5 THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 29 OF 2016

(Coram: Kenneth Kakuru, Frederick Egonda-Ntende and Hellen Obura, JJA)

10 1. ONEGI GEOFFREY
2. ALWOKO FLORENCE OGWETE
3. OKOT PETER ::APPELLANTS
4. OGWAL RICHARD
5. OKELLO CEASER
15 6. OTEE AMBROSE

VERSUS

UGANDA :::UGANDA

JUDGMENT

20 **Introduction**

This appeal is against the decision of Her Lordship Winfred Nabisinde, J delivered at Lira High Court on the 04/02/2016. The appellants were jointly indicted, tried and all of them except the 5th appellant were convicted of the offences of murder and attempted murder contrary to sections 188, 189 and 204 of the Penal Code Act (PCA). On the count of murder, 25 the trial Judge sentenced the 1st and 2nd appellants to 50 years imprisonment, the 3rd and 4th appellants to 40 years imprisonment and the 6th appellant to 35 years imprisonment. On the count of attempted murder, she sentenced the 1st, 2nd, 3rd, 4th and 6th appellants to 35 years imprisonment whereas the 5th appellant was convicted of a minor cognate offence of conspiracy to commit a felony (which the trial Judge in her judgment erroneously said is 30 contrary to section 208 of the PCA yet it is contrary section 390 of the PCA). The 5th appellant was sentenced to 10 years imprisonment.

Background Facts

The brief facts of this case as adopted by the trial Judge were that on 26/04/ 2011 at Minakulu trading Centre "B" in Oyam District, PW2, Angole Nyang Moses (the victim and complainant) 35 went to Patela Bar and Lodge where he met Awor Hellen (the deceased) and another visitor aged about 10 years old. PW2 bought some drinks for the deceased and her visitor since it was raining heavily and when the rain stopped, she (deceased) asked for a lift from PW2 who accepted. As they were sitting on the motorcycle, they heard gunshots aimed at them which

5 wounded PW2 and killed the deceased but the young girl escaped unhurt. The matter was reported to Minakulu police post and later in May 2011, the police received information incriminating the 2nd appellant in the shooting whereupon a team of detectives from (Rapid Response Unit (RRU) Lira and CID Headquarters took over the investigations and arrested the appellants. They were indicted of the offences of murder and attempted murder, tried,
10 convicted and sentenced as indicated above in the introduction.

Being dissatisfied with the decision of the trial court, the appellants appealed to this Court against both convictions and sentences on the following Grounds;

1. *That the learned trial judge erred in law and fact when she failed to properly evaluate the evidence on record regarding participation hence arriving at a wrong decision.*
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2. *That the learned trial judge erred in law and fact in admitting charge and caution statements which were not properly obtained by the police officers who recorded them.*
3. *That the learned trial judge erred in law and fact in refusing to hold that the trial of the accused persons was a nullity on account of torture meted upon them by the members of the Rapid Response Unit (R.R.U) investigation unit leading to their trial.*
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4. *That the learned trial judge erred in law and fact by relying on suspicion as a basis for conviction of the appellants.*
5. *That the learned trial judge erred in law and fact in treating the pieces of evidence adduced by the prosecution as circumstantial evidence.*
6. *That the learned trial judge erred in law and fact when she convicted the 5th appellant of the offence of conspiracy to commit a felony when there was no evidence to that effect.*
25
7. *That the learned trial judge erred in law and fact when she passed illegal sentences against the appellants in the 2nd and 3rd counts.*

30 **Representation**

At the hearing of this appeal, Mr. Levi Etum (RIP) represented the appellants while Mr. Ndamuranyi Atenyi Senior Assistant DPP from the Office of the Director Public Prosecutions represented the respondent.

Appellants' submissions

Counsel for the appellants opted to argue grounds 1 & 2 together and grounds 3, 6 & 7 separately. He abandoned grounds 4 and 5. He submitted on grounds 1 and 2 that the trial Judge erred in evaluating the evidence relating to participation of the appellants and relying mainly on the testimonies of PW2, PW5, PW7 and PW8. Further that it is clear at page 10 of the proceedings that PW2 never saw those who shot at him and the deceased. The only eye witness who purportedly tried to identify two of the assailants was PW8, Adong Philomena who testified that she was 2-3 meters away from the people who were shooting and she used her phone torch light and saw two people. Counsel contended that PW4 having testified that the Police Officer who visited the scene recovered 14 spent cartridges, it was unbelievable that PW8 could flash her torch light from a distance of 2-3 metres directly onto the faces of the assailants when one of them was said to be firing all those 14 bullets. Further that, PW2's testimony that when the assailants started shooting, PW8 ran back inside the bar contradicted that of PW8 that she stood outside the door and watched the shooting. He contended that PW8 identified the assailants by height and in her testimony she stated that the short one was the one who was firing whereas during the trial, the short person was different from the one she had earlier identified.

Counsel also submitted that the trial Judge relied on the repudiated charge and caution statements which were obtained from the 1st and 3rd appellants through torture by the RRU at Lira police barracks. He argued that the trial Judge relied on these statements to pin all the other appellants and yet they (the appellants) had consistently stated that the three officers who arrested them and extracted their statements, namely; Adutala Walter, Rwamanyindo and Kiyengo had tortured them during the extraction of the confessions.

Counsel also added that the 1st appellant is not literate and as such did not know English and yet the person who recorded his charge and caution statement did so in English. Counsel submitted that the trial Judge erred in relying on this charge and caution statement to convict the appellants without any other independent evidence. According to counsel, if court had addressed its mind to those pieces of evidence, it would not have relied on the charge and caution statements to find a conviction and, in the absence of the charge and caution statements, there is no other evidence implicating the appellants except the evidence of PW8 which should not be relied upon because of inconsistency.

5 On ground 3, counsel submitted that the specific evidence of the appellants which are found in a trial within a trial and all of their testimonies in defence are very clear that they were tortured on 3 consecutive dates that is on 13th, 14th and 15th May 2011.

On ground 6,counsel also submitted that there was no evidence that a co-conspirator was also charged with the offence of conspiracy to commit a felony yet court went on to only 10 punish the 5th appellant for conspiracy. Counsel also asserted that a minor and cognate offence to murder and attempted murder is manslaughter which the 5th appellant could have been convicted of instead of conspiracy to commit a felony. Counsel prayed that this Court finds that this was erroneous.

On ground 7, counsel contended that the trial Judge did not take into account the time the 5th 15 appellant had spent on remand which is 4 1/2 years before passing the sentence of 10 years imprisonment. He faulted the trial Judge for merely stating that *"this court has also considered and taken into account from each of the convicts the period served as pre remand prisoners before arriving at the final sentences,"* instead of arithmetically subtracting the 4 1/2 years from the sentence to be imposed.

20 In conclusion on all the grounds, counsel prayed that on the basis of the evidence on record which he highlighted in his submissions, this Court be pleased to find that all the appellants were convicted and sentenced in error. He prayed that their convictions be quashed, sentences be set aside and the appellants be set free.

Upon submission by counsel for the appellants, counsel for the respondent prayed for time 25 within which to file written submissions as he was not ready to argue the appeal. His prayer was granted and he was given two weeks within which to file the submissions and to serve the appellant's counsel who would file a rejoinder within a week after being served. However, the time that was given expired without counsel for the respondent filing his submissions in reply. This appeal remained pending for some time but still counsel did not take advantage of 30 it. We have now decided to determine the appeal based on the submissions of the appellants only.

Court's Consideration

We are aware of our duty as the first appellate Court under ***Rule 30 of the Judicature (Court of Appeal Rules) Directions.*** As the first appellate court, we have the onus to 35 reconsider all the material evidence that was before the trial court, and while making allowance for the fact that we have neither seen nor heard the witnesses, come to our

5 own conclusion on that evidence. In so doing, we will consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that we can reach our own conclusion, as distinct from merely endorsing the conclusion of the trial court. See: ***Baguma Fred vs Uganda, SCCA No. 7 of 2004.***

The burden to prove a charge of murder against the appellants lay squarely on the
10 prosecution and the guilt of the appellants had to be proved beyond reasonable doubt. The ingredients of the offence of murder that had to be proved at the trial were that the deceased was dead, that the death was unlawful, that there was malice aforethought and finally that the appellant participated in the offence.

The first three ingredients were not disputed by the appellants and as such they are not being
15 contested in this appeal. However, the appellants contested their participation in the offence. In ground 1 they specifically challenged the evidence adduced to prove their participation. We note that in arriving at her conclusion about the appellants' participation, the trial Judge relied mainly on the charge and caution statements of the 1st and 3rd appellants which she found to have been voluntarily and freely recorded in accordance with the requirements of the law and
20 admitted in evidence after conducting a trial within a trial.

These statements were challenged throughout the trial despite their admission and they are still being challenged in this appeal. We therefore find it pertinent to first dispose of ground 2 which raises the issue of admissibility of the charge and caution statements, before considering ground 1. Counsel for the appellants submitted that the trial Judge relied on the
25 repudiated charge and caution statements which were obtained from the 1st and 3rd appellants through torture by the Rapid Response Unit (RRU) at Lira Police barracks. Further that the statements were recorded in English and yet the 1st and 3rd appellants are not literate. He contended that in the circumstances, these statements were inadmissible and as such there would be no evidence on record to sustain the conviction of the appellants.

30 We note from the record that during the trial, the prosecution sought to have admitted on record the charge and caution statements allegedly made by the 1st appellant, Onegi Geoffrey, the 2nd appellant, Alwoko Florence Ogwete, the 3rd appellant, Okot Peter and the 4th appellant, Ogwal Richard. The defence objected to the admission of those charge and caution statements on the ground that none of the appellants made it and knew nothing about
35 the content but each of their signatures as appended on their alleged respective statements, except for the 1st appellant who maintained that he never signed his, were procured through torture. Furthermore, that the 4 appellants were not literate and as such they did not know

English. In addition, that the laid down procedure for recording a charge and caution statement was not followed.

The Supreme Court in ***Amos Binuge & ors vs Uganda, SC Criminal Appeal No. 23 of 1989***, held:

> *"It is trite that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial within a trial…The purpose of a trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted."*

In the instant appeal, the defence counsel prayed that a trial within a trial be conducted in respect of each of the 4 appellants to determine the admissibility of their alleged respective charge and caution statements and there being no objection by the prosecution, his prayer was allowed.

The procedure to be followed in a trial within a trial was elaborately set out in the celebrated authority of Court of Appeal of Kenya in ***Kinyori s/o Karuditu vs R* (1) (1956), 23 E.A.C.A. 480 at p. 482.** The only improvement on the decision in that case is that today the Assessors remain in Court during the trial within a trial as provided for under Section 81 of the Trial on Indictments Act. The purpose of the trial within a trial, is to decide, upon the evidence of both sides, whether the confession was voluntarily made and as such should be admitted. See: ***M'Murari s/o Karegwa vs R (1954) 21 E.A.C.A. 262 and Mwangi s/o Njerogi vs R (1954) 21 E.A.C.A. 377.***

The trial Judge conducted the trial within a trial in respect of each of the 4 appellants. She ruled that the prosecution had failed to fully discharge its burden of proving that the charge and caution statements of the 2nd and 4th appellants were voluntarily made by them at the time. As regards the 2nd appellant, the trial Judge's conclusion was based on her finding that the 2nd appellant had sustained some injuries that affected her reasoning at the time she was recording the statement. The trial Judge however did not attribute the injuries to the torture of the 2nd appellant by the police officer who extracted her statement.

We wish to point out from the onset that, much as the trial Judge ruled that the statements of the 2nd and 4th appellants were not admissible for the reasons she gave, and as such the appellants have not raised any issue regarding the evaluation of evidence adduced in respect of a trial within a trial for those two appellants, we have found it necessary to subject the evidence adduced in all the trial within a trial to a fresh scrutiny because they will have a bearing on our overall observation of how the evidence in the trial within a trial of all the 4

appellants were evaluated and the findings and conclusions made which impacted on the main trial and the outcome. We shall start with the 2nd and 4th appellants whose charge and caution statements were found inadmissible.

For the case of the 2nd appellant, the prosecution presented one witness, D/ASP Tumusiime Rwamanyindo Patrick, the police officer who allegedly recorded her charge and caution statement. He narrated the procedure he followed in recording the statement and denied torturing or even witnessing the torturing of the 2nd appellant before or during the recording of the statement. He testified that there was no sign of torture on her and she did not even complain to him about anyone torturing her. Further that even after recording the statement, the 2nd appellant was examined on Police Form 24 and no torture marks were revealed. During cross-examination, he said he could see the 2nd appellant walking on crutches but he could not explain her walking on crutches.

It is curious to note that this witness in cross-examination stated that he visited PW2, the victim/complainant in the hospital in Gulu and asked him about his relationship with the 2nd appellant and PW2 told him that the relationship was not good as they had land wrangles and that was the cause of the problem. However, in re-examination he said the visit was after he had already recorded the 2nd appellant's statement.

On the other hand, the defence adduced evidence to show that the 2nd appellant was tortured with a bid to procure her confession of the offence. The 2nd appellant herself gave an account of what she was subjected to. She narrated that she was beaten by an officer called Kiyengo and also kicked on the waist by another one called Tumusiime and blood started coming. It was also her testimony that when she wanted to get up and go to the car she failed to do so and she was left behind as other suspects were taken. When the car came back she was held by Tumusiime and Adutala (another police officer) and placed in the boot of the car. The 2nd appellant also testified that she was made to sign a paper that had already been written under those circumstances and upon being advised by Adutala who said the case was not in their hands but before the RRU and so she needed to accept to sign to rescue her life.

The 2nd appellant further testified that when she was taken to prison, a doctor examined her and said he could not handle her case so he referred her to Lira Regional Referral Hospital where she started receiving treatment and up to the day of her testimony (7/11/2013) she was still getting treatment and she had medical forms to that effect. An application to tender in evidence her medical forms was objected to on the ground that she was not competent to tender it and the objection was upheld.

DW2, Bernadette Akoli , a Nursing Assistant with Prisons Medical Department who assisted the Medical Clinical Officer to screen the 2nd appellant in prison on 26/5/2011 testified that she (2nd appellant) had trauma of waist and left knee and had difficulty in walking and she was taken to Lira Regional Referral Hospital. The 2nd appellant's condition as stated above was recorded in the Prison Service Medical Screening Register which was admitted in evidence and marked **Defence Exhibit No. 2.**

DW3, Ekwan Francis who described himself as a Medical Worker, Physical Therapy/Mental Health testified that he met the 2nd appellant in the physiotherapy department, Lira Regional Referral Hospital where he was working. He had a discussion with her and found out what her problem was. She revealed in her history that she was beaten focusing on the hips, lower back and left hip. Upon examining her, he discovered that she had pain on the joint which separates the spine from the hip and numbness on the upper foot and his conclusion was that the Lumber 5 SI muscle (nerve which goes between the spine and hip) was affected. It was the testimony of DW3 that the 2nd appellant underwent physiotherapy up to November 2013. The 2nd appellant's medical forms showing the treatment she had received from Lira Regional Referral Hospital were admitted in evidence and marked **Defence Exhibit No. 1.**

We note from the evidence of D/ASP Tumusiime that during the trial the 2nd appellant was walking with the aid of crutches and that could not be explained.

Our reappraisal of the above evidence leads us to a conclusion, with due respect, that the trial Judge did not properly evaluate the above evidence in the trial within a trial which could have led her to come to a firm conclusion that the 2nd appellant was subjected to serious torture to extract a confession from her. She did not at all allude to the medical evidence that was adduced by DW2 and DW3 and the Defence Exhibits No. 1 & 2 that were admitted in evidence. To that extent, we fault the trial Judge for selectively evaluating the evidence and failing to make a firm finding on whether or not the 2nd appellant was tortured to procure a confession from her.

We must observe that torture or cruel, inhuman or degrading treatment of suspects for whatever reason should never be overlooked or down played by judicial officers but must always be isolated and condemned so as to send a strong message to the security forces that it is a violation of the suspect's constitutional right as enshrined under article 24 of the Constitution.

It is also noteworthy that the evidence of D/ASP Tumusiime about his visit to the complainant and inquiring about his relationship with the 2nd appellant is suggestive that he was also one of the investigating officers. Otherwise, what business does an officer who is merely assigned

5 to record a statement have to do with visiting the complainant and talking to him about the case and moreover travelling all the way to another district (Gulu) for that purpose?

As regards the 4th appellant, the trial Judge's conclusion was based on two grounds, namely first, that the proper procedure for recording a charge and caution statement was not followed as the statement was recorded in the presence of a 3rd party and secondly, that the statement 10 was recorded in the English language which the 4th appellant had said he could not understand.

We note that just like the 2nd appellant, the 4th appellant's main ground for objecting to the admission of the charge and caution statement was that he was tortured and forced to sign a document that had already been written and whose content he did not know. Prosecution 15 adduced evidence of D/AIP Adutala Walter (DW1), the police officer who allegedly recorded the statement of the 4th appellant. He testified about the procedure he followed to record the statement in English language which he said the 2nd appellant told him he knew and preferred to use. He narrated what he was told by the 4th appellant which he recorded in the statement. He denied knowledge of the involvement of officers from RRU in the case and also stated 20 that he did not torture or force the 4th appellant to sign the statement. Further, that the 4th appellant did not even complain to him that he was tortured.

The 2nd prosecution witness was Dr. Yine Henry (DW2), a Senior Medical Doctor who allegedly examined the 4th appellant on 15/5/2011 and found no torture marks on him. It is noteworthy that the examination was done on the very day the 4th appellant is alleged to have 25 made the charge and caution statement. Police Form 24 in which the findings were recorded was admitted in evidence as Prosecution Exhibit No.1.

The defence presented 4 witnesses. DW1 was the 4th appellant himself who testified that on 13/5/2011 the 5th appellant and him were picked from Central Police Station (CPS), Lira and taken to the police barracks Lira where they found the 2nd appellant. They were given a piece 30 of paper already written to sign but they refused and upon being threatened, they were taken back to CPS. On 14/5/2011 they were again picked and taken to the same place where they found the 2nd appellant sitting down and crying. She was putting on only pants. Adutala and Tumusiime were also in the room beside Kiyengo and Babu who had picked them. He narrated how he was tortured and the injuries he got on his knees which was repeatedly hit 35 by a baton and the swelling of his testicles which he said was tied with a rope and each time Adutala pulled the rope it caused him great pain to the extent that his auntie, the 2nd appellant who was also undergoing torture, advised him to just sign the document that had already been written to save himself from further pain.

5 He further testified that on 20/5/2011 he went to the medical wing of prisons and he was given medicine by a nurse called Berna which made him feel some change. He denied ever appearing before Dr. Yine and being examined by him.

DW2 was Okello Ceaser, the 5th appellant. He narrated how on two different occasions him and the 4th appellant, who is his cousin were picked from Central Police Station (CPS) Lira by 10 Kiyengo and Babu and put in a vehicle then driven to the police barracks. On the first occasion which was 13/5/2011, they were made to enter a room where they were given a paper to sign. When he asked Adutala to allow him first read it before signing, he insisted that they should just sign them. Upon their refusal to sign the same, they were handed back to the people who brought them and they were returned to CPS Lira.

15 On the 2nd occasion which was 15/5/2011, they were again picked by the same men Kiyengo and Babu using the same vehicle and taken to the same place and room where they found four people, namely; Babu, the driver who took them, Adutala Walter, Tumusiime, and his mother Alwoko Florence, the 2nd appellant. The driver was holding a gun. They were all undressed, except for his mother who remained with a petticoat, and tortured. He saw 20 Tumusiime kicking his mother on the waist and blood came from where she was sitting. He was ordered to clean the blood and he did so using his shirt. His shoulders were hit by Tumusiime who also kicked his chest. Ogwal was also assaulted on the knees. Because of the great pain they were in, the 2nd appellant advised them to sign the papers they were given and they did so.

25 DW3 and DW4 the medical personnel from prison medical department who examined and treated the 4th appellant testified that he had swollen knees and had difficulty in walking and he was treated. The medical forms were admitted in evidence to prove that the 4th appellant was treated for some traumatic knee injuries.

Upon our re-evaluation of the above evidence and perusal of the ruling in the trial within a 30 trial, we find that the trial Judge merely glossed over the allegation of torture of the 4th appellant and even avoided to make any specific finding on it. At page 263 the trial Judge made a finding as follows:

> *"DW1 claims that force was used against him. Defence counsel in his submission stated that the issue was not only whether there was force or undue influence during the recording of the 35 statement, but also whether the proper procedure was used to record the statement. He submitted that PW1 was not very consistent and that his demeanour is questionable and that it was evident that he had interest in the case.*

5 *I have carefully considered these submissions, my view is that if I am to agree with the defence that they were more than one police officers in the room with the male police officer who recorded the statement, this has not been fully disproved by the state (sic).*

...There is one point I find to be valid for bringing this application and that is the presence of a third
10 *parties in room while the statement was being recorded. This has also been ably put to the test and I am inclined to agree with the defence that this offends the practice of recording such statements. DW1 also stated that he could not understand English language in which the statement was recorded; I find this a strong ground taking into account that PW1 could not explain to court why he recorded the whole statement in English and not Luo yet he*
15 *admitted being a Luo speaker. It must be noted that in statements of this nature, the recorder must abide by the rules and capture the statement in the language that is best understood and chosen by the maker; it is only after it is captured that it is interpreted into English unless the maker chose to use English from the word go (sic)."*

She then concluded that the prosecution had failed to fully discharge its burden of proving
20 that the charge and caution statements of the 4th appellant was voluntary made by him at the time.

As we observed in the case of the 2nd appellant, we are of the view that there was proof beyond doubt that the 4th appellant was tortured. Defence Exhibit D3, being his medical form indicated that on 20/05/2011 when he was examined at the Prison health facilities as part of
25 the process of admission of new inmates, he was found to have bilateral painful knees, was limping and had swellings. The history as recorded in the medical form indicated that the 4th appellant was well till 13th May 2011 when he was arrested and taken to Lira Police barracks where he was beaten and he sustained swellings and pain on both his knees and testicles. Had the trial Judge evaluated the evidence on record in the trial within a trial in their totality,
30 she would have made a finding that the 4th appellant was tortured and as such his statement could not have been voluntarily made. That would have formed another major ground for finding the charge and caution statement inadmissible. We therefore fault the trial Judge for her failure to evaluate the evidence of the defence in regard to the 4th appellant's torture by the police officers who allegedly recorded his charge and caution statement.

35 We now turn to consider the trial within a trial as relates to the 1st and 3rd appellants whose charge and caution statements were found to have been voluntarily made and admitted in evidence. As for the 1st appellant the trial Judge ruled that the prosecution had discharged its burden of proving that the statement was voluntarily made by him at the time and was therefore admissible before court. A similar conclusion was made in respect of the 3rd
40 appellant.

5 For the 1st appellant, he had objected to the statement being admitted in evidence on the ground that he was assaulted seriously and the procedure for recording a charge and caution statement was not followed. In the trial within a trial, the prosecution called 2 witnesses. PW1 was Dr. Yine Henry who allegedly examined the 1st appellant on 15/5/2011 two days after he recorded the statement and found no torture marks on him and PW2 was D/AIP Adutala 10 Walter who allegedly recorded the statement. PW1 testified that he was the Principal Medical Officer at Lira Municipal Council when he examined the 1st appellant on 15/05/2011 and he did not find any injuries on him. Police Form 24 in which he recorded his findings was admitted in evidence as Prosecution Exhibit No. 1.

On his part, PW2 explained the procedure he followed to make the 1st appellant comfortable 15 in preparation to record his statement and the steps he took during the recording of the statement. He said the 1st appellant told him that he knew both English and Kiswahili but he preferred to use English and so that is the language they used. According to PW1, the 1st appellant told him that he was the one who opened the fire by pulling the trigger that killed the deceased and wounded the victim upon being instructed by the 4th appellant who 20 promised to give him some money after accomplishing the mission. It was the evidence of PW1 that the 1st appellant signed the statement voluntarily without being forced or subjected to any torture.

For the defence case, 3 witnesses testified to prove that the 1st appellant was tortured to sign the statement but he declined to do so. Further, that the 1st appellant was illiterate and 25 therefore did not know the English language which he was alleged to have used during the recording of the statement. The evidence of torture was adduced by DW1, the 1st appellant and DW2, the 2nd appellant. The evidence of the 1st appellant's illiteracy was adduced by the appellant himself and DW3 who testified that he was his teacher in Primary 1 in Lira Main Prison Primary School. A report card for Primary 1, 3rd term 2013 was admitted in evidence 30 as Defence Exhibit No. 1.

The trial Judge evaluated the evidence and as regards the allegation of torture, she found that it had not been proved and she concluded that it was just a fabricated story aimed at derailing court from admitting the statement. On the allegation of illiteracy, the trial Judge stated that illiteracy was not raised as one of the grounds for objecting admission of the 35 statement and her conclusion was that it was just fabricated to derail the case. She also found that the report card of the 1st appellant (Defence Exhibit D1) bore the Headmaster's stamp dated 11.2.2014 and she concluded that it was made when the 1st appellant had already started testifying in the trial within a trial to establish whether his charge and caution statement was voluntarily made.

5 On the other hand, she analysed the prosecution evidence and on pages 284 and 305 of the court record stated thus;

> *"Turning to the evidence of PW2, I have carefully analyzed it and found that he was very elaborate on the steps he took in recording the statement and that after the preliminaries, he inquired into the language the accused wished to use and the accused person choose to make a statement in English, but also stated that he knew Kiswahili. PW2 then proceeded to record the statement. The requirement of the law is that the officer recording the statement should ask the witness/accused person the language he understands best if he chooses one language, whether he suspects that he knows another language better than the one he has chosen. In this particular case it was evident that the accused person chose to use the English language; my conclusion is that there was no injustice occasioned to the accused in recording his statement in a language he personally chose."*

The trial Judge then ruled that the 1st appellant's charge and caution statement was admissible and it was accordingly admitted in evidence in the main trial as Prosecution Exhibit No. 6. In so far as the ground of torture is concerned, we have reappraised the evidence that was presented before the trial Judge by both the prosecution and the defence in the trial within a trial in respect of the statement alleged to have been made by the 1st appellant and we are persuaded that the 1st appellant was subjected to torture as testified by him and the 2nd appellant who said she saw him being tortured as she also underwent torture. As such, he did not voluntarily make the charge and caution statement. We therefore fault the trial Judge for finding that the prosecution had fully discharged its duty to prove that the 1st appellant voluntarily recorded the statement and concluding that it was admissible.

On the trial Judge's finding that the 1st appellant had not raised his illiteracy and lack of knowledge of the English language as a ground for objecting to the admission of his charge and caution statement in evidence, we also have a different view based on our perusal of the record. On 26/6/2014 as PW5 had finished testifying in the main trial on how he recorded the statement of the 3rd appellant, he was called to testify and present the statement he had recorded from the 1st appellant. After he explained how he recorded the statement, prosecution prayed to tender it in but counsel for the appellants said he had instructions to object because the 1st appellant was assaulted seriously and made to sign it. He also said that the procedure for recording was not according to the law. An order for a trial within a trial was then made and prosecution led the evidence of PW1 to bring out the fact that the 1st appellant knew English and chose it as a language of his preference. He was cross-examined on the same and he said the 1st appellant spoke to him in English. In his defence, the appellant testified that PW1 spoke to him in Lango because ever since he was born he did not go to school and the only school he attended was in prison. He then called DW3 to testify about his

poor performance in literacy in Primary 1 while in prison. A report card which is already alluded to above was tendered in evidence.

From the above analysis of the record, it is clear that one of the grounds for objecting to the admission of the statement allegedly made by the 1st appellant was that the procedure for recording the charge and caution statement was not according to the law. We wish to emphasize that establishing the language the suspect knows and is comfortable to use is a very important part of the procedure to be followed by a police officer when recording a charge and caution statement. There was therefore no basis for the trial Judge's finding that illiteracy was not a ground of objection.

On the credibility and veracity of the 1st appellant's evidence of his illiteracy and his lack of knowledge of the English language, we agree with the trial Judge that the report card was purposely made for strengthening the 1st appellant's case which was already being heard. Its authenticity would therefore be questionable.

Be that as it may, it was the appellant's case that he did not go to school and therefore he did not know the English language. On the other hand the prosecution case was that the 1st appellant told PW1 that he knew English and Kiswahili but he preferred to speak in English and that is the language he used to communicate and record the statement. It should be noted that PW1 had said earlier that the 1st appellant also told him that he knew Lango and it is also on record that PW1 was a Luo speaker. One then wonders why the two could not have communicated in their mother tongue which we believe they were both fluent in.

We have also had opportunity to look at a copy of the charge and caution statement, Prosecution Exhibit No. 6 and observed how the 1st appellant wrote his name in the space he was given to sign. It is quite interesting that the person who was said to have communicated in English could hardly write his name. It is clear from the way the name of the 1st appellant was written as; "ONEGi JOFRi " below the caution and "ONEGi JOFiRi" below the charge and after the statement that the person who wrote it was struggling to write. The letters looked so crooked and as can be seen capital letters were mixed with small letters.

The appellant denied signing the document but even if we were to be satisfied that he did sign it, the style and manner of signing would still raise some doubt in our minds as to whether the 1st appellant was educated and knowledgeable of the English language at the time he signed the document. That doubt ought to be resolved in favour of the 1st appellant. Since the trial Judge failed to take note of this important piece of evidence which was on record, we ourselves have exercised our duty as a 1st appellate court to re-appraise the evidence and

we find that the prosecution did not fully discharge its duty to prove that the 1st appellant understood the English language in which he was alleged to have communicated, and his statement recorded and read back to him.

In the premises, we find that the charge and caution statement allegedly made by the 1st appellant was inadmissible as it was not voluntarily made and it was also recorded in a language that he did not know. It ought not to have been admitted in evidence for those reasons.

For the 3rd appellant the trial Judge upon evaluating the prosecution evidence and that of defence concluded that the prosecution had discharged its burden of proving that the statement was voluntarily made by the suspect at the time and therefore admissible before court.

Prosecution had called one witness, D/AIP Adutala Walter who allegedly recorded the charge and caution statement of the 3rd appellant. He testified about the general atmosphere of the room where he recorded the statement from and the relaxed state of the 3rd appellant as he communicated to him in English, a language of his choice and the procedure he followed while recording the charge and caution statement. He then testified about what the 3rd appellant narrated to him which he recorded. Interestingly, what the witness said the 3rd appellant told him and he recorded are different in material aspect from the content of the statement which was tendered in evidence as the 3rd appellant's charge and caution statement. We shall revert back to this as we deal with ground 1.

D/AIP Adutala denied knowledge of torture of the 3rd appellant and said he was just smiling as his statement was being recorded and so he could not have been tortured. For the defence, 3 witnesses including the 3rd appellant testified. DW1 was the 3rd appellant who testified that he was taken to Lira Police barracks inside a house where he found 3 men in civilian clothes and one was holding a gun. His hands were tied and something was also tied to his testicles. Adutala beat his knees with a baton and he got some injuries while another person kicked his chest. He went to prison where he was treated by a woman and his wounds healed. He testified further that Adutala made some writings and told him to sign it and he did so because of the threats. It was also his testimony that he did not go to school and so he did not know English.

5 DW2, Akoli Bernadi, who was a medical personnel in prisons medical department testified that on 19/05/2011 she screened the 3rd appellant as a new inmate and found that he had swollen scrotum and a wound on the right knee. The witness referred to the prisons medical screening register and identified that the 3rd appellant was registered as No. 45 /May/2011 and it was entered in the report that he had "traumatic knee pain". She also referred to another 10 record where the 3rd appellant was registered as No. 113/05/2011 and the diagnosis was URTI (Urinary Tract Infection). The records were admitted as Defence Exhibit Nos. 1 & 2. In cross-examination, the witness stated that the swollen scrotum was not recorded in the medical screening register and conceded that this was a weakness.

15 DW3 was Oweri Jacob, a medical personnel from Lira Prison Main Health Centre who at first said he had examined the 3rd appellant and found that he had a swollen scrotum and some wound on the right knee which he never recorded in the register. Further that the 3rd appellant told him that he sustained the knee injury at the time of his arrest.

20 However, during cross-examination DW3 changed his testimony and said he had gone to take blood sample to Lira Regional Referral Hospital when the 3rd appellant was screened by a nurse in his absence. He said he had started the process of screening him then he was called to the hospital and so he did not take his record.

25 The trial Judge in her ruling said it was hard for court to believe the evidence of DW3 as the truth. We agree with the trial Judge to that extent but our concern is that after that finding she again proceeded to rely on another aspect of DW3's evidence to the effect that the 3rd appellant told him that he sustained the injury on his knee during his arrest as the basis of her decision to reject the allegation of torture. It was clear from the evidence of DW3 that the 30 3rd appellant was screened in his absence. How and when could he then have got this information from the 3rd appellant? It is our finding that DW3 was not a credible witness and as such no aspect of his evidence could be relied on. We therefore fault the trial Judge for her selective treatment of the evidence of DW3 which caused her to arrive at a wrong conclusion that the 3rd appellant sustained the knee injuries at the time of his arrest.

35

Upon our re-evaluation of the evidence in the trial within a trial on record, our finding is that the evidence of DW2 and Defence Exhibits Nos. 1 & 2 corroborated the evidence of the 3rd appellant that he was beaten on the knees and he got injuries. On that basis alone the statement could not be said to have been made voluntarily and ought not to have been 40 admitted in evidence as the 3rd appellant had proved that he was tortured by the police officer

who allegedly recorded it. We therefore conclude that the charge and caution statement of the 3rd appellant was also admitted in evidence in error.

The above findings and conclusions resolve the 2nd ground of appeal in the affirmative and in effect it succeeds.

Before we take leave of this ground, we wish to observe that on the whole, our finding is that the circumstances under which all the charge and caution statements were recorded is highly suspicious and lends credence to the allegations of the 4 appellants that they were all placed in the same room where there were 4 police officers and forced to sign the pre-written statements through torture. It is noteworthy that D/ASP Tumusiime who recorded the statement of the 2nd appellant and D/AIP Adutala who recorded the statements of the 1st, 3rd and 4th appellants were officers attached to Oyam Central Police Station in Oyam District where the offence took place. No explanation was given as to why these officers had to come to record the statements in the Central Police Station, Lira which presumably had many senior officers who could have done the job.

We have also looked at the entries in Defence Exhibits Nos. 1 & 2 which indicate that the 1st, 3rd and 4th appellants all had traumatic knee pain while the 5th appellant had traumatic chest pain at the time they were admitted in prison. Those were clear medical evidence which corroborated the evidence of the appellants that they were tortured in the manner they each testified about. If the trial Judge had properly evaluated the evidence adduced in all the trial within a trial, she would have found that none of the appellants had voluntarily made a charge and caution statement and she would not have admitted any of them.

We now turn to consider the 1st ground of appeal where the appellants fault the trial Judge for failing to properly evaluate the evidence on record regarding participation hence arriving at a wrong decision.

The question for consideration in this ground of appeal is whether the trial Judge failed to evaluate the evidence relating to the appellant's participation as argued by counsel for the appellants. It was contended that there is no direct evidence implicating the appellants except the testimony of PW8 which should not have been relied upon because it was inconsistent with the evidence of PW2. The other contentions were based on admissibility of the charge and caution statements which we have already found in ground 2 above to have been

5 admitted on record by the trial Judge in error but for purposes of resolving this ground of appeal, we shall still refer to them.

We have found very instructive the decision in the famous South African case of ***DPP vs Oscar Lenoard Carl Pistorious, Appeal No. 96 of 2015,*** where it was stated that;

10 *"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is*
15 *reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.* [Emphasis added].

In the instant appeal, counsel for the appellants submitted that in reaching her conclusion on the guilt of the appellants, the trial Judge relied on the testimonies of PW2, PW5, PW7 and
20 PW8. He contended that of all those witnesses it was only PW8 who purportedly tried to identify two of the assailants using her phone torch which she shone on them from where she was standing at a distance of 2-3 metres. Counsel argued that in view of the evidence of PW4 who testified that he recovered 14 spent cartridges at the scene, it is unbelievable that PW8 could have stood at a distance of 2-3 metres and lit a torch on the face of the gun man who
25 was rapidly firing those bullets.

We have subjected the evidence of these witnesses to a fresh scrutiny. As regards the evidence of PW8, her testimony was that on the fateful night she came with the deceased to Minakulu Trading Centre but when they reached there it started raining and they sheltered at the verandah of Patela Bar. When PW2 found them there he talked to the deceased and
30 invited them to go inside the bar. They sat up to around 9:00pm when the deceased asked PW2 to drop them at the police post where she was staying. PW2 accepted to do so and he went and picked the motorcycle and the deceased sat on it. However, when PW8 was about to sit, she heard gunshots and she moved back to Patela Bar where she stood at the door 2-3 meters away from the assailants and with the help of the torch on her phone and the light
35 coming from the motorcycle, she was able to see two people one of whom she identified as the 4th appellant whom she had not seen before.

In cross-examination, PW8 testified that she was scared because she was a visitor there and there were several gunshots which lasted for about 5 minutes and that is the time she also took to see the assailants. She however maintained that she was able to identify the 4th

5 appellant and even saw a scar around his eye. In re-examination she introduced new evidence that she was also aided by the light from the vehicle which shone on the assailants.

The offence in this appeal was committed at night. PW2 and PW8 testified that the shooting took place at around 9.00 pm when it was raining. PW3 said it was past 9.00 pm when he heard the gunshots. It is therefore not in dispute that it was dark and visibility was very poor. 10 One needed light to be able to see. The circumstances were also that bullets were being fired rapidly. It is clear from the record that it was also only PW8 who purported to have identified the assailants as the 1st and 4th appellants under the circumstances she testified about. In a situation like that it is now settled that a trial Judge must consider whether there were factors/conditions that favoured correct identification as set out in ***Abdulla Bin Wendo v R,*** 15 ***[1953] EACA 166***. In ***Abdulla Nabulere & Anor vs Uganda, (CA) Cr. Appeal. No.9 of 1978***, this court stated;

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the* 20 *assessors of the special need for caution before convicting the accused on reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witness can all be mistaken. The judge should* 25 *then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All those factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the* 30 *greater the danger.*
>
> *In our judgment, when the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to* 35 *support the identification evidence, provided the court adequately warns itself of the special need for caution."*

The trial Judge in this case referred to the authority ***of Nabulere vs Uganda (Supra)*** and stated that she had applied the parameters of that case to examine the circumstances for 40 identification of the actual assailants. She then evaluated the evidence of PW1 which was basically about the alleged 1st appellant's charge and caution statement which she said was

5 corroborated by the evidence of PW8 who was present at the scene of crime and properly identified the 1st appellant and 4th appellants. We note at page 225 of the records that the trial Judge erroneously relied on the piece of evidence PW8 had introduced in re-examination regarding the source of light which contradicted her evidence in chief and was never subjected to cross-examination to come to a conclusion that PW8 used her torch light and
10 saw two people who included the 1st appellant who were also illuminated by lights of an oncoming motor vehicle and she clearly used those lights to identify them.

We observe that it was irregular for the trial Judge to record and rely on this new piece of evidence in re-examination which was intended to clarify matters that had already been testified about. Upon our own re-evaluation of the evidence at page 54 of the record, during
15 examination in chief PW8 stated thus;

> *"When I was about to sit, I heard the gunshot. I feared and moved back to Patela Bar and stood at the door. The gunshots continued. I had a phone on my chest. I flashed its torch, I saw 2 people. The light from the motor cycle was also shining; it was coming from the side of 2 people. The tall person was standing on the side, the short one was firing the gun. I was*
> 20 *about 2-3 metres away. The tall person I saw very well; he is that one [witness points at A4]."* [Emphasis added].

In cross-examination PW8 stated that she had not known the 4th appellant before but she confirmed that he was the person she saw on that day. She also said she told the police that she saw the 4th appellant and he had a scar. She insisted that if there is light one can see a
25 scar. Then in re-examination she stated thus;

> *"I was standing about 3-4 metres from the people who were shooting. I flashed my torch and the light from the vehicle also shone on them. The scar I told police was around the eye."* [Emphasis added].

Although the trial Judge believed her and relied on that evidence, which she said was
30 corroborated by the charge and caution statements of the 1st and 3rd appellants, to convict the 4th appellant, we find it not free from the possibility of error as the evidence on the source of light was contradictory. In examination in chief PW8 mentioned her phone torch and light that was shining from the motor cycle and coming from the side of the assailants. She never stated whether the motor cycle was moving or she meant the one belonging to PW2 that was
35 stationary. It is also noteworthy that according to the evidence of PW2, it was the indicator of his motor cycle that was on. If at all PW8 meant the motor cycle of PW2, it is common knowledge that indicator lights just flicker on and off. It is not a constant light that could have aided proper visibility. In any event, even if we assume that it was from a moving motorcycle,

5 the fact that it was coming from the side of the assailants as testified by PW8, it would not, in our view, aid her sight as the light from there would instead blur her vision.

In cross-examination, PW8 talked of light from the vehicle which shone on the assailants. She did not specify whether it was from an oncoming vehicle. The trial Judge in her evaluation of that evidence added that the light was from an oncoming vehicle. We find that the trial Judge
10 made that addition in error because it was not in the evidence of PW8 and we fault her for so doing and basing her conclusion on it.

Counsel for the appellants argued that the trial Judge erred in accepting the evidence of identification by PW8 which was unbelievable. We are persuaded by the argument of counsel because to our minds it is inconceivable that an unarmed civilian would be so daring as to
15 stand at a distance of about 2-3 metres and flash light directly in the faces of assailants with a view of identifying them, and moreover to the detail of even seeing a scar on the eye of one of them, when one of them is rapidly firing live bullets. The natural reaction when a gunshot is heard from close range is usually for people to scamper for safety. In fact PW2 testified that PW8 did exactly that and we find that evidence more believable.

20 We must observe that the trial Judge failed to take extra caution in her evaluation of the evidence of PW8 given that the condition for proper identification was very poor since it was night time and the witness even admitted to have been scared as she was a visitor in the area. In addition, PW8 did not know the assailants before. She was seeing them for the first time and worse still at night. It was also her evidence that she saw them for 5 minutes only
25 as the bullets were being fired. She could only vaguely describe the assailants as being short and tall which is not a distinguishing feature since every community right from family level is composed of tall and short people. Even the evidence of alleged distinguishing mark of a scar on the 4th appellant's eye was unbelievable given the prevailing condition and circumstances of this case.

30 We observe further that the issue of identification was even compounded by the fact that no identification parade was carried out to determine whether PW8 could pick out the persons she had seen on the fateful night. She only made dock identification during the trial which was of very little evidential value as it did not provide the safeguards that come with identification parade. Her evidence on that score, as well as when examined on its own, was therefore
35 weak and improbable. It could not bolster a weak prosecution case.

In a situation like that, the true test to be applied was stated in the case of ***Tomasi Omukono & Anor vs Uganda, Criminal Appeal No. 4 of 1977 reported in (HCB) 61*** where the court held thus:

5 *"Although identification of an accused person can he proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness regarding identification, especially when the conditions favouring correct identification are difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can be reasonably concluded that the evidence of identification can*
10 *safely be accepted as free from possibility of error.* ***The true test is not whether the evidence of such witness is reliable. The true test is whether the evidence can be accepted as free from the possibility of error*** [Emphasis added].

Had the trial Judge cautiously addressed her mind to the factors that favour proper identification as set out in the case of ***Nabulere & Anor vs Uganda (supra)*** which she alluded
15 to, she would have found that the conditions were not favourable for correct identification and tested the evidence of PW8 as a single identifying witness with the greatest care as advised in the case of ***Tomasi Omukono & Anor vs Uganda (supra)***. We believe if the trial Judge had done so, she would have found the evidence of PW8 not free from the possibility of error and not relied on it to convict the 1st and 4th appellants.

20 The trial Judge also heavily relied on the confessions as contained in the respective retracted and repudiated charge and caution statements of the 1st and 3rd appellants whose admissibility we have already determined herein above. Even if the 1st and 3rd appellants' charge and caution statements were admissible, the trial Judge was still required, as a matter of law, to evaluate their contents together with the other evidence on record to determine
25 whether they were true in which case she could then find a conviction even without corroboration if she was satisfied that their guilt had been established beyond reasonable doubt.

This position was succinctly stated in ***Tuwamoi vs Uganda (supra)*** as follows:

"If the Court is satisfied that the statement is properly admissible and so admits it, then when
30 *the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the court must decide whether the accused has correctly related what happened and whether*
35 *the statement establishes his guilt with that degree of certainty required in a criminal case."*

The Supreme Court in ***Matovu Musa Kassim vs Uganda, SC Criminal Appeal No. 27 of 2002*** emphasized that position when it stated thus;

"A trial Court should accept any confession which has been retracted or repudiated with caution and must before finding a conviction on such a confession be fully satisfied in all circumstances of that case that the confession is true."

As regards the 1st appellant, the trial Judge also stated in her judgment at page 228 of the record, paragraph 2 that it was her finding that he was implicated by PW2 the victim of attempted murder and PW8 to the satisfaction of court. With all due respect, we have thoroughly reviewed the evidence of PW2 and we do not find any statement implicating the 1st appellant let alone any reference to him. Similarly, we have not seen any evidence where PW8 stated that she saw the 1st appellant apart from stating generally and vaguely that the 2nd assailant who had a gun and was shooting was short.

The trial Judge further made a finding as follows;

"I have also found that the confession of DW1 admitted as P. Exhibit No. 6 satisfactorily leads me to prove that he was indeed placed at the scene of crime at the material time that the offence was committed. Further, despite the allegation that at such an hour in the conditions for identification were not favourable, it is my finding that DW1 in his confession unequivocally admits to having participated in this crime. He not only implicated himself, but others as well whom he mentioned by names; I have already ruled that this confession was extracted lawfully and was admissible before court after subjecting it to a trial within a trial."

We note that the trial Judge only alluded to the admissibility of the statement and not the veracity of its content which is required at this stage. In addition, she appeared to have been convinced that the 1st and 3rd appellants' statements were true without subjecting it to a close scrutiny and that is why her evaluation of the other evidence on record were all skewed towards them. In our view, it affected her ability to assess the credibility and veracity of each of the prosecution evidence independently before she could consider them in their totality together with the defence evidence. It was clear that the evidence of PW5 about what the 3rd appellant allegedly told him which he recorded in the charge and caution statement was quite different from most of what was recorded in the charge and caution statement that was admitted in evidence as P. Exhibit No.5.

PW5 testified at page 20 of the record as follows;

"He informed me that on the 25. 04. 2011 at around 6.00pm in the evening Ogwal went to him (A4) and told him that. I recorded down what he was saying. After he finished, I read back the whole statement to him. It was recorded as he was talking. He told me that he wanted him to accompany him to Minakulu trading center to Alwoko Florence. That they went together to the home of Alwoko Florence at Minakulu. He told me at first he did not know why they were coming to visit Florence. He continued to tell me that Alwoko told them that he had

5 *a brother in law called Angole Nyang Moses, who is disturbing her at their home, so he wanted both of them to kill the said Moses. Later on, he said Alwoko Florence removed a gun from a bag and gave it to Onegi. I wanted to know if he knows Angole Nyang Moses. He said Angole Nyang is a chairman; the NRM chairman and he knew him. He said Alwok promised to him him 300,000/= in case they completed the assignment. That he involved one*
10 *Onegi to assist him in the mission. He went back on the 26th. He was ridden on a motorcycle by Onegi. I asked him why he involved Onegi. He told me Onegi had been a soldier. When they came to Minakulu, the mission was done. (SIC)*

The shooting was done by Onegi. Ogwal gave him the rifle. I wanted to know if the shooting was on Angole Nyang only. He said there was also a woman on the motorcycle who was
15 *sitting. His statement ended. I read it to him. He confirmed that it is what he said.*

I wanted to know if there was anything more he wanted to add. He said it was enough from him. I asked him to sign and he signed, then I countersigned…"

Meanwhile the content of the charge and caution statement allegedly made by the 3rd appellant is as follows:

20 *"On the 31/04/011, I left my home in Wirao to come and see my brother in law who was sick at Aceno village and he is called Okello Santo, then after as I was going back, I branched to the home of my Nice Mrs. Florence Ogwete who I got at home and she told me that Ogwal Richard and Onegi short at Angole Nyang and also kill Awor Hellen and she further told me that she is the one who sent Ogwal and Onegi to go and kill Angole Nyang but she did not*
25 *tell me why she wanted them to kill Angole Nyang. Only told me that she used Otee who is the driver to rack for Angole Nyang and identify him to the killers. I felt concerned when she told me that Angole Nyang bewitched her eyes and that of the son. During our conversation she told me that Ogwal Richard has gone with the gun to Ajaga, then she sent Amen Evaline to go and remove something from the house and give me to go with it, and keep then she*
30 *told me that she has sent somebody to Ogwal Richard to go and tell him that he should something to me to keep. So I left and went home. Then on 6/5/011, Ogwal Richard came to me at night with a SMG rifle and two magazines and told me that Florence Ogwette said that I should keep because the information is leaking out and Ogwal further told me that if the investigation into the case has pashed then Ogwal will come and get it from me and take it*
35 *back to her. I received this rifle with the two magazines plus the one Flow gave me and I took and dug a hole and burry it in the old house of my son which he has left. Then on 11/5/011 at around 05 30/e I was at home asleep, then I heard some people calling me and before that I heard the dogs backing, those people told me that they were policemen, I came out to them and I was put on handcuffs and move to the place where the mv was and we were*
40 *driven to Minakulu and to Oyam CPS. In the mv I found Ogwal Richard. We were brought to Lira CPS. Then on the 11/05/011 I was taken back to Oyam where I took the police to go and*

5 *recover the gun and Ogwal also revealed to them that Onegi was the one who killed and injured those people and Onegi was also arrested and all of us are now in Lira Police Station where I have recorded this statement; and all recorded are true and correct. Read back to me, found correct and I sign."(Sic).*

Although the disparity in the evidence of PW5 and the content of P. Exhibit No.5 is obvious, 10 the trial Judge never addressed her mind to it. She only referred to the part where the 3rd appellant allegedly said he was given a small riffle and two magazines by the 4th appellant who told him the 2nd appellant had said he should keep them until the investigation of the case was over. She also referred to the part of the statement where the 3rd appellant allegedly narrated how he was arrested.

15

The apparent difference in the evidence of PW5 and the content of the charge and caution statement attributed to the 3rd appellant is that one narrates the story before the incident and makes the 3rd appellant part of the team that planned and executed the murder thus making him a principal offender while the other one brings him on board after the offence had been 20 committed thereby making him an accessory after the fact. We find that this irreconcilable difference between the evidence of PW5 and the content of the charge and caution statement was material. In our view, it went to the root of the prosecution case and therefore it should not have been ignored.

25 The trial Judge also stated that this evidence was corroborated by the evidence of PW6, the investigating officer who testified that he was part of the team that arrested the 3rd and 4th appellants and recovered the gun used in the murder from the home of the 3rd appellant. We have perused the evidence of PW6 who testified that on 8/5/2011 he was dispatched by the Regional Police Commander to go to Oyam and liaise with the District CID Oyam to beef up 30 the ongoing investigation and transfer the suspects to Oyam. By that time there were 3 suspects including the 2nd appellant in Oyam Police cells. One of the suspects revealed to them that he knew everything and they took him aside for interview which revealed details of what transpired and how the 4th appellant was also involved. They swung into action by first moving to Minakulu police post for more reinforcement after which they drove to Parklani 35 where they arrested the 4th appellant who confessed to them that it was the 1st appellant who pulled the trigger. The 4th appellant also revealed that it was the 3rd appellant who had kept the gun in his goats' kraal. They moved in to arrest the 3rd appellant through the LC1 of the area and upon his arrest he immediately confessed that he had the gun and took them to where he had kept it underground and when the chairman dug the place, they recovered a 40 full gun SMG with 3 magazines.

5 PW6 added that they made a search certificate which he signed and the LC 1 Chairperson also signed it and retained a copy. He gave a copy to the in-charge of the case and retained a copy for himself. He was surprised that there was no copy of the search warrant on the file. He also testified that he learnt that the gun was examined by a ballistic officer and firing checked in Kampala.

10 First of all, as regards corroboration, even if the charge and caution statement was properly admitted in evidence, it would not be corroborated by the evidence of PW6 in some material aspects as it had major inconsistencies regarding the arrest of the 3rd appellant and the recovery of the gun. While PW6 stated in his evidence that immediately after arresting the 3rd appellant, he confessed that he had the gun which was recovered there and then, in the 15 statement the 3rd appellant allegedly stated that after his arrest on 11/05/2011 (initially written 10/05/2011 then 10 crossed and replaced with 11) he was taken to Minakulu and then to Oyam CPS and to Lira CPS. Then on the 11/05/011 he was taken back to Oyam where he took the police to go and recover the gun. Perhaps the crossing of the date that was first written as 10 and replacing it with 11 explains why the subsequent statement begins with, 20 "then on 11/05/2011" because ordinarily if he was taken back the same day there would be no need to state the date again.

We note that it was the testimony of PW4 that on 11/05/2011 he joined a team from Lira led by PW6 which took back the 3rd appellant to his home and they recovered the gun. This material inconsistency on the arrest of the 3rd appellant and recovery of the gun was never 25 considered by the trial Judge.

Secondly, we have also had the opportunity to peruse the evidence and the plain police statement of DW8, Oyengo Celestino, the LC 1 Chairman of the 3rd appellant's village through whom the arrest was said to have been effected and who was alleged to have dug out the gun and also signed the search warrant. We find some deliberate untruthfulness in the 30 evidence of PW6 regarding the alleged role of this witness in the arrest of the 3rd appellant and recovery of the gun from him.

We note that DW8 maintained in both his plain statement and evidence on oath even under intense cross-examination that he only heard about recovery of the gun as he did not participate in it and none of the people who recovered the gun came to his home. He denied 35 signing any document or remaining with a copy of it. He testified that a police officer and a person whose name he later learnt to be Angole Nyang, (PW2) came to him in 2013 and wanted him to tell them how and where the gun was recovered but he said he knew nothing. But when he was shown his plain statement, he admitted that he made a short statement in 2013 in which he said he only heard the rumour of recovery of the gun and thought that the

5 authorities that recovered it would come and record his statement but up to that time they had not come.

We are of the view that there was some deliberate effort to reconstruct evidence in this case by the investigating officers and to that end DW8 was belatedly approached in 2013 to record a statement on how and where the gun was recovered but when his evidence appeared
10 unfavourable to the prosecution case it was abandoned. Unfortunately for PW6 who did not anticipate that DW8 would appear as a defence witness, he told some blatant lies that the 3rd appellant was arrested through his LC1 (PW8) who dug the ground where the gun was buried and even signed the search warrant.

Regarding the gun, the trial Judge made a finding as follows;

15 > *"The gun was admitted without any objection from the defence as P. Exhibit No. 3, Magazines as P. Exhibit No. 4 (a), (b) and (c) including the 75 rounds of ammunition. I therefore have no doubt that the killer weapon and two magazines was recovered from the home of DW3 by a team of police officers."*

We wish to point out that there was no basis for the trial Judge's finding that the gun which
20 was recovered from the 3rd appellant was the killer weapon as no ballistic experts report confirming that the said gun was capable of firing bullets and actually it was the one that fired the bullets whose cartridges were found at the scene of crime and the bullet that was removed from the leg of PW2.

Besides, contrary to the evidence of PW6, there was actually no search certificate signed by
25 the officers who recovered the gun and DW8. Yet if indeed a search had been conducted under a search warrant, a search certificate should been prepared and duly signed by the officers who conducted the search, the local authorities who witnessed it and the 3rd appellant in whose home and presence the gun was alleged to have been recovered pursuant to section 27 of the Police Act, Cap 303.

30 Even if the gun was recovered immediately upon arrest of the 3rd appellant as testified by PW6 at least the police officers who recovered it and the local authorities who witnessed it should have immediately made police statements to that effect and testified about it in court. The only direct evidence on record about recovery of the gun is that of PW6 which, in our view, is tainted with a lot of deliberate falsehood that goes to the root of the prosecution case.

35 Had the trial Judge properly evaluated the evidence, she would have found it full of gaps and incapable of sustaining a conviction and she should have instead found that the prosecution had failed to discharge its duty to prove beyond reasonable doubt that the 1st, 3rd and 4th

5 appellants participated in the offence. She should have then acquitted them of both counts of the offence of murder and attempted murder.

As regards the 2nd appellant, her conviction was based on the evidence of PW2 that she was his sister-in-law with whom he had a grudge over the claim for his late brother's benefits which she fraudulently received and utilized. Furthermore, that PW2 cried out her name when he

10 was shot and injured and she was also the first to arrive at the scene of crime. The trial Judge found that the evidence of PW2 was corroborated by that of PW8 who was at the scene of crime and that of PW6 the investigating officer. PW8 had testified that after the assailants had left, she went to PW2 who was shouting that the 2nd appellant was killing him for nothing. She further testified that the 2nd appellant was the first person to arrive at the scene of the crime

15 and she was followed by her husband shortly. These pieces of evidence were further found by the trial Judge to have been corroborated by the charge and caution statements of the 1st and 3rd appellants which we have already found to have been admitted in evidence in error.

We have subjected all the evidence that was adduced to prove the 2nd appellant's participation in the offence to a fresh scrutiny and our finding is that the trial Judge did not follow the proper

20 procedure for evaluating the evidence in their totality. She first evaluated the prosecution evidence in isolation of the defence evidence. The 2nd appellant's evidence in defence as adduced by her and the other defence witnesses', including her husband, were analysed after the trial Judge had already made a finding that she had found compelling evidence to prove that the 2nd appellant was the mastermind of the crime before court and her actual role had

25 been clearly outlined in Prosecution Exhibit Nos. 5 & 6, being the charge and caution statements of the 3rd and 1st appellants respectively, her co-accused.

It is apparent to us that because of this approach, the defence evidence was not evaluated with an open mind but rather with a bias to find out whether it discredited the prosecution evidence which had already been found to be compelling. This can be clearly seen from the

30 conclusion of the trial Judge after evaluating the evidence of each of the defence witnesses. For example, upon evaluating the evidence of DW9, the 2nd appellant's husband, the trial Judge stated as follows;

> *"Further, his evidence only proves that A2 was not at the scene of crime; this is not disputed by court, however, his evidence did not discredit the prosecution's evidence about the events*
>
> 35 *before 26.04.2011 which were masterminded by A2."*

In conclusion, the trial Judge stated in respect of the 2nd appellant as follows;

> *"After a careful analysis of the events that led to the commission of these offences and the evidence led by the prosecution in this case, it is my finding that in respect of the role played*

by A2 Alwok Florence (testified as DW2) in the commission of this offence, the prosecution has led convincing evidence that she was indeed the master planner of the commission of these offences. I have arrived at this finding after carefully analyzing the evidence of PW2 Angole Nyang Moses her brother in law and victim of attempted murder. The evidence clearly indicates there was an ongoing grudge between the two of them over money belonging to the brother of PW2 who was deceased; she was even prosecuted for this offence as per P. Exhibit No.7. While I agree that she was not at the scene of crime at the exact time that the actual offences were committed, the evidence of PW2 confirming her motive, corroborated by PW8 who saw immediately at the scene; I have found her defence a mere fabrication intended to derail court and not relevant to explain how she became known to both DW1 and DW3." (Sic).

There was really no compelling evidence on the 2nd appellant's participation apart from the evidence of PW2 on her grudge with him and her alleged threat that she would deal with him which, in any event, was not corroborated by any other independent evidence save for what was allegedly stated in the 1st and 3rd appellants' charge and caution statements. To our minds, the evidence of PW2 amounted to a mere suspicion which could not support a conviction in the absence of corroboration with credible evidence.

We also wish to point out that we have perused the police statement of PW2 which he made on 27/04/2011 (D. Exhibit No.1 (a)), the next day after the incident and the additional statement that he made on 11/05/2011. We note that PW2 neither alluded to the grudge between him and the 3rd appellant or even the threat to deal with him in the 1st statement nor mentioned the 3rd appellant's name in the statement. He did not even say that he cried out with anybody's name. He only stated that after the gun shot he started making an alarm to call people.

It was in the police statement dated 11/05/2011 (D. Exhibit No. 1 (b)) where PW2 stated that on 2/05/2011 Alobo Patrick went to him with Jalobo Charles and informed him that those who shot at him were planning to use other means to kill him by either poisoning him or using the medical staff in the hospital to inject him with poison. Further that when he requested to know from Alobo the person who had told him, he refused to tell him. However, after a one Etuk was arrested, Alobo called him and said Etuk would reveal the information to police since he was now in their hands. Alobo then told him that the 2nd appellant was insisting that she was still going to kill him whether he returned from the hospital walking or crawling. He also narrated how his grudge started with the 2nd appellant and how the clan leaders were involved in trying to resolve it and the warning he received through a one Pamela Oloya whose husband had allegedly told her that the 2nd appellant was planning to hire some people from Gulu to go and kill him by shooting. He stated that the 4th appellant was also involved. On

5 25/04/2011, he reported the matter to his clan chief who promised to call a meeting but he was shot the following day before the meeting could be held.

It is these pieces of information that PW2 testified about and the trial Judge said his evidence was corroborated by that of PW8 who was at the scene of crime and that of PW6 the investigating officer as well as the charge and caution statements of the 1st and 3rd appellants.
10 It is noteworthy that the clan leader who is said to have received the report of threat by the 2nd appellant against the life of PW2 was never called by the prosecution to testify. Neither did Pamela Oloya, for whatever value her evidence would have added to the prosecution case, testify.

To our minds, the allegation that the 2nd appellant masterminded the offence came from PW2
15 as an afterthought upon hearing the rumors that were prevailing after the incident. It remained a suspicion as no credible evidence was adduced to prove the same.

In the course of perusing the evidence on record, we keenly followed the line of cross-examination of PW2 and PW8 by the defence and the evidence of the 2nd appellant and her husband which suggested that PW2 was in love with the deceased and her husband who was
20 a police officer and said to have been on pass leave and away at that material time could have been responsible for the crime. PW2 denied any love affair with the deceased but conceded that he was putting on her police sweater which he borrowed from her as they were going to ride in the rain. It is worth noting that they both happened to be at Patela Bar at that material time and the background facts of the case, which the trial Judge said in her judgment
25 was summarized from the prosecution case by counsel for the appellants, suggested that PW2 bought some drinks for the deceased and her visitor. We must however point out that our own perusal of the evidence on record did not disclose that fact.

It is also on record that the deceased's husband was arrested and released. Our view is that there was evidence of a probable motive for the crime which presented another hypothesis
30 for the death of the deceased and the shooting of PW2. In our view, that clue should have also been investigated to its logical conclusion alongside with the allegations against the 2nd appellant.

Had the trial Judge properly evaluated all the evidence on record she would have found that prosecution had failed to prove beyond reasonable doubt that the 2nd appellant planned and
35 organized the crime that led to the death of the deceased and injury of PW2 as other possibilities had not been ruled out. We therefore find that the trial Judge erred in not properly evaluating the evidence and coming to a wrong conclusion that the case against the 2nd appellant had been proved to the required standard.

For the 5th appellant, we will handle this ground together with ground 6 where the trial Judge is faulted for convicting the 5th appellant of the offence of conspiracy to commit a felony when there was no evidence to that effect. The trial Judge stated from the onset in her judgment as she considered the case against the 5th appellant that she relied on the evidence of PW4, PW5 and PW6 to prove that he was part of the conspiracy with his mother the 2nd appellant to secure the murder weapon and that his role was to ferry the gun that was used in killing the deceased and injuring his uncle PW2.

We note that the trial Judge did not point out aspects of the evidence she relied on to arrive at that conclusion. She found that from the evidence on record, prosecution did not prove all the ingredients of both the offences of murder and attempted murder against him beyond reasonable doubt and acquitted him. She however found that the evidence led by prosecution as testified by PW4, PW5 and PW6 proved a lesser, minor and cognate offence of conspiracy to commit a felony contrary to section 208 of the Penal Code Act. We have failed to discern whether the trial Judge meant conspiracy to commit a felony as provided under section 390 of the PCA or conspiracy to murder as provided under section 208 of the PCA. What makes it even more confusing is when she quoted what she said was section 208 in the following words and left out the key words; *"to kill any person"* that are contained in that section;

> *"S. 208 reads that:-*
>
> *"Any person who conspires with any other person, whether such person is in Uganda or elsewhere commits a felony and is liable to imprisonment for fourteen years.""*

If at all the trial Judge meant conspiracy to commit a felony which she stated in her judgment, the sentence prescribed under section 390 of the PCA is seven years and not fourteen years. There was definitely a mix up of the law under which the 5th appellant was found culpable. Although counsel for the appellants did not specifically point out this anomaly in his arguments, in our view, this infringed on the 5th appellant's right to a fair hearing as the anomaly created confusion and doubt as to which offence he was convicted of and the proper sentence he is to serve. For that reason alone even without reappraising the evidence upon which his conviction was based, we would resolve the doubt in favour of the 5th appellant, set aside his conviction and quash the sentence.

Be that as it may, we have found it necessary to also reappraise the evidence and make some few comments in some areas. To that end, we have subjected the evidence of PW4, PW5 and PW6 which the trial Judge said she relied on to a fresh scrutiny to determine whether prosecution indeed proved any offence against the 5th appellant.

5 PW4, Corporal Ayo who was attached to Minakulu Police Post testified that he heard the gunshots on the fateful night and proceeded to the scene of crime which he condoned off upon the advice of the DPC whom he had informed of the incident on phone. He also testified that he was part of the team that arrested the 1st appellant when they had taken back the 3rd appellant to recover the gun from his home. There was completely no mention of the 5th 10 appellant in his evidence. We therefore do not know which aspect of the evidence of PW4 the trial Judge relied on to support the 5th appellant's conviction.

For PW5, all his evidence was based on what the 1st, 3rd and 4th appellants told him as he recorded their respective charge and caution statements which were found to be inadmissible for the reasons already stated herein above. His evidence was therefore not admissible for 15 the same reason. The trial Judge relied on it in error.

As for PW6, we have already pointed out the gaps and deliberate lies in his evidence which discredits it. But more specifically as relates to the 5th appellant, PW6 only mentioned his name as he narrated what he was allegedly told by one of the suspects who volunteered information that led to the arrest of all the appellants except the 2nd appellant. That suspect 20 was released and never called to testify to what he allegedly told PW6. We find that in the absence of his direct evidence, the evidence of PW6 concerning the role of the 5th appellant in the crime was a hearsay that was inadmissible and it should have been treated as such by the trial Judge.

On the whole, we find that there was no cogent evidence on record that the trial Judge could 25 rely on to find a conviction of the 5th appellant. We therefore fault her for convicting the 5th appellant of an offence that was not clear and moreover when prosecution had failed to discharge its duty of proving a case against him to the required standard.

For the 6th appellant, the trial Judge also stated from the onset that the prosecution led compelling evidence that he was seen scouting the presence and movements of PW2 that 30 fateful evening before the offence was committed and he was indeed seen by PW2. She then found that his participation was corroborated by the evidence of PW4, PW5 and PW6 and P. Exhibit Nos. 5 and 6.

We have thoroughly perused the evidence of PW4, PW5 and PW6 and with all due respect to the trial Judge, we were not able to see reference to the 6th appellant in any of them. The 35 only witness who mentioned the 6th appellant was PW2 when he said in examination in chief that he knew the deceased who died on 24 /05/2011. He was at Minakulu Health Centre at around 9.00 pm where he had gone to chat with his friend. When he reached he found the

deceased sitting there with his sister-in-law. He then saw the 6th appellant passing behind the bar.

The import of PW2's evidence in chief was that he saw the 6th appellant on the fateful evening. However, in cross-examination, PW2 said he saw the 5th appellant pass by and the next day the incident took place. He said that was a public place with many people. It was therefore not clear whether PW2 saw the 6th appellant the previous day or on the fateful day. Of course in the charge and caution statements of the 1st and 3rd appellants, which we found to be inadmissible, there was a mention of the 6th appellant as the one who did the recking for the assailants.

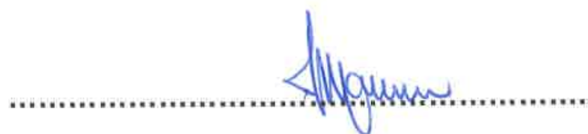
In the absence of any cogent evidence to corroborate the inconsistent evidence of PW2 regarding the 6th appellant's role in the crime, there would be no basis to conclude that he participated in it. His conviction was therefore erroneous due to the trial Judge's failure to properly evaluate the evidence.

All in all we find that the trial Judge failed to properly evaluate the evidence on participation of the appellants. Had she done so, she would have discovered the gaps, contradictions/inconsistencies and the deliberate untruthfulness we have highlighted above and found that the prosecution had failed to discharge its burden of proof to the required standard. Upon our own re-evaluation of the evidence, we so find. We do not think it is necessary to again consider the remaining grounds 3 and 7 of the appeal as this finding disposes of the appeal.

In the result, this appeal succeeds and the conviction of all the appellants are quashed and their respective sentences set aside.

We so order.

Dated at **Kampala** this....4th.....day of.........April.................................2019



Hon. Mr. Justice Kenneth Kakuru

JUSTICE OF APPEAL

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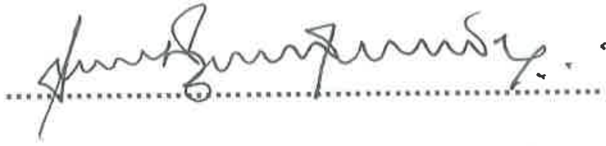

Hon. Mr. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL