THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE G.M. OKELLO, JA.
HON. JUSTICE S.G. ENGWAU, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 52 OF 2001

1. LT. STEPHEN MISANGO]

2. LT. OMAR BONGO] :::::::::::::::: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

[Appeal from the decision of the Court Martial Appeal Court at Makindye dated 17th December 1998 in Criminal appeal No. 4 of 1998]

JUDGEMENT OF THE COURT

This is a second appeal from the decision of the General Court Martial where both appellants were convicted of murder contrary to section 183 of the Penal Code Act and were sentenced to death.

The following is the background to the appeal. Lt. Stephen Misango, the first appellant, was the second in command of the 43rd Battalion and was Accused No.1 during the trial. Lt. Omar Bongo, the second appellant, was the officer in charge of Sironko army detach and was Accused No.2 during the trial. On 30th July 1991 in the early morning at around 6.00 a.m., the 1st appellant sent the 2nd appellant to go and arrest Wanzala, now deceased, who was working as RC III Defence Secretary for Buwalasi Sub-county. The cause of the arrest was an article, which was published in the New Vision newspaper of 29/7/1991. The deceased had authored the article which, contained allegations of misconduct by NRA soldiers operating at Sironko and implicating the second appellant. The second appellant led a group of 7 soldiers to the home of the deceased. They were directed there by Sgt. Muhamed Bwambale who was a resident of Sironko and was Accused No.3 during the trial. The deceased

was arrested from his home, beaten up by soldiers on the order of the second appellant and was taken to the RC office where he picked some papers. From thence, the deceased was led to the 1st appellant at the detach. He was ordered by the 1st appellant to read loudly the article in the New Vision newspaper. Afterwards the 1st appellant ordered the soldiers to beat the deceased (ambush) i.e. assaulting him all over the body. The 1st appellant further ordered the soldiers to put the deceased in the cells, take him out every 30 minutes and beat him in the same manner. He stated that if Wanzala died, he would be responsible. The soldiers complied with the order. During the process Sgt. Muhamed Bwambale got an SMG gun and shot two bullets on the ground where the deceased was seated so as to scare him. The deceased died on the same day at around mid day.

According to the report of the post mortem examination carried on his body, there were multiple bruises over the trunk, chest wall especially posterioly, crushed testicles, wounds on the genitalia and a deep wound below the chest. In the opinion of Dr. Gidudu, PW8, blunt weapons caused the injuries. The cause of death was massive haemorrhage due to ruptured liver leading to cardiac arrest.

Subsequently, the appellants and Muhamed Bwambale were arrested and charged with murder before the General Court-Martial. The two appellants were convicted of murder and sentenced to death. Muhamed Bwambale (A3) was convicted of manslaughter and sentenced to 10 years imprisonment. He did not appeal. Both appellants appealed to the Court Martial Appeal Court where their appeals were dismissed, hence the second appeals to this court

In this court, learned counsel Mr. Edward Ddamulira Muguluma represented the first appellant and learned counsel Mr. George Emesu represented the second appellant. Mr. Michael Wamasebu, learned Assistant Director of Public Prosecutions appeared for the respondent.

The Memorandum of Appeal filed on behalf of the 1st appellant on 30th September 2005 is on three grounds namely:

"(I) That the Hon. Members of the Court Martial of Appeal erred in fact and in law when they held that the appellant killed the deceased with malice aforethought and was properly convicted by the trial Court and as a result came to a wrong conclusion.

(2) That the Hon. Members of the Court Martial of Appeal erred in fact and law when they failed to evaluate evidence as a whole and thus came to a wrong conclusion.

(3) That the Hon. Members of Court Martial of Appeal erred in fact and law when they failed to consider in favour of the appellant that the said appellant had poor legal representation if at all at the trial and as a result came to a wrong decision.

The Memorandum of Appeal for the second appellant which was filed on 20th March 2002 contains five grounds of appeal which state:

"1. That the Court Martial Appeal Court erred in law in holding that the General Court Martial Court was justified in disregarding the evidence which emerged during the trial raising a possible defence of intoxication in favour of 2nd appellant and the said error caused a miscarriage of justice to the 2nd appellant.

(2) That the Court Martial Court erred in fact and in law in holding that at the time of commission of the murder of the deceased both appellants were acting in unison and had a common intention to cause the death of the deceased and the said error caused a miscarriage of justice to the 2nd appellant.

(3) ***That the Court Martial Appeal Court erred in the facts and in law in holding that 2nd appellant killed the deceased with malice aforethought and that was properly convicted by the General Court Martial Court.***

(4) That the Court Martial Appeal Court erred in law in not subjecting the evidence adduced by the prosecution and the accused to their own independent scrutiny and revaluation and the error caused a miscarriage of justice to the 2nd appellant.

(5) ***That the Court Martial Appeal Court erred in fact and in law in not holding evidence adduced by PW8 as to the cause of death of the deceased was uncertain and inconclusive as to which injuries actually***

resulted in the death of the deceased and the said error caused a miscarriage of justice to the appellant."

We shall begin with the appeal of the first appellant.

Mr. Edward Ddamulira Muguluma, learned counsel for the appellant argued grounds1 and 2 together and ground 3 separately. We shall deal with the grounds in the same order.

The gist of counsel's complaint in grounds 1 and 2 is that there was no evidence to establish that the 1st appellant had malice aforethought to kill the deceased. Counsel argued that the first appellant's general intention was to arrest the deceased who had published defamatory article about the army at Sironko. He submitted that when the 1st appellant said that he would be responsible in case the deceased died, he did not intend to kill him. He only meant that he would take responsibility as he was 2nd in command of the 43rd battalion.

Counsel criticised the Court Martial Appeal Court for stating thus in their judgement:

"We have considered the evidence on record and also the principle of the law that a man intends a natural and probable consequences of his acts and we find that the first appellant intended to kill him because of the damaging article that had appeared in the New Vision."

Counsel reasoned that the Court Martial Appeal Court had no basis for that finding in view of the fact that the General Court Martial had answered issue No.VI in the negative.

Mr. Wamasebu did not agree. He supported the Court Martial Appeal Court's finding that the 1st appellant had malice aforethought to kill the deceased. He submitted that the 1st appellant ordered for the arrest of the deceased. When the deceased was brought to the detach he ordered the soldiers to beat him. The first appellant said that he would take responsibility in case the deceased died. According to Mr. Wamasebu, that indicated that the 1st appellant had malice aforethought. Regarding the finding on issue No. VI in the negative, he argued that, that finding only referred to the 3rd

accused. He reasoned that the General Court Martial could not have proceeded to convict the 1st appellant of murder if the answer to issue No. VI included him. He stated that this Court was faced with concurrent finding of fact from two courts below, which is supported by evidence. He argued that it is settled law that the second appellate court is precluded from questioning the finding of fact by the trial court so long as that finding is supported by evidence. He argued that it is completely immaterial that on second appeal the appellate court could have come to a different finding. The second appellate court could only interfere with the finding if there was no evidence to support it. In his view, it is not the case in the instant appeal. He relied on **Kifamunte Henry Vs Uganda, S.C. Criminal Appeal No. 10 of 1997.**

The Assistant Director of Public Prosecutions rightly points out that this is a second appeal. Our duty is to determine whether the first appellate court re-evaluated the evidence on record and properly considered the judgement from which the appeal rose. When this court findings that there was evidence to support the first appellate court's decision, we may not disturb its decision. This was stated by their Lordships of the Supreme Court in **Kifamunte Henry vs Uganda** (supra) at p. 11 thus:

> ***"Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a court of first instance has wrongly directed itself on a point and the court of first appellate court has wrongly held that the trial court correctly directed itself, yet, if the court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view R. Mohamed Ali Hashan vs R (1941) 8 E.A.C.A. 93.***
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> ***On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or even probably that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no***

evidence to support the finding of fact ,this being a question of law. R vs Hassan bin Said(1942) 9 E.A.C.A. 62."

We have carefully read the judgement of the Court Martial Appeal Court and the whole record of proceedings. We note that the Court Martial Appeal Court was alive to its duty to re-appraise the evidence that was before the trial court and to come to its own conclusion. Before considering the merits of the appeal, the first appellate court ably summarised the principles by which it had to be guided as stated in the following authorities, **Pandya v R [19657 336, Selle & Another vs Associate Motor Co. Ltd & Others [1968] EA 123 and Uganda vs George Wilson Simbwa S.C. Criminal Appeal No. 37 of 1995.**

The 1st appellant's case in both grounds 1 and 2 was that he had no malice aforethought to kill the deceased. During the appeal in the Court Martial Appeal Court the 1st appellant's case was that he could not have had malice aforethought because he was drunk. In this Court counsel for the appellant abandoned the issue of intoxication and has simply argued that from the evidence on record his client did not have malice aforethought. He ordered the arrest of the deceased because the later had published a defamatory article about the soldiers at Sironko detach. When arrested, the soldiers took the deceased to him. He ordered them to beat him. He only said that if the deceased died, he would be responsible because of his superior position as second in command of the 43rd battalion. With the greatest respect, we do not accept counsel's argument. Malice aforethought is provided for by section 191 of the Penal Code Act as follows:

"Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances

(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused."

The 1st appellant instructed the second appellant to arrest the deceased. When he was brought to him he ordered the soldiers to beat him ambush, i.e. all over the body after every thirty minutes. The 1st appellant made a declaration to Christopher Nabirye, PW1, Wanzala was to die that day. Soldiers who were at the detach namely Pte Enfiranekayo Soten, PW4,, Pte Okudu Simon, PW5, and Sgt. Byabakama Patrick heard him giving orders to the soldiers to beat the deceased. These witnesses also heard him making a statement to the effect that if the deceased died, he would explain or be responsible. The first appellant ought to have known the consequences of his orders that the deceased be taken out after every thirty minutes and beaten "ambush".

According to the post-mortem examination of the body of the deceased, there were multiple bruises over the face, trunk, chest, crushed testicles, wounds on the genitalia and deep wound on the chin. In the opinion of the doctor the cause of death was due to massive haemorrhage due to ruptured liver leading to cardiac arrest. Judging from the statements made and orders given by the 1st appellant and the injuries found on the body of the deceased, the 1st appellant had the required malice aforethought to kill the deceased.

The Court Martial Appeal Court rightly re-appraised all the evidence and based its finding on the legal principle that a man intends the nature and probable consequences of his acts. The 1st appellate Court properly considered the defence of intoxication and rightly, in our view, found it not available to the 1st appellant. The court found that there was no evidence that the appellant was drinking or was drunk. All prosecution witnesses who saw the 1st appellant early in the morning when he gave the orders to go and arrest the deceased did not say that he was drunk. The witnesses, who saw him when he was giving orders to beat up the deceased, did not testify about his alleged drunken state. It was only Muhamed Bwambale who said that the 1st appellant was drunk.

The argument by counsel that the Court Martial Appeal Court was wrong to find that the 1st appellant had the intention to cause the death of the deceased whereas the General Court Martial had answered issue VI in the negative, is untenable. The record of appeal shows that issue VI and the answer to it were stated in the following terms:

Issue V

"Whether the accused intended to cause the death of the deceased."

Answer

"Court could not find clear evidence of intention to cause death and this issue was determined in the negative."

We observe that although the trial court answered the issue in the negative, it went ahead to convict the 1st appellant. In our view, the trial Court based the conviction on evidence available and stated that the first appellant as a reasonable officer should have contemplated that the beatings would have caused the death of the deceased. The first appellate court, too, re-appraised the evidence on record and found that there was malice aforethought on the part of the 1st appellant. We are unable to fault the 1st appellate court on that finding.

Grounds 1 and 2 fail for lack of merit.

We now consider ground 3 which is a complaint that the Court Martial Appeal Court erred in fact and in law when they failed to consider that 1st appellant had poor legal representation at the trial and that is why he was wrongly convicted.

Mr. Muguluma's submission on this ground was that counsel for the 1st appellant did not cross-examine the prosecution witnesses. He told the trial court that he had no questions to put to the prosecution witnesses and left the burden of cross-examination to the appellant. He submitted that during the trial the defence counsel cross-examined his own witness.

In reply, the learned Assistant Director of Public Prosecutions submitted that this ground of appeal was not raised by the first appellant in the Court Martial Appeal Court. He contended that at the trial the defence counsel as an officer of court was doing his best to bring out all material facts so as to help the court to reach a just decision.

We note that this ground of appeal was not raised before the Court Martial Appeal Court. In our view, it is not fair to criticise the court for not dealing with the matter that was not raised before it. Be that as it may, we shall consider the complaint since

it touches on the constitutional requirement of a fair trial. We have perused the record and found that out of the eight prosecution witnesses the defence counsel cross-examined only two witnesses. The appellant was allowed by the chairman of the General Court Martial to examine all the prosecution witnesses by himself if he so wished. In fact the 1st appellant cross-examined prosecution witnesses. We must observe that normally it is counsel for the accused to put questions to the prosecution witnesses on behalf of the accused. However, counsel may decline to cross-examine if in his/her opinion it is unwise to do so. This may be in a case where the witness has not at all incriminated the accused or where counsel thinks that by cross-examination the witness might give further damaging evidence against the accused. In the appeal before us, counsel cross-examined some witnesses and appellant cross-examined others. We are of the considered view that failure by counsel to cross-examine all prosecution witnesses did not cause a miscarriage of justice. It is not true that counsel for the 1st appellant cross-examined his own witness. We have observed from the record that counsel put the prosecution witnesses' testimonies to him and provided the 1st appellant the opportunity to reject or accept their evidence.

Ground 3, too fails.

We now turn to the appeal of the second appellant. Mr. Emesu, learned counsel for the 2nd appellant abandoned ground 1 and argued grounds 2 and 3 jointly. We shall deal with grounds 2, 3 and 4 jointly as they are inter-related and are on the evaluation of evidence..

Counsel's complaint in the three grounds is that the Court-Martial Appeal Court failed to re-evaluate the evidence properly. By reason of that failure it wrongly concluded that the 2nd appellant had a common intention with the 1st appellant to kill the deceased and had malice aforethought. He criticised the Court Martial Appeal Court for finding that the 2nd appellant had malice aforethought whereas the General Court Martial did not find a clear intention on the part of the accused to kill the deceased. Counsel further submitted that the Court Martial Appeal Court was wrong to base its finding that the appellant had malice aforethought to kill the deceased on the evidence of Pettirina Namakwere, PW3, which was to the effect that the 2nd appellant said that Wanzala was going to die that day. Counsel argued that at the time the deceased was

arrested, PW4 and PW5 were present but did not testify that they heard the 2nd appellant saying those words. Counsel reasoned that PW3 being the wife of the deceased was motivated by vengeance against the second appellant because he had arrested her husband who subsequently died while in custody. Counsel argued that even if the 2nd appellant said such words his subsequent conduct shows that he disengaged himself. He told soldiers to stop beating the deceased as they approached the detach where he handed over the deceased to his superior, the 1st appellant.

On common intention, counsel argued that there was no common intention between the first and the second appellant to murder the deceased. Once the 2nd t appellant had arrested the deceased he took him to the first appeellant as directed. He was, therefore, not responsible for the beatings which were inflicted on the deceased by the soldiers in the barracks at the instructions of the 1st appellant.

The learned Assistant Director of Public Prosecutions supported the findings of the Court Martial Appeal Court. He submitted that there was malice aforethought established beyond reasonable doubt. On common intention he contended that both accused had the same intention to effect the unlawful arrest and beatings of the deceased. He prayed this Court not to interfere with the concurrent finding of the two courts below.

Common intention is defined by section 22 of the Penal Code as follows:

> ***"When two or more persons form a common intention prosecute unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

The 1st appellate court re-evaluated the evidence on whether the second appellant had malice aforethought and common intention with the first appellant to kill the deceased. Mr. Emesu's submission that the 1st appellate court was wrong to believe PW3's evidence that she heard the second appellant saying that Wanzala was gong to die that day because it was not heard by PW4 and PW5 who were present is not

tenable. Firstly, because in his evidence PW4 explained that when they reached the deceased's home each one of the soldiers took his position. He did not, therefore, hear what the second appellant said to the deceased. We are of the view that this applies to PW5. Secondly, apart from the testimony by PW3, Silasi Wapukuru Sisilo, PW2, who actually pointed out the house of the deceased to the soldiers heard the 2nd appellant telling the deceased that he should not joke with bush men and that he would die that day.

The first appellate court found that both appellants were acting in unison. It stated thus:

> ***"The words used by the 2nd appellant when he arrested the deceased telling him that he was going to die, were similar to those used by the first appellant while ordering the soldiers to beat the deceased. Apparently the 2nd appellant had abducted a schoolgirl and the deceased had disclosed this in the article that apparently angered them. There also appears to have been misconduct by soldiers at the detach which was exposed by the article and no wonder the appellants were determined to eliminate the deceased. We therefore find that the appellants killed the deceased with malice aforethought and were properly convicted by the trial court."***

We cannot fault the 1st appellate court on that finding of fact. We are unable to see according to the record of appeal where the 2nd appellant disengaged himself from the mission of murdering the deceased. He started beating the deceased immediately on his arrest. He only took the girl in issue to Tororo to explain his case to his superior, the Brigade Commander, that he had married her with the consent of her father. This was after he had set in motion the process of murdering of the deceased. We accept the Assistant Director of Public Prosecution's submission that common intention was in the unlawful arrest and beating up of the deceased which resulted in his death. To us death was the probable consequences of the appellants' actions.

We accept Mr. Wamasebu's submission that the finding by the trial court that there was no clear evidence of intention to kill the deceased referred to the 3rd accused at the

trial. If that finding had referred to the second appeellant the trial court would not have convicted him of murder. Grounds 2, 3 and 4 fail.

We now consider ground 5, which is

"That the Court Martial Appeal Court erred in fact and in law in not holding evidence adduced by PW8 as to the cause of death of the deceased was uncertain and inconclusive as to which injuries actually resulted in the death of the deceased and the said error caused a miscarriage of justice to the appellant."

Counsel contended that the body was not thoroughly examined. However, according to the evidence of Accused No. 3 the deceased suffered extensive injuries. Counsel submitted further that Accused No.3 kicked the deceased and he fell down. He reasoned that the fall caused the laceration of the liver and the bullets which he shot injured the testicles. He argued further that the type of sticks which the 2nd appellant used in beating the deceased were not described and it cannot, therefore, be inferred that it was the injuries that he inflicted which caused the death of the deceased.

We have held that both appellants had the common intention to kill the deceased. This is clearly shown by the fact that the second appellant immediately beat the deceased when he arrested him. He made a declaration that Wanzala was to die that day. The 1st appellant who ordered for the arrest of the deceased instructed the soldiers to beat him. He also said that he would be responsible if the deceased died. It is obvious that both appellants participated in the murder of the deceased. Both of them were actively engaged in the execution of their unlawful purpose. It does not matter the degree of participation as long as the intention was the same. See: **Solomon Mungai and Others Vs Republic [1965] EA 762.**

Ground 5 too fails.

We have considered the sentence passed. In our opinion, it is appropriate in the circumstances. This is a case of brutal murder of the deceased by the appellants who were supposed to protect him. The sentence of death is, therefore, upheld.

Dated at Kampala this 22nd day of March 2007.

G.M. Okello
JUSTICE OF APPEAL

S.G. Engwau
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL