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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-CN-0048-2009

(Arising from Buganda Road Court Crim. Case No. 1125 of 2008)

1. ASHIMWE GODFREY}

2. WASSWA GONZAGA }APPELLANTS

VERSUS

UGANDARESPONDENT

BEFORE: HON. JUSTICE RUGADYA ATWOKI

JUDGMENT

This is an appeal from the judgment of the Chief Magistrate sitting at Buganda Road Court in which the two appellants were convicted of conspiracy to murder c/s 208 of the Penal Code Act, and sentenced to three years imprisonment. Being dissatisfied with that decision, they appealed to this court against both the conviction and sentence.

Briefly the facts were that PW1, Hajji Musaayi was owner of the land at Mawagulu Mawokota. It had tenants (bibanja owners) including the 2nd appellant Wasswa Gozanga. He sought vacant possession by resettling the tenants on his land. He agreed with some but others including A2 did not agree to be resettled. On 18/12/2007 PW1's surveyors while on their duties on the suit land were assaulted and their vehicle vandalized. Following this attack, criminal case No.241/2008 of assault and malicious damage to property was instituted in Mpigi court against the suspects who included A2. In 2009 they were acquitted.

Nine months later the two appellants were charged with conspiracy to murder PW1, which was orchestrated in 2007. They denied the charge, gave sworn evidence and called

witnesses. The trial magistrate convicted them and sentenced them to three years imprisonment. They appealed to this court, and were granted bail pending their appeal.

Three grounds were set out in the memorandum of appeal as follows.

1. The learned trial magistrate erred in law and in fact when he convicted the appellants basing on the uncorroborated evidence of a communications print out from MTN as evidence of conspiracy to murder their landlord, Haji Haruna Musayi.
2. The learned trial magistrate erred in law and fact when in convicting the appellants, he relied on the uncorroborated evidence of accomplices, PW2 and PW3 who claimed that they were paid shs.3 million by the appellants in order to kill him but the money was not exhibited as evidence of an overt act.
3. The learned trial magistrate erred in law and fact when for conviction of the appellants, he relied on the weakness of the defence case that did not call any other witnesses apart from themselves, but preferred the evidence of 5 prosecution witnesses all of whom were accomplices in the crime.
4. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus wrongly convicting the appellants.

The duty of a 1st appellate court has been stated by the superior courts in a number of decisions. In *Baguma Fred v. Uganda* SC Cr. App. No 7 of 2004, the Supreme Court held that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. [See *Pandya v. R* [1957] EA 336, *Ruwala v. R* [1957] EA 570, *Bogere Moses v. Uganda* Cr. App. No.1/97(SC), and *Okethi Okale v. Republic* [1965] EA 555].

The duty of a 1st appellate court to re examine the evidence on record and come to its own conclusions on the facts means in practical terms that the appellant expects nothing less than a fresh and exhaustive scrutiny of the evidence on record as if it is a retrial.

The evidence before the trial court was from PW1 Musayi, the alleged victim of the conspiracy to kill. He was summoned to the office of the Regional Police Commander (RPC) Bitwire and told of a plot to kill him. A telephone conversation between PW2 and A1 was made audible for him and the RPC Bitwire PW4 to hear. In that conversation the plot to kill him was revealed. A1 told PW1 that the victim of the plot was the one they had been shown in Wandegeya. He had scars on the head and at times wore spectacles. Court was shown the scars on the head of the witness. The reason for the plot to kill him was because of a land dispute between him and A2 the brother of A1.

PW2 was one of the operatives attached to the Rapid Response Unit of the police force (RRU). He was detailed by RPC Bitwire to find out about the burning of a vehicle and destruction of property and injury to people in the area called Maya. He was with a colleague PW3 another RRU operative. Both are members of the UPDF. While they travelled back, one of their colleagues Mulumba called him and told him of a deal. Mulumba told him to await a call from the person who would give him the details of the deal.

Indeed soon a person who later was identified as A1 called and they agreed to meet at a petrol station on Kafumbe Mukasa road near Owino market where the contact was said to be. The witness described the vehicle he was in, which had Kenya registration number plates. The witness together with PW3 met A1 and A2 and the discussion took place inside the car.

The deal was to kill or set up to be killed one Haji Haruna Musayi PW1 for the reason that he owned a gun illegally and was threatening people. He was even a land grabber. A sum of shs 3 million was promised to be paid as soon as the mission was accomplished.

The two deal makers A1 and A2 took the witness and PW3 to Wandegeya in order to identify the victim. They drove in the Kenya registered vehicle to Wandegeya and in a shop of used cookers and refrigerators a man in a kanzu and with clearly identifiable

scars on the head was pointed to them as the victim of the mission. They two deal makers passed on shs 30,000/- for fuel and shs 20,000/- for airtime all for facilitation of the deal.

PW3 was the co operative from RRU. He was with PW2 when the deal to kill PW1 was consummated. PW4 RPC Bitwire coordinated the case and called in Mulumba to ensure that the suspects were apprehended. PW5 was the IO in the case. He tendered in evidence the print outs from the MTN data centre which showed the various telephone contacts between A1, A2 and PW2 and Mulumba who introduced the two accused to the army operatives.

The two accused each gave sworn testimony, and called two witnesses. A1 told court that he had no interest in the land in dispute. He was drawn into the matter when his brother A2 who had interest in the land of PW1 was being chased around by two armed men. He contacted a brother and UPDF officer Mulumba for advice. Mulumba set up the contact with the two army men who were looking for his brother A2, and these were PW2 and PW3. He met the two and explained that the problem was a land dispute between A2 and PW1. He denied giving the two any money or promising them any. He told court that he never went with the army men to Wandegeya. He was not summoned to the police; he went there on his own.

A2 also testified on oath. He was a second hand clothes dealer at Owino market. He had a land dispute with PW1. He called in his brother Asimwe A1 to help. Asimwe contacted PW2 and PW3. The witness told court that he never gave them anything and never travelled with them anywhere in their car. Musayi PW1 had dragged him to court at least 4 times. He denied that he wanted to kill PW1.

Kakooza James DW3 was the defence secretary of Kamwokya. The 2 accused were his friends. When they told him of land wrangles, he took them to one Musana the Regional CID Officer. When they got to Musana, he directed them to RPC Bitwire PW4 who instead arrested them.

The learned Chief Magistrate believed the prosecution witnesses and disbelieved the defence evidence. He convicted the two accused and sentenced them to imprisonment for three years.

During the hearing of the appeal, only the 1st and 4th grounds of appeal were argued. This in effect disposed of all the grounds of appeal. The 1st ground was that the trial court did not consider the appellants defence which was raised during the trial. The defence of A1 was a total denial. He had no interest in the land of PW1. He only came into the picture when his brother A2 was being chased around by two armed men, and in the attempt to help him, he contacted Mulumba an army man who linked him to PW2 and PW3. The defence of A2 was equally a total denial. He was being harassed by armed people on account of the land dispute between him and PW1. He approached the LCI Chairperson of Kamwokya, his relative for assistance. The LCI Chairperson took them to Musana the CID Chief of Kampala, who instead handed him over to PW4 for arrest.

The testimony of PW2 was that when the two accused realised that these two operatives were the same ones who had earlier visited the scene when the motor vehicle of the surveyors was vandalised, they developed cold feet and their linkman Mulumba warned PW2 and PW3 accordingly. Upon this sudden turn of events, the operatives reported to PW4 RPC Bitwire for further directions, and Bitwire summoned Mulumba, and ordered him to call the suspects to Central Police Station (CPS). That was how A2 was arrested.

The evidence of the defence witness DW3 was that he led the team which included A2 to CPS and when they were led to the office of Bitwire, there were four people inside. That corroborates the evidence of PW2 because in that room were Bitwire, the two operatives PW2 and PW3 plus Mulumba. Mulumba was the army man who brokered the deal and linked the accused with the two operatives PW2 and PW3.

Bitwire caused the arrest of A2 because he was aware of the ongoing investigations of a plot to kill PW1 in which PW2 and PW3 who were supposed to carry out the mission, were assisting the police to net the suspects. That was why he called in Mulumba who knew them well. The complaint was that Mulumba was not called to testify. To me rather the issue would be why he was not charged as a co conspirator in the plot to kill PW1.

Mulumba called A2 on the pretext that he was to get them a new deal since they were not comfortable with the one involving PW2 and PW3. A2 promptly came at CPS in

company of others, including DW3. He testified so, and this corroborated the evidence of PW2 in this respect.

The evidence of A1 was that he was the one who was in direct contact with the army operatives and in particular PW2, as he was the one able to talk the Runyankole language. His co accused corroborated that evidence. PW3 further corroborated that aspect of the evidence. The evidence of the two accused persons was that they met the two army operatives at or near a petrol station not far from Owino market and discussions commenced. The army operatives were in a saloon car with Kenya registration number plates. That evidence corroborated that of both PW2 and PW3.

The involvement of the two accused persons in the plot to kill PW1 was proved by the evidence on the record. I was satisfied that the trial court considered fully, even if this was in a single paragraph, the defences raised by the two accused persons and came to the right conclusion. The 1st ground of appeal is therefore to be dismissed.

The 4th ground of appeal, which encompassed all the remaining grounds of appeal was a complaint that the trial court did not properly evaluate the evidence on record and thus wrongly convicted the appellants.

The complaint here was on 5 aspects of the trial. 1st that there was selective presentation of the witnesses by the prosecution. The argument was that Mulumba who was key to the alleged plot to kill PW1 was not called to testify. The reason to me was simple. He was more of a co conspirator and so his value as a prosecution witness was limited. He was the one who linked the accused to the operatives. When the cover of the operatives was blown, he confronted them about possible double dealing. That was when the operatives quickly moved to Bitwire and caused the arrest of the suspects.

The 2nd complaint was that the trial court relied on the MTN data centre printouts. These printouts showed that there was communication by telephone between A1 and A2 on one hand, and Mulumba on the other. There was also communication between A1 and A2 on one hand, and PW1 and PW2 on the other hand. There was also communication between PW1 and Mulumba. All this communication was between 15th and 29th December.

The argument was that the printouts did not show what was said during these telephone contacts. The printouts therefore ought not to have been relied on to prove conspiracy. The trial court found that there was indeed communication between the parties at the material time when the plan to kill PW1 was hatched. This was from the evidence of PW2 and PW3. The evidence was that the accused persons gave money to the operatives for airtime for this purpose. Calls were made by A1 and A2 to both PW2 and PW3. The printouts showed this. The printouts corroborated prosecution evidence that there was communication between the two accused persons and the army operatives at the relevant time.

The 3rd complaint was that the trial court did not consider the cause of the problem. The argument being that A1 who had no interest in the land of PW1 would not have any motive to kill him. Secondly it was not believable that a crime allegedly contrived and plotted in August 2008 could be prosecuted in December 2009, almost 9 months later. The argument being that the conspiracy charge was an afterthought after the charges of assault and malicious damage to property collapsed in Mpigi court.

The evidence of A1 was that he was assisting his brother A2, who was being harassed by PW1 using armed men. His evidence was that Musayi had caused the arrest of his brother at least 4 times. Now armed men were looking for him. So he plunged into the matter in order to assist his brother out of these difficulties. He knew a brother in CMI one Mulumba who could solve the problem. He contacted said Mulumba who claimed he was far, but linked him to PW2 and PW3, who would accomplish the intended mission. The mission was to kill or arrange to have killed Musayi PW1. The evidence of PW3 and that of Bitwire PW4 corroborated that aspect of the evidence. A1 was a full participant in the plot.

From the evidence of PW2 and PW3, the contract to kill PW1 was in December 2007. The printouts from MTN were for the period 15th to 29th December 2007. Both A1 and A2 testified to events of December 2007. The two were charged with this offence on 4th September 2008. The evidence of the Investigating Officer was that A2 was on a charge of assault and malicious damage to property in Mpigi, and that he had refused to record a statement. It was only the week before the trial of the present charges that the trial in

Mpigi ended. The investigations in this case including the arrest at CPS was done in December 2007 soon as the plot was discovered. This was corroborated by both accused persons. Therefore the submission that the conspiracy charge was an afterthought was to be dismissed as the record of evidence did not bear that out.

The 4th complaint was that the evidence of the two main prosecution witnesses ought not to be relied on. These two, PW2 and PW3 were army operatives attached to RRU. They were identified as people who went to the scene soon after the vehicle of the surveyors was vandalised. They were the two armed men who were said to be looking for A2 and in respect of whom A1 sought help from Mulumba. These were not police officers. They agreed that they were not mandated to handle land cases. It was argued that the way they found themselves on a land case before the conspiracy theory emerged was suspect.

PW1 testified that they were doing patrol duties as part of their security detail. They were instructed to go to Maya by RPC Bitwire and check out some reported chaos in the area. Indeed when they got to the area they found that a motor vehicle was vandalised beyond recognition, some people were injured and there was a possibility that some might have sustained fatal injuries.

The evidence of PW2 was that they did not investigate the land case as they were not mandated to handle land cases. Once they observed what was at the scene, including the fact that police was already present, they reported this to their boss Bitwire. That was the extent of their involvement before the conspiracy plot emerged.

The last complaint was a general one that the evidence on record could not sustain the charge. It was submitted for the appellants that the alleged overt act was the giving of money yet the evidence was inconclusive in this regard, and was contradictory. There was no evidence that the killing of Musayi was the only option left to the hired killers as there was the option of taking Musayi to the scene where the mob would do the job. Lastly it was submitted that the prosecution case was riddled with contradictions which made it unsafe to found a conviction.

S. 208 of the Penal Code Act provides thus;

‘Any person who conspires with another person to kill any person, whether such person is in Uganda or elsewhere, commits a felony and is liable to imprisonment for fourteen years.’

Conspiracy is an agreement or kind of partnership for criminal purposes in which every member becomes an agent or partner of every other member. The prosecution must prove in a charge of conspiracy to kill that;

- i) That two or more persons, in some way or manner came to a mutual understanding to try and accomplish a common and unlawful plan as charged.
- ii) That the person wilfully became a member of such a conspiracy.
- iii) That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (overt acts) described in the charge.
- iv) That such overt act was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An overt act is any transaction or event which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

In Hofni Topacho Ongiretho & 2 others v. Uganda Cr. App. No. 1 of 1993 it was held that an overt act is an intention to affect any purpose which can be called an element of the offence, every act in furtherance of the commission of the offence, or every act of conspiring with any person to effect that purpose and every act done in furtherance of the purpose by any persons conspiring, shall be deemed to be an overt act manifesting the intention.

In the present case, the accused persons took PW2 and PW3 from Kafumbe Mukasa road up to Wandegeya where they pointed out to them the intended victim of the conspiracy. This was a man in a kanzu. He had clearly identifiable scars on the hands and the head. Next, the accused persons paid over to PW2 and PW3 shs 30,000/- for fuel. They added shs 10,000/- to each of them for airtime for purposes of facilitating communication

between them all in the accomplishment of the conspiracy. There was further evidence of the overt acts in the telephone contacts as shown by the MTN printouts. All these were acts by the two accused persons in furtherance of the conspiracy.

While in the office of Bitwire, Mulumba was made to call his cahoots in crime, the appellants herein on phone and the phone was put on loudspeaker. All present heard the accused commit themselves to pay shs 3 million as reward to the operatives once the mission to kill Haji Haruna Musayi was successfully completed. The identity of the victim Musayi was repeated as the one whom the accused showed the operatives at Wandegeya, that this was a man with scars on the head and that he at times wore spectacles. This was another overt act by the accused persons in their conspiracy to kill Haji Haruna Musayi. The 4th ground of appeal is also dismissed.

All the grounds of appeal having failed the appeal is accordingly dismissed.



RUGADYA ATWOKI

JUDGE

10/06/2011.