judge found that the prosecution had proved the case against the appellant beyond reasonable doubt. He convicted him and sentenced him to life imprisonment –hence this appeal. His co-accused was acquitted.

20 The appeal was premised on the following grounds:

1. That the learned trial judge erred in law and fact when he admitted in evidence the extra judicial statement which was not properly recorded thereby occasioning a miscarriage of justice.
2. The learned trial judge erred in law and fact when he convicted
5 the appellant on weak circumstantial evidence.
3. The learned judge erred in law and fact on assessment, interpretation and application of the law on contradictions and inconsistencies thus arriving at a wrong decision occasioning a miscarriage of justice.
- 10 4. The learned trial judge erred in law when he sentenced the appellant to life imprisonment when he had no jurisdiction to sentence the appellant.
5. The learned judge erred in law and fact when he failed to properly evaluate the evidence thus arriving at a wrong decision
15 occasioning a miscarriage of justice.

The appellant's prayers were;

1. The appeal be allowed.
2. The conviction and sentence be set aside and
- 20 3. The appellant be acquitted.

When the appeal came before us for final disposal, Mr Ondimu who represented the appellant on state brief argued grounds 1, 2 and 4 jointly. He stated that section 23 of the Evidence Act which provides for confessions
5 and states that if the statement is made before a magistrate, there shall be corroboration. He pointed out that the judge stated that the prosecution case depended entirely on the confession but that there was no corroboration of the confession.

On jurisdiction of the court, learned counsel submitted that the appellant was
10 supposed to be sentenced by the Family and Children Court. He relied on section 94(1)(g) of the Children Act which states that child offenders above the age of 16 years of age and in the case of an offence punishable by death, may be detained for a maximum of three years.

He stated that the appellant was 21 years at the time of conviction and
15 sentence and was therefore 17 years at the time of the alleged offence. He further stated that the appellant has been in prison for 8 years and 11 months and that this was over and above the 3 years allowed by the Children Act.

On the delayed hearing of the appeal, learned counsel submitted the appellant filed the notice of appeal on 12th February 2008 and the appeal was
20 heard on 10th December 2012. He emphasized that the delay was inordinate

and had violated the appellant's right to a speedy trial. He relied on the provision of **Article 28(1)** of the Constitution which guarantees the appellant a speedy and fair hearing and **Article 126(2)(b)** of the same Constitution which provides that justice shall not be delayed.

5 Learned counsel further relied on the case of *Procurator Fiscal, Linlithgow v John Watson & 2 others [2002] UKPC D I (29TH January 2002)*.

He prayed that the 60 months delay be held to be inordinate and the appellant be released immediately.

10 In reply, Ms Nakigude, the learned State Attorney, who represented the respondent, objected to ground one of the appeal contending that corroboration was not raised. She submitted that during the trial within a trial, the Magistrate (PW8) stated that there were no threats and that the statement was voluntary. She further submitted that the magistrate inquired
15 about the language and the charge against the appellant. She maintained that the statement was properly recorded and prayed for ground one to fail.

The learned State Attorney conceded that the appellant was 17 years at the time of the alleged offence and that sentencing him to life imprisonment was unconstitutional.

On the issue of delay, counsel also conceded that it had infringed on the right to a speedy trial and went on to state that the appellant should be released and sent to the Family and Children Court.

5 There is no dispute on the facts before us, that the appellant was a child as defined under *section 2* of the **Children Act**- Cap 59 Laws of Uganda at the time of the commission of the offence. He ought to have been sent to Family and Children Court for sentencing in accordance with *section 94* of the same Act. The sentence of life imprisonment imposed by the trial court was illegal
10 in the eyes of the law and it occasioned a miscarriage of justice.

The delay in hearing the appeal, contributed to the appellant's unlawful imprisonment for 8 years and 11 months thus contravening Articles 28(1) and 126(2)(b) of the Constitution and thereby occasioning a miscarriage of justice.

15 The sentence imposed by the trial court is hereby set aside.

Dated at Kampala this.....8th.....day of...Feb....2013.

20 C.K.BYAMUGISHA
Justice of Appeal

S.B.K.KAVUMA

Justice of Appeal


A.S. NSHIMYE

Justice of Appeal

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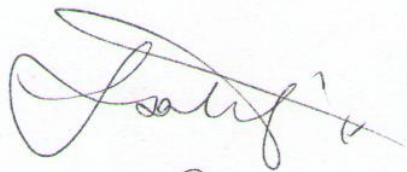
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Delivered before Counsel

Duncan Achona state

brief for the appellant

DPP absent.


A.R.

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