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

CORAM: **HON. LADY JUSTICE C.N.B.KITUMBA, JA.**
 HON. LADY JUSTICE C.K.BYAMUGISHA, JA.
 HON. MR JUSTICE S.B.K.KAVUMA, JA.

15
CRIMINAL APPEAL NO. 204/02

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BETWEEN

TINKASIMIRE LAWRENCE:::::::::::::::::::::APPELLANT

25
AND

UGANDA:::::::::::::::::::::RESPONDENT

[Appeal from the judgment of the High Court of Uganda Kabale High Court Circuit sitting at Rukungiri (Bamwine J) dated 7th November 2002 in HCCSC No. 115/2000]

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REASONS FOR THE JUDGMENT

On 7th October 2008 we heard the appellant'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.

The appellant herein with one Onesmus Kishaija were indicted for robbery contrary to sections 285 and 286(2) of the Penal Code Act.

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.

5 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.

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

1. **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.**
- 15 2. **The learned trial judge erred in law and fact by convicting the appellant basing on confession which was not voluntarily made.**
3. **The learned trial judge failed to evaluate the evidence as a whole by considering the prosecution evidence to the prejudice of the appellant.**

20 The substance of the prosecution case is that on 31st August 1996 at around 1.00 a.m. the appellant and others still at large armed with a gun broke into the house of the complainant and robbed him of cash *Shs* 308,000/=. The complainant was shot in the course of the robbery. He was taken to Nyakibale Hospital and later discharged. Among the people who welcomed him back was one Stephen Tumwesigye an army veteran who asked the complainant to give him the spent cartridges but the complainant refused.

25 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 failed to trace him until 2nd January 2000 when he was arrested. On being arrested, he implicated Kishaija. He too was arrested.

30 In the meantime Tumwesigye jumped bail and disappeared. As we pointed out earlier, the appellant was convicted on the confession he made before D/ASP Barutagira Stephen (P.W.4).

When the appeal came before us for final disposal Mr Mark Bwengye, learned counsel for the appellant, abandoned ground one of the appeal.

5 In submitting on ground 2, Mr Bwengye stated that the appellant was convicted on the basis of a confession which was admitted after a trial within a trial. Learned counsel claimed that the confession was not made voluntarily and the trial judge 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. 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. He further submitted that
10 the trial judge rejected the confession of Kishaija who was arrested on 3rd January 2000 and made his confession on 9th of the same month.

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
15 Tumwesigye was arrested he implicated the appellant and Kishaija 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 left for Luwero.

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
20 the appellant.

In conclusion, the learned State Attorney submitted that the confession was not corroborated in material particulars and therefore it was wrong for the trial judge to hold that it was a true confession.

25 We accept the decision of the learned State Attorney not to support the appellant's conviction as the correct one. The basis of the appellant's conviction was a confession which he made while he was 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 **Cpl Wasswa & another v Uganda Criminal Appeal No. 48&49/99** and
30 this Court in the case of **Muwanga Francis & others v Uganda- Criminal appeal No.88/99**. Both courts were of the view that the unsatisfactory behavior of the police in delaying the recording of the suspect's confession *per se* should not be sufficient grounds for rejecting a confession if it is properly proved that it was voluntarily made.

The appellant was arrested almost four years after being implicated by Tumwesigye who was the first prime suspect. 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 Katusingye Angelas (P.W.2). This witness testified that on 29th August 1996 a strange man came into the area and was seen in the company of Tumwesigye. After the robbery 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, no identification parade was conducted for this witness to confirm that the person he saw in the company of Tumwesigye was the appellant.

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10 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. The learned trial judge found that the statement was sufficiently detailed and therefore true. However, there was no corroborative evidence to confirm in material particular that the confession was true.

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

Dated at Kampala this 10th day of February 2009.

C.N. B.Kitumba
Justice of Appeal

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C.K.Byamugisha
Justice of Appeal

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S.B.K.Kavuma
Justice of Appeal