**Batala v Uganda**

[1974] 1 EA 402 (CAK)

**Division:** Court of Appeal at Kampala

**Date of judgment:** 25 September 1974

**Case Number:** 27/1974 (113/74)

**Before:** Spry V-P, Mustafa and Musoke JJA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Uganda – Kakooza, J

*[1] Evidence – Confession – Co-accused – Only slight evidence.*

*[2] Evidence – Confession – Admissibility – Against co-accused in joint trial – Exculpatory statement*

*not a confession admissible against co-accused.*

*[3] Evidence – Witness – Hostile – Evidence is unreliable.*

**Editor’s Summary**

In convicting the appellant of murder, the trial judge relied heavily on a statement made by a co-accused

implicating him and the judge treated the statement as irresistible evidence of guilt.

The judge also relied on the evidence of a witness who had been declared hostile.

On appeal

**Held –**

(i) the confession of a co-accused is only of slight evidential value;

( ii) the statement of the co-accused was exculpatory and therefore not a confession and not admissible

against the appellant;

(iii) treating a witness as hostile is equivalent to a finding that the witness is unreliable and his

evidence can be given little if any weight.

Appeal allowed.

Page 403 of [1974] 1 EA 402 (CAK)

**Case referred to Judgment:**

(1) *Alowo v. Republic*, [1972] E.A. 324.

**Judgment**

The considered judgment of the court was read by **Spry V-P:** On 18 September 1974, we heard this

appeal and allowed it, quashing the conviction of the appellant and setting aside the sentence passed on

him. We now give our reasons.

Mr. Omondi for the Republic, in our opinion very properly, did not support the conviction.

The appellant, together with one Bityobityo Muzeyi, was charged on two counts of murder. He was

convicted on both counts, while his co-accused was acquitted of murder but convicted of having been an

accessory after the fact to the murders.

The victims were a woman named Zabina Kikaziki and her small child. They were found to be

missing when a police officer attempted to serve a summons on Zabina. Eventually, both bodies were

found in a river, about a month after they had last been seen alive.

The case against the appellant consisted of evidence that he led a party to the place where the bodies

were found, on an alleged confession by his co-accused and on evidence of motive. We shall consider

each of them in turn.

First, however, it is necessary to consider the medical evidence as to the cause of death. It was

unfortunate that the doctor was not available for cross-examination. His post mortem report was admitted

in evidence and although it does not appear in the record – we do not know why – it was summarised in

the judgment. Incidentally, the post mortem report was improperly admitted: no formal evidence was

given that the doctor’s presence could not have been obtained without undue delay or expense and no

evidence, such as evidence of handwriting, to that the report was that of the doctor. Be that as it may, the

essence of the report was that both bodies were thoroughly decomposed, with the heads separated from

the trunks and that the cause of death was suffocation preceded by strangulation. It appears that the hyoid

bones were not broken. In the absence of some explanation of the reasons for the conclusion, little, if

any, weight can be attached to this report. The judge accepted a defence submission that where

decomposition is complete, it is extremely difficult to establish the cause of death but added that this

“does not mean that it is scientifically or medically impossible to establish cause of death where the body

is decomposed”. As a broad statement, we accept that as correct, but a bare statement that a person has

died of strangulation, supported by no explanatory findings of fact, where neither flesh nor internal

organs remain and no bones are broken, has no evidential value.

We would suggest that consideration be given to the discontinuation of the practice of stating, on the

form of request for a post-mortem examination, the police theory of the cause of death. The late

Professor F. E. Camps, a very famous pathologist, said in his book *Camps on Crime*:

“I myself am reluctant to perform an autopsy with too much prior knowledge. It is unfortunately only too easy

to find what one expects, even to the extent of missing the obvious. . . .”

What a court wants from a post-mortem report is a statement of everything abnormal about the corpse,

not merely the pathologist’s opinion as to the

Page 404 of [1974] 1 EA 402 (CAK)

immediate cause of death. For example, details of non-fatal injuries may be of great value in

corroborating or contradicting the evidence of witnesses about the events preceding the death, and so be

highly relevant to the question whether a killing constituted murder or manslaughter.

As we have said, the main evidence against the appellant was to the effect that he voluntarily took a

party of chiefs and others to the place where the bodies were found. This would, if true, be highly

incriminating. Two questions arise in this connection. First, there is conflicting evidence whether the

bodies were found floating or submerged. The judge made no finding on this. It is of importance, because

if the bodies were submerged, only the guilty person or persons would know where to find them, but if

they were floating, anyone might have seen them. It is, we think, sufficient to refer to the evidence of two

witnesses. Heneriko Ngobi, the mutala chief, said in his evidence, given more than sixteen months after

the event, that the bodies were submerged but in the statement he made to the police, he is recorded as

having said that the bodies were floating. This statement is not evidence of the fact but it casts grave

doubt on the reliability of the witness’ evidence. The same applies to the evidence of Sosipateri

Kiwagama, a constable, who said in evidence that he did not know where the bodies were before

arresting the appellant, but who was recorded in his police statement as having said the reverse. It should

perhaps be added that the bodies had originally been weighted with a stone but the stone was not

recovered until a day after the recovery of the bodies.

The other question is whether the appellant went voluntarily to the place where the bodies were

found. Here, again, there is some conflict of evidence. In this connection, the judge said that the accused

persons did not allege that they were beaten on the way but only at the time when the bodies were

recovered. This is literally correct, but both accused alleged that they had previously been severely

beaten and if this were true, the influence of it on their minds would hardly have disappeared. On this

issue, the judge made a specific finding that the accused persons had gone voluntarily.

On this aspect of the case, we would only say that while the evidence was incriminating, perhaps

gravely so, it was such that it would not have been safe to convict on it alone. This the judge appreciated

and he looked for, and found, other evidence.

For the sake of completeness, we would mention here that two witnesses alleged that the appellant

made highly incriminating remarks before the bodies were recovered. It would appear that this evidence

was inadmissible and, presumably for this reason, the judge ignored it.

The judge did, however, rely heavily on a statement made to a magistrate by the appellant’s

co-accused, regarding it as a confession and treating it as “irresistible evidence” of the guilt of the

appellant. With respect, this was a fatal misdirection. If the statement were believed and if it amounted to

a full confession, it could be taken into account against the appellant, but it has repeatedly been held by

this court that such evidence is of slight evidential value and can only be used to give final assurance to

an already strong case.

In the present case, the statement made by the co-accused cannot even be regarded, for this purpose,

as a confession. What he was seeking to do was to exculpate himself and inculpate the appellant. He

claimed that his first connection with the affair was when he met the appellant after the murders and all

that he admitted was helping, under duress, to dispose of the bodies. Such a statement was totally

inadmissible against the appellant.

Incidentally, there were good reasons for doubting the truth of the statement, which was inconsistent

with what he is alleged to have told the prosecution witnesses and was repudiated by him at his trial.

Page 405 of [1974] 1 EA 402 (CAK)

There was a further matter on which the judge relied. The wife of the appellant, Perusi Tibyonza, gave

evidence to the effect that the deceased woman, Zabina, had accused the appellant of stealing her hen and

that Zabina had performed an act of witchcraft, following which a child of the appellant had died. The

judge regarded this as evidence of motive.

During the course of the examination in chief of Perusi, the state attorney applied for and was granted

leave to treat her as a hostile witness. Later, in the course of his judgment, he said that he had ruled that

the evidence given by Perusi before she was declared a hostile witness could be considered and relied on.

With respect, this is a serious misdirection. The judge quoted a passage from Halsbury’s Laws of

England, but this passage does not relate to witnesses declared hostile but to the position where a party

contradicts part of the evidence of his own witness. The giving of leave to treat a witness as hostile is

equivalent to a finding that the witness is unreliable. It enables the party calling the witness to

cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied

on, whether given before or after he was treated as hostile, and it can be given little, if any, weight (see

*Alowo v. Republic*, [1972] E.A. 324). The rule of practice is based on logic, because if a person is found

to be untruthful, there is no reason to suppose that he was any more truthful before he was caught out

than after: indeed it is the very evidence that he has given that has shown his unreliability. Here, the

application for leave to treat the witness as hostile appears to have been premature – there is no apparent

reason for it, appearing on the record – but it was made and allowed. It must be presumed that the

evidence she had given conflicted in some material respect from some earlier statement she had made.

In short, the only real evidence against the appellant was of his apparent knowledge of where the

bodies were to be found and this evidence was somewhat suspect. The judge found support for it in the

statement made to a magistrate by the co-accused, which was inadmissible against the appellant, and in

evidence of motive, which could not be trusted. For these reasons, we allowed the appeal.

*Order accordingly.*

For the appellant:

*PS Ayigihugu*

For the respondent:

*JH Omondi* (Principal State Attorney) and *L Ogwang-Obote* (State Attorney)