Murder - Life upheld.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 173 OF 2012

KATO KAJUBI GODFREY.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM: HON. JUSTICE REMMY KASULE, JA

HON. JUSTICE ELDAD MWANGUSYA, JA

HON. LADY JUSTICE FAITH E. MWONDHA, JA

JUDGMENT OF THE COURT

Introduction

This is an appeal from the Judgment and sentence of ***Hon. Justice Mike J. Chibita*** *dated 26/ 07/ 2012 at the High Court of Uganda at Masaka in High Court Criminal Session Case No. 28 of 2012.*

Background

The background to this appeal is that the deceased, Kasirye Joseph was a twelve year old son of Joseph Mugwanya (PW4). He was living at the home of his grandfather, one Matiya Mulondo together with his uncle Paul Kasirye (PW3). On the 27th day of October 2008 **UMARU KATEREGGA** alias Bosco

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(PW.7) a neighbour and family friend paid a visit to the home and talked to both Paul Kasirye and the boy. He told the boy that someone wanted him to work in his Poultry Farm. The boy expressed interest and shortly after he picked a ten litre empty jerycan and left with it. It was believed that he went to fetch water. He never returned. A search for him was mounted that night and the following morning. His whereabouts could not be established. The search party went to the home of Kateregga Umaru who was asked whether he had seen the deceased. He said he had not seen him. During the search, car tyre marks were seen in the compound of Umaru Kateregga. They were leading to a shrine. That same morning Umaru Kateregga and his wife **MARIAM NABUKEERA** (P.W8) were seen hurriedly leaving the village carrying a bag. They were intercepted on the way to Masaka and arrested.

A search in the home revealed a 10 litre jerrycan and blood stained clothes which according to James Kasirye (PW.3) were burnt when the house was set on fire by irate villagers.

On interrogation, Kateregga Umaru and his wife revealed that the boy had been killed, his head decapitated and private parts cut off. Kateregga directed the Police to a swamp in Kayungi where the body was found without a head and private parts. According to Kateregga the head and private parts had been taken away by the Appellant in his car. Kateregga revealed that the tyre marks in his compound were left by a motor vehicle that the Appellant had used when he came to his home on the night the boy was killed. He also revealed that the Appellant had come with another man. Kateregga, who was described as a witchdoctor, also claimed that the Appellant was his client with whom he had been communicating on phone prior to the killing and had visited his various homes. He claimed that the Appellant is the one who had asked him to look for a boy to work in his Poultry Farm and secured the deceased for the purpose.

The MTN Computer print-outs of the telephone numbers of the Appellant and Kateregga showed that on the day of the killing, before and after the killing,

there was mobile telephone communication taking place between the appellant and Kateregga. Further evidence from the print-outs showed the movements of the appellant and that he was within the vicinity of the scene of the crime.

Based on the above information, the Police sought to arrest the appellant in connection with the murder. The police led a search party to the known homes and premises of the appellant in Masaka, Jinja and Kampala under the direction of Kateregga. They were looking for the appellant and the missing parts of the deceased's body plus the gun that the appellant had been carrying. The Police did not get the appellant or the deceased's body parts.

The Police kept calling the appellant's phone which was all the while switched off. The case was widely covered in the media implicating the Appellant.

On recovery of the body a post mortem examination of the deceased's body revealed the injuries as a decapitated head and cut off private parts. The cause of death and reason for the same was that the head and genitalia were completely cut off with a sharp object and the deceased had bled from the wounds.

After his arrest, it was found that the appellant possessed 2 guns- a short gun and a revolver. The appellant denied the offence but admitted knowing Kateregga whom he claimed to have met at the home of a one Makumbi, a witch doctor and that Kateregga was Makumbi's worker who was collecting herbs for Makumbi.

The Appellant was tried in High Court at Masaka, Criminal Session Case No. 16 of 2009 before Mukiibi J., but he was acquitted following a submission of no case to answer. The prosecution appealed to the Court of Appeal which set aside the acquittal and ordered a re-trial.

At the re-trial, he was convicted of the offence of murder and sentenced to life in prison by Chibita J.. Hence this appeal.

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Grounds of Appeal

The grounds upon which the appeal is premised were laid out in the Amended Memorandum of Appeal dated 12th September 2013 as follows:

1. **The learned trial Judge erred in law and in fact when he accepted and relied upon the uncorroborated evidence of the accomplices.**

2. **The learned trial Judge erred in law and in fact when he convicted the appellant in total disregard of the irreconcilable discrepancies that characterised the key prosecution witnesses' evidence thereby occasioning a miscarriage of justice.**

3. **The learned trial Judge erred in law and in fact when he ignored the appellant's defence.**

4. **The learned trial Judge erred in law and in fact when he relied on hearsay evidence to conclude that the appellant had travelled to Masaka on the said night of the murder.**

5. **The learned trial Judge erred in law and in fact when he failed to consider the evidence that the mobile phone of the appellant was stolen from him over a month before the alleged crime and was later used to frame him.**

6. **The learned trial Judge erred in law and in fact when he ignored the alibi of the appellant to the effect that he was in Jinja and not Masaka on the alleged night of the offence.**

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7. The learned trial Judge erred in law and in fact when he allowed himself to be influenced by the facts arising from the hostile publications on other previous trial and the release order set aside by the Court of Appeal to convict the appellant as a matter of expediency.

8. The learned trial Judge erred in law and in fact when he denied the appellant the right to a fair hearing by subjecting him to a trial without a lawyer of his own choice and denying him adequate time to prepare his defense.

9. The learned trial Judge erred in law and in fact when he proceeded to hear the case against the appellant amidst hostile attacks and prejudicial press coverage that were clearly contrary to the subjudice rule.

10. The learned trial Judge erred in law and in fact when he found that the appellant caused the death of the victim, Joseph Kasirye.

11. The learned trial Judge erred in law and in fact when he found that the appellant, with malice aforethought, caused the death of Joseph Kasirye.

12. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on court record thereby coming to a wrongful decision.

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13. **The learned trial Judge erred in law and fact when he handed the appellant a harsh, excessive and/or illegal sentence when he sentenced him to "life in prison".**

Representation

At the hearing of the appeal, the appellant was represented by Mr. Wameli Anthony while Mr. Ojok Alex Michael, Principal State Attorney, and Mr. Semalemba Simon Peter, also Principal State Attorney, appeared for the respondent.

Case for the appellant

Counsel for the appellant abandoned all the grounds except four. The grounds that remained are grounds 1, 2, 3, and 13.

Ground 1

Lack of corroboration:

Counsel submitted in respect of ground 1 that it was clear from the record that the trial Judge received and relied upon the evidence of PW7 Kateregga Umaru and PW8 Nabukeera Mariam to convict the Appellant. He criticized the learned Judge for finding their evidence against the Appellant credible and amply corroborated, which in his submissions was not. He described both witnesses as untrustworthy and unbelievable.

As to whether PW7 and PW8 were accomplices, counsel stated that a person is an accomplice if he is a witness for the prosecution and has participated in the commission of the actual crime charged. He pointed out that the sum total of the evidence of PW7 and PW8 was that the appellant had asked for a child who was provided. Then the appellant who had come with another person slaughtered the victim in their house. They had been jointly charged with the appellant but later released and turned into witnesses. To counsel, the two

witnesses were accomplices who had participated in the commission of the offence.

In reference to Section 132 of the Evidence Act and whether their evidence needed to be corroborated, Counsel argued that while the position of the Law is that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, presumption is that accomplice evidence is not trustworthy and unless that presumption is removed or unless the court believes such a witness as trustworthy, then accomplice evidence must be corroborated in a material particular before a conviction is based upon it.

It was counsel's submission that though PW7 and PW8 were competent witnesses, having participated in the murder and having been charged with the appellant and charges later dropped not because there was no evidence against them but because they were needed as witnesses, their trustworthiness was not established. The trial Judge ought to have looked for corroboration of their evidence before convicting the Appellant on it and the two witnesses' evidence was not corroborated in any material particular. He submitted that there was no proof that the telephone communications relied upon by the learned trial Judge and his belief that these were about the murder were not confirmed by any evidence especially since the appellant testified that he had left his phone at a sauna of a one Suuna. To counsel, it was not enough for the trial Judge to reject the Appellant's evidence as unbelievable and the Appellant's failure to report to the Police was incapable of corroborating the evidence of (PW.7) and (PW.8) in a material particular.

He submitted that as husband and wife and as accomplices (PW.7) and (PW.8) could not corroborate each other and in his view both of them needed corroboration either jointly or individually which was not the case. He thus prayed that this Honorable court finds in the affirmative on the first ground.

Ground 2

Inconsistencies and contradictions:

As regards ground 2 Counsel pointed out the inconsistencies between the plain statements of PW7 and PW8, their charge and caution statements before His Worship Batema the then Chief Magistrate of Masaka court and their testimonies in Court. According to Counsel the testimonies of both witnesses in court was a denial of having participated in the murder of Kasirye Joseph claiming that they were forced to do whatever they did by the appellant and one Steven. He further noted that in the charge and caution statement of PW7, he had stated that it was Steven who came out of the car and ordered him to hold his wife who was then gagged and taken out. Counsel further pointed out that PW7 stated that at that point, the appellant was threatening him with a gun.

Counsel stated that PW7 denied having had the intention to kill the boy and yet in the charge and caution statement, he stated that he killed the victim before even the appellant came to his house as he slaughtered him with the help of his wife. In counsel's view, that contradicted what he said in his evidence in court.

He referred to the case of **OKWANGA ANTHONY VS UGANDA; SUPREME COURT CRIMINAL APPEAL NO 20 OF 2000** where the witness denied his charge and caution statements and the court found that the prosecution had to bring evidence to confirm from the police officer who actually took the evidence before it could be admitted. It was his submission therefore, that in this case His worship Batema, the Magistrate who wrote the statement was produced in court and he confirmed that the contents in the charge and caution statement were true. To counsel, the effect of **Okwang Anthony** (supra) is that where there are inconsistencies between the evidence in court and the charge and caution statement or plain statement, then the evidence of the prosecution is discredited.

Counsel referred to the inconsistencies in PW8's charge and caution statement and her evidence in court. He stated that in her oral testimony she stated that she did not know the deceased and yet in her charge and caution statement, she stated that she knew him. In the same charge and caution statement she talked of one man who came and entered the house whom she identified as the Appellant but in her oral evidence she said the appellant came with another man called Steven. In her oral evidence, she had stated that she was pushed outside the house, gagged and so she lost consciousness and as such, did not know what transpired. In her charge and caution statement, she stated she was pushed inside the inner bedroom where she continued hearing them opening the door and doing whatever she said they were doing.

Counsel also pointed out that in her oral evidence; PW8 stated that she regained her consciousness at 9:00 a.m. the following morning while outside the house; yet in her charge and caution statement she stated that the husband had opened for her and they slept until morning when they planned to escape. In her oral evidence, she had mentioned a pistol having been pointed at her head and being told to shut up yet in her charge and caution statement, she mentioned a knife and stated that the appellant pointed a knife towards her and told her to keep quiet.

It was thus counsel's submission that given the nature of PW8's, contradicting evidence it was probable that she was actually fed with the information especially since the evidence showed that a pistol was recovered from the appellant's home and so she had to substitute knife with pistol. In counsel's view, with those inconsistencies, the Judge ought to have rejected the evidence of PW7 and PW8 because the law is to the effect that grave inconsistencies if not explained away should lead to the evidence being rejected and if minor, the evidence will be believed if there was no design to tell deliberate lies to court. In his view the evidence of (PW.8) should have been rejected.

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Ground 3

Evaluation of evidence:

Counsel contended as to ground 3 that the trial Judge failed to properly evaluate the evidence adduced. Counsel reiterated his position on the 1 and 2 grounds and contended that the learned Judge did not properly consider the several pieces of evidence especially the charge and caution statements plus the oral evidence of PWs 7 and 8. He also referred to the evidence of PW6 and stated that the Judge ought to have considered the contents of that evidence which he did not. PW6, for example, said that he found a grave dismantled with blankets at PW7's home and PW7 stated that he had dug it in the process of digging a toilet, and the fact that the residents had informed PW6 that they had seen a skull with him and that was what they were looking for. It was counsel's submission that the learned Judge never mentioned anything about that evidence of PW6 and yet according to counsel, that evidence pointed to the activities of PW7 even before Kasirye was killed because a skull implies that there had been a time between that particular person's death and this one of the case under trial which was a fresh murder according to the prosecution. The Judge ought to have considered this piece of evidence in respect of Kateregga to the effect that he could most probably have got involved in several ritual sacrifices apart from and before this particular one. In his view, the Judge should have considered that evidence to show that PW7 should have been looked at as someone who had been in the business of sacrificing children and therefore it could confirm that he actually is the one who killed the child and had to find a scapegoat. Otherwise, counsel wondered, why a human skull that was not connected with this particular appellant would appear in someone's compound unless he was a serial killer of children for sacrificial purposes.

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Counsel also argued that the learned Judge wrongly rejected the appellant's testimony that he had not reported the loss of his phone simply because he, the trial Judge did not believe him.

Ground 4

Sentence

It was counsel's contention that the sentence of **'life in prison'** which the trial Judge passed was an illegal sentence because it is not prescribed in any known laws of Uganda. He argued that "**life imprisonment**," which the Law prescribes invokes of Section 47(6) of the Prisons Act which is to the effect that in calculating remission, "**life imprisonment**" will be taken to mean 20 years in prison and "**life in prison**" which was imposed means you are preventing the prison authorities from computing remission.

It was counsel's further argument that the sentence imposed by the trial Judge was harsh and excessive in the circumstances, given that the appellant was a first offender and from the evidence, there must have been many other participants in the commission of the offence. It was his submission, therefore, that weighing both the aggravating and mitigating circumstances, the sentence was excessive and he urged that court so finds. He prayed that this Honourable Court be pleased to allow the appeal, quash the conviction and set aside the sentence. In the alternative , he prayed that the sentence be substituted with a lesser lawful sentence.

Case for the respondent

Counsel argued the first three grounds, together and the last one separately.

Counsel submitted that the learned trial Judge properly accepted the evidence of PW7 and PW8 and that there was ample corroboration to their testimonies. He pointed out that the learned trial Judge duly cautioned and warned himself as well as the assessors of the dangers of acting on the uncorroborated

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evidence of PW7 and PW8 pointing out their own involvement in the commission of the offence. He submitted that PW7 and PW8 were central to the whole crime and therefore their evidence was that of an accomplice.

He argued that the lies as told by PW7 and as considered by the learned trial Judge were honestly explained away by PW7 in his testimony. According to the lies as highlighted by the learned trial Judge, PW7 lied to PW3 that he did not know the whereabouts of the deceased yet he knew that he had been killed and he also lied to the Appellant regarding his ability to bring back his spirits. Counsel submitted that PW7 had lied about the whereabouts of the deceased to save his life from a mob which had gathered. In respect of the lies about PW7's powers of recovering spirits, counsel pointed out that PW7 honestly stated that he simply wanted money from the Appellant.

Counsel submitted that the learned trial Judge considered the inconsistencies in the testimonies of PW7 and PW8. To counsel, it clearly showed that PW7 was consistent in his evidence regarding the presence of the appellant in his house on that material night and also the taking away of the private parts and the head by the appellant from the deceased's body after PW7 had called him on phone on the 27th of October, 2008 at around 10:00 p.m.

Counsel submitted that, in as much as there were inconsistencies in the evidence of the witnesses as to how the child was killed and by who, the learned trial Judge found some consistency that all the time during the murder of the deceased, the cutting off of the private parts, the appellant was present in PW7 and PW8's house where the murder was presided over, superintended and actually supervised by the appellant. In counsel's view, the learned Judge having found that both PW7 and PW8 were accomplices, there was no need to single out what roles each of them played in the killing of the deceased.

The learned trial Judge had also critically examined the evidence of PW8 showing that in the plain statement made on 29th October 2008, she mentioned that two men came into their compound and later in their house,

where PW7 told her that the appellant was going to take the boy to look after his chicken. That they stayed with the boy in the sitting room and at about 10pm, a vehicle came and two men entered in the house. The inconsistence in her extra judicial statements showed that a man with an over coat got hold of her and pushed her in the bedroom, locked the door and told her not to make any alarm or else he would kill her.

Counsel stated that on the other hand in her oral testimony, PW8 told court that the appellant and Steven went to their home at about 8pm. PW7 brought the child Kasirye whom she had not known before, They stayed with the child and had supper together and made him a bed and they slept. Later, the person whom PW7 was waiting for came and entered wearing a black over coat and PW8 stated that her husband grabbed her by the shoulder and told her to go down. He then called a certain Steven from outside who came in, grabbed her and gagged her with a hankie, pushed her outside and she passed out.

Counsel submitted that while there were inconsistencies in respect of PW8's evidence as to who was in the room at the time of the murder, it was his contention that the learned trial Judge found consistency in the evidence of PW8 to the extent that, the deceased was in their house on that night, they got visitors that night and that she never witnessed the killing as she consistently stated that she was not in the room when it took place. Counsel therefore, asserted that there was sufficient corroborative evidence to corroborate the evidence of PW7 and PW8. He stated that it was the evidence of PW7 that led the police to where the body parts were and he invited Court to believe his testimony that the head and private parts were taken by the Appellant.

On the evidence of the print-outs, PW7 was on telephone number 0773-717631 and the appellant was on telephone number 0772-700921. Counsel observed that on 27th October, the appellant called PW7 at 2.30 pm and at 3:00 p.m. and then called him several times on the 28th.

Counsel referred to the case of **VETROVEC VS THE QUEEN 1982(1) SCR 811** where it was held that corroboration may also be found in the conduct of the accused person. He noted that the appellant stated that he reported the loss of his phone to the police on the 12th August 2008 and the murder occurred on 27th of October 2008, yet a close look at the police report of the loss of the phone showed that the document was only valid for one month. To counsel, the police report was of no evidential value since the murder occurred after one and a half months of its validity. Counsel contended that whereas there was no evidence that the phone was retrieved by the appellant, there was evidence that it was all the while in use. He further argued that on reading about the murder that was widely circulated in the press, the appellant kept in hiding instead of handing himself over to the police yet he testified that he suspected that it was his boys using his phone to fabricate the story about him. To counsel, this was no conduct of an innocent person.

Counsel also pointed out that the appellant in his statement first denied knowing PW7 but while being interrogated by PW12 Kabuye, he revealed that he actually knew him very well and that he even called him in the month of November 2008 using his very phone number 0772700921 after the commission of the offence. Counsel noted that on cross-checking the printouts it was actually found that those communications were in the month of October, the very month of the murder of the deceased.

To counsel, all that corroborated the evidence of PW7 as to his truthfulness.

In further submission for the respondent, it was stated that this court as the first appellate court has a duty to re-evaluate the evidence and make its own findings as was stated in the case of **KIFAMUNTE HENRY VS UGANDA CRIMINAL APPEAL NO. 10 OF 1997.** Counsel observed that the trial Judge evaluated the entire evidence before him and came to the right conclusion in convicting the appellant of the charge. He reiterated that the appellant denied

knowledge of PW7 and yet looking at the evidence of PW9, it was PW7 who led police to all the known homes of the Appellant.

He submitted that PW7 was as truthful as he was trustworthy. Counsel referred to the case of **Vitrovec** (supra) where it was stated that accomplice evidence should be treated as any other evidence and each case should be decided on its own merits and that in looking for corroboration, court should look at such evidence as is capable of inducing a rational belief that the accomplice was telling the truth. It was thus counsel's submission that there was corroboration of PW7's evidence in various aspects of his evidence which showed that he was truthful. He added that corroboration need not necessarily be in each and every detail, but rather in the material facts.

On the sentence, counsel submitted that the court will not ordinarily interfere with the discretion of a trial Judge in the matter of sentence unless it is evident that the Judge had acted upon some wrong principle or overlooked some material factor. He submitted that to him, the learned Judge meant life imprisonment and he did not see any ambiguity. In the case of **TIGO STEPHEN VS UGANDA; CRIMINAL APPEAL NO. 8 OF 2009 (SC)**, the Supreme Court has interpreted life imprisonment to mean imprisonment for the natural life of a person. So there is no question that life imprisonment would mean twenty years which would attract remission. The sentence imposed by the trial Judge is in line with the stated Supreme Court decision.

On whether or not the sentence was harsh Counsel submitted that this was a case where a young child was brutally murdered for ritual purposes, with his private parts and head not retrieved. These were very aggravating circumstances and so the sentence of life imprisonment was appropriate. He noted that the trial Judge while giving the sentence stated that he balanced the prayers of the prosecution and the pleas of defense and came with that sentence, which to counsel was neither illegal nor harsh. He prayed that the appeal be dismissed and the sentence upheld.

Reply

Counsel for the appellant in response to his learned friends' arguments that the Judge warned himself before relying on the evidence of PW7 and PW8, submitted that this was not a question of warning oneself but a question of looking for corroborative evidence, which to him was lacking.

About the lies being explained away, Counsel asserted that PW7 told court in evidence that he did not slaughter the child. If that was the truth then the witness lied to both the police officer and the chief magistrate that he is the one who slaughtered the boy, severed his private parts and called the appellant to take them and that lie was never explained. He added that if it was a lie, PW7 was not under fear or any influence both before the police officer and the magistrate.

Regarding the submission that the appellant supervised the murder, counsel contended that that could not be so since PW7 stated in his evidence which was considered credible by the learned Judge, that he got the boy, slaughtered him, severed the parts and called the appellant to come and pick them. It was counsel's submission that there was no way the appellant could have supervised the ritual murder. He stated that the lies were therefore never explained away since the act of severing was one of the aggravating factors that the Hon. Judge considered and if all the evidence was to be considered, then the severing and slaughtering were done by PW7 and not the appellant.

On the communications, according to the print out, the last time on 27th October that the appellant was alleged to have communicated to PW7 was 7.15 pm yet through PW7's testimony, he talked of 7:00 p.m., 8:00 p.m. and 10:00 p.m. and most importantly, the appellant also reported to MTN and all the reports were to the effect that he had lost his phone. According to MTN, there was a request that the number be not blocked for they were using it to track

the phone and whoever was with it. He disagreed with Counsel for the respondent's contention that the prosecution witnesses said that the appellant kept communicating with PW7 after the murder. He contended that the appellant did not have his phone at the time and it was therefore not his number at the time that was in use.

Counsel argued that it could not be said that since PW7 led the police to the appellant's home, the appellant knew PW7. He stated that anyone can know another's home without the owner of the home necessarily knowing the one who knows his home. As to the fact that PW7 led the police to several of the appellant's homes, counsel submitted that the appellant being a prominent business man who was a public figure of sorts, it was very possible that someone could know his homes even when he himself did not know that particular person. He reiterated that the appellant denied having participated in the murder and the evidence of PW7 and PW8, in light of the concrete evidence of the charge and caution statements, and plain statements could not be relied upon to convict the appellant. He prayed that Court allows the appeal as prayed in the memorandum of appeal.

Court's consideration of the appeal

This court is fully mindful of its duty as a first appellate court to re-appraise the evidence adduced at the trial, draw inferences therefrom and reach its own decision as it was clearly stated in the case of **KIFAMUNTE HENRY VS UGANDA; SUPREME COURT CRIMINAL APPEAL NO. 10 OF 1997**. We shall follow the stated principles.

We note that the crux of this appeal is whether PWs 7 and 8 were accomplices to the killing and whether their evidence was corroborated.

The law on accomplices has been long settled. Black's Law Dictionary, 9th Edition, page 18 defines an accomplice as:

> **"a person who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory...**
>
> **A person who knowingly, voluntarily, and intentionally unites with the principal offender in the committing a crime and thereby becomes punishable for it."**

Phipson on Evidence, 14th edition, on page 306, on 'accomplice' states:

> **"The term 'accomplice' includes when they are called for the prosecution persons who are *participes criminis* in respect of the actual crime charged whether as principals or accessories."**

Phipson further notes on page 306 paragraph 14-08 referring to the case of **R Vs Thorne (1977) 66 Cr.App.R.6** where it was held as follows:

> **"There is nothing to prevent a jury convicting on the uncorroborated evidence of an accomplice however much of a villain he may be, provided that they have been given an adequate warning as to the dangers of convicting on such evidence. If a jury after a proper warning does convict on such evidence, the Court of Appeal will not interfere because there was nothing to corroborate the evidence."**

In the case of **DPP Vs Kilbourne [1973] A.C.729, Cr.App.R.381 at 750**, Lord Reid said:

> **"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see**

whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater extent by the other statements or circumstances with which it fits in."

In the instant case, the major contention was on the arguments that there were various inconsistencies in the evidence of PWs 7 and 8 and as such, their evidence could not be relied upon to convict the appellant without corroboration. A look at the evidence both in court, and in their charge and caution statements plus the plain statements, shows some inconsistencies as to who exactly killed the deceased and whether the appellant supervised the killing or was just called in to pick the parts after a finished job by PW.7 assisted PW.8. In her plain statement and oral testimony, PW8 consistently stated that the appellant came to their home wearing an overcoat. That he brought drinks and samosas with him. He gave the child a soda and a samosa whereafter some time, the child collapsed. She stated in both statements that when she tried to check on the boy, she was taken out of the room and locked away in another room where she could not see anything because she too passed out. In her charge and caution statement, she stated that a gentleman she recognised as the appellant came into the house and immediately led to another room where he locked her way and on asking why she had been locked away, he threatened to cut her.

PW7 on the other hand stated in both his oral testimony and the charge and caution statement that the appellant came in at about midnight with drinks and samosas. He ordered PW7 to cut off the child's head and one Steven cut off the private parts. In his plain statement however, PW7 stated that he cut the child with his wife long before the appellant came and only called him to pick the head and private parts. He then stated that he carried the body of the deceased to the swamp.

PW7 offered an explanation for falsehoods in his charge and caution statement where he stated that he was afraid of being lynched by a mob that had gathered and so he denied having killed the deceased or knowing his whereabouts. We find a consistence in the stories of PWs 7 and 8 regarding the fact that the appellant came to their house with sodas and samosas and gave them to eat. We also appreciate that PW8 did not witness the actual killing as she was either locked away in the bedroom or had passed out after being gagged and pushed into some other room.

The various versions by both PW.7 and PW.8 reveal that at one time both of them were trying to distance themselves from the death of the deceased which to us is understandable. They would have been lynched by the mob if they had admitted their complicity. But whatever version one may decide to follow one fact clearly comes out. This is the fact that both PW.7 and PW.8 knew something about the death of the deceased because the killing took place in their home. PW.7 is the one who lured the deceased from the home of the grandfather with a promise of a job in a poultry farm. The version that they are the ones who had killed the deceased and the Appellant only came to pick the head and private parts as opposed to the other version that it was the Appellant and one Steven who had killed the deceased; and cut off his head and private parts, just shows their attempt to exculpate themselves while implicating the Appellant in one of the versions. The role played by PW.7 and the evidence of PW.8 about the presence of the deceased in their home clearly shows that PW7 and PW8 were aware of the circumstances under which the deceased met his death. Apart from having lured the deceased with a promise of a job, PW.7 describes in detail as to how he was killed, his head and private parts cut off and how his body was stuffed in a polythene bag and thrown in a swamp. He with precision directed the Police to the spot where the body had been thrown and it was found in the condition he had described it, namely. the head had been decapitated and taken away together with the private parts.

PW.8 may not have witnessed the killing because she was not in the room where the killing took place but her evidence is supportive of the evidence of PW.7 of the presence of the Appellant in their home.

But before this Court determines the credibility of the evidence of PW7 and PW8, it must be pointed out that apart from the inconsistencies in their stories as already highlighted, the credibility of their evidence can only be determined when their evidence has been considered in totality with all the evidence adduced by the prosecution and that of the defence. The entire evidence has to be re-appraised.

In re-appraising such evidence Court must exercise caution when handling evidence where witnesses contradict themselves. In that case of **Twehangane Alfred Vs Uganda Court of Appeal Criminal Appeal No. 139 of 2001**, this Court held:

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. Therefore the Court should consider the broad aspect of the case when weighing evidence. Contradictions in the testimony of witnesses on material points should not be overlooked as they seriously affect the value of their evidence."**

On the inconsistencies in this case, it is clear from the various versions that both PW7 and PW8 were knowledgeable about the circumstances under which the deceased was killed. PW.7 participated in the actual killing. Both of them were trying to flee from the area when they were arrested. What this Court has to decide is as to whether or not the death of the deceased was planned and executed by the Appellant as claimed by the prosecution. In other words whether or not the story by the two accomplices that he was at their home on the night of the killing and drove way with the head and private parts of the deceased is corroborated. This evidence must be re-appraised together with the defence evidence of the Appellant that he was away in Jinja from 26.10.08 when the crime is said to have been committed.

According to PW.7 the Appellant was his client and they had, had a long association before the incident. They were in constant communication on telephone. A printout from MTN produced by Joseph Muyanja (PW.7) and James Sekamatte (PW.8) shows that between 15.10.2008 and 30.10.2008 there was communication on almost daily basis between the Appellant on the telephone No. 0772700921 and PW.7 on telephone No. 0773717631. On 27.10.2008 the Appellant first called PW.7 at 7:56:32 a.m. and the cite is given as US Embassy. On the same day he called at 2:30:28 p.m. 3.16.29 p.m. and 3.22.37 p.m. all from Biashara. Then at 7:54 p.m. from a site which is not given. This was on the evening of the day the deceased was killed. The Appellant next called PW.7 on 28.10.2008 at 12:32:02 a.m. (Masaka Sports) 1:08:41a.m. (Kako)) and 7:30:36 (Masaka Technical). The calls on 28.10.2008 were after the deceased had been killed.

The Appellant denies having made all these calls because he was not in possession of his phone which he had forgotten at a Sauna belonging to one Suuna and he had reported the loss of the phone to MTN. First of all, right

from 15.10.2008 to 31.10.2008 the printout shows that the phone was being freely used from numerous sites within Kampala and Masaka and not in Jinja where the Appellant claimed to be when the deceased was being killed. The frequency of its use is a clear indication that it cannot be someone who had picked it on 26.10.2008 from Sauna and was using it as if it was his own and moreover talking to PW7. The pattern shows that it was being used by someone who was mobile and the claim by the Appellant that he had misplaced it cannot be believed. The calls made on 28.10.08 were made after the deceased had been killed and are all from cites within Masaka.

The significance of the MTN printout is that it leads credence to PW.7 evidence that he was contacted by the Appellant and requested to provide a worker in a Poultry Farm. The Appellant's denial that he was not in possession of the phone cannot be true and his denial is not conduct of an innocent person which provides the requisite corroboration for the evidence of PW7 that he lured the deceased on the prompting of the Appellant who went to fetch him n 27.10.2008 but ended up killing him and taking a way his head and private parts. The print-out also places the user of the Appellant's phone to be in Masaka at the time the deceased was killed and not in Jinja, where the Appellant claimed to be at the time.

Again on the conduct of the Appellant there was evidence that following the death of the deceased he disappeared from all his known residences and switched off his phones. He reported to the Directorate of CID on 26.11.2008. According to **MOSES BALIMWOYO** (PW.16) Mr. Kabega the Appellants lawyer with whom the Appellant surrendered to Police explained to Police the instructions of the Appellant as being that the Appellant had decided to surrender to avoid the continued search by the Police yet he was innocent.

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Thus the Appellant's first reaction when he knew that he was being sought was to hide which again is not an act of an innocent person.

As already indicated although the Appellant stated that he was in Jinja at the time the offence was committed there was evidence of the MTN printout that on the night of the killing he was in Masaka. In the case of **Bogere and another Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997** the Court mentioned a fabricated alibi as one of the type of evidence that may support evidence of identification. It is not exclusive to that type of evidence. In a case like this one where the Appellant tried to fabricate an alibi the fabrication not only destroys his alibi but also supports the prosecution evidence that he was in Masaka when the deceased was killed.

We accordingly come to the conclusion that grounds 1, 2 and 3 of the appeal must fail. On the issue of sentence, we wish to comment on the sentence of 'life in prison' that was passed by the learned Judge. **Article 28(12)** on fair hearing provides:

> **"Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."**

Section 189 of the Penal Code Act cap 120, provides that any person convicted of Murder shall be sentenced to death. Whereas death is the maximum sentence, it has been stated that a mandatory death sentence is unconstitutional and an accused should be heard in mitigation. See **Attorney General Vs Susan Kigula & 417 Others, Constitutional Appeal No.03 of 2006.**

That decision aside, it is trite law that a trial Judge has the discretion to pass a sentence that he deems fit. In **Kiwalabye Bernard Vs Uganda; Criminal Appeal No. 143 of 2001** the Supreme Court held:-

> **"The appellant court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered which passing the sentence or where the sentence imposed is wrong in principle"**(sic)

The trial court in this case sentenced the appellant to 'life in prison'. In the case of **Tigo Steven** (Supra) the Supreme Court defined life imprisonment as follows:-

> **"We hold that life imprisonment means imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned."**

We would agree with counsel for the respondent that the learned Judge in sentencing the appellant to life in prison meant life imprisonment as was defined by the Supreme Court in the case of **Tigo** (supra). We, therefore, would not accept the arguments by counsel for the appellant that the sentence was ambiguous and harsh or excessive. If anything, even if "life in prison" is not the sentence prescribed in law for murder a proposition we do not agree with, given the gruesome nature of the crime of which the Appellant was convicted,

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the Appellant deserved no less than the sentence of life imprisonment, irrespective of whether or not the crime was committed with others.

This appeal stands dismissed and both the conviction and the sentence of the appellant to life imprisonment are upheld.

Dated at Kampala this.....12th..... day of.....June.....2014

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Hon. Mr. Justice Remmy Kasule
Justice of Appeal

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Hon. Mr. Justice Eldad Mwangusya
Justice of Appeal

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Hon. Mr. Justice Faith E. Mwondha
Justice of Appeal