**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT UGANDA**

**AT MENGO**

**(CORAM; WAMBUZL C.J., ODER J.S.C., AND SEATON J.S.C.)**

**CRIMINAL APPEAL NO. 5/90**

**BETWEEN**

**A.I JAMES SAWOABIRI**

**A.2 FRED MUSISI** ==========APPELLANTS

AND

UGANDA========== RESPONDENT

***(Appeal against conviction and sentence of the H/C decision holden at Kampala by Hon. Justice WK.M. Kityo dated the 19th day of April 1990 from original)***

**IN**

**H.C.CH. SS. CASE NO. 6/89)**

**JUDGMENT OF THE COURT.**

The Appellants were charged in the High Court at Kampala that on the 4th day of May, 1988 at Bugolobi in the Kampala District they robbed Dr. Ingrid Rissom of a motor vehicle Registration No. UZO 875 Mercedes Benz valued at Shs. 5 million and at or immediately after the said act threatened to use a deadly weapon to wit a gun on the said Dr. Rissom and thereby committed the offence of robbery contrary to sections 272 and 273(2) of the Penal Code Act.

The trial took place on various dates between 18th July, 1989 and 21st March, 1990, before Justice Kityo assisted by two assessors. The defendants pleaded not guilty relying on an alibi and calling three witnesses in support of it. Mr. Damulira-Muguluma, an Advocate, was retained on a private brief to defend the Appellants and he conducted the defence during a part of the hearing. A number of witnesses were called. At the conclusion of the trial the Judge addressed the assessors, both of whom expressed the opinion that the Appellants should be acquitted. One assessor was of the view that the Appellants were at work elsewhere

at the time of the offence, thus accepting their alibi. The other assessor gave his opinion that the complainant, Dr. Rissom, could not identify the Appellants within the short time, 5 minutes, and she was shocked by the attack.

The Judge found both Appellants guilty of attempted (simple) robbery in violation of sections 272 and 274 of the Penal Code. He sentenced them each to three years imprisonment. Apparently by inadvertence mandatory corporal punishment was not imposed as required by S.274 A. They duly appealed from both the conviction and sentence. Learned Counsel has been retained by the Government to represent them before this Court.

The main ground of the appeal is that there has been no fair hearing before the High Court. This was because the Counsel whom they had engaged was, in the circumstances, unable to appear when the trial commenced and the defence was deprived of the opportunity effectively to challenge the evidence of the prosecution witnesses by cross-examination.

Article *15*(2) of the Constitution of Uganda provides as following:

> ***"(2) Every person who is charged with a criminal offence……..***
> (d) ***shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;***
> ***(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court***

The Trial on Indictments Decree states the following in S.70:

> ***"The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution."***

It appears from the record that on the 21st June 1989, when the case was first mentioned, the Appellants were not represented by any advocate. Therefore the Registrar was directed to brief an advocate to defend them on a State brief. Then the hearing of 18th July, 1989 was

fixed.

On the above - stated date, Mr. Muguluma of Kirenga & Ndozireho, Advocates, appeared and, with the consent of the prosecution, he requested that the case be heard on 24th July 1989. But the Court, finding that the day suggested was occupied by another criminal case, fixed the adjourned date to be 25th July 1989, in the presence of both parties, assessors and prosecution witnesses.

Mr. Muguluma did not appear on the 25th July 1989, nor did he notify either the Court or the other side the reason for absence. In the circumstances, the case could not be heard but was adjourned to the 28th July 1989, with specific instructions to the Assistant Registrar to notify Mr. Muguluma of that date or, if that be impossible, to brief another Lawyer on state -brief basis to assist the two Appellants in the trial, and with a view that the trial should commence on the appointed date or, failing which, the case be adjourned to the next criminal session.

Once again, on the new appointed date of 28th July 1989 in the absence of Mr. Muguluma but in the presence of the two Appellants and the others concerned in the case, Mr. Lugayizi, Advocate, notified the Court that he had been briefed by the Registrar to defend the two Appellants; that he had consented to do so but that the Appellants had rejected his services, saying that their Lawyer, Mr. Muguluma, would be appearing for them. Therefore, Mr. Lugayizi prayed that he be relieved of the duty. Each of the Appellants confirmed the rejection of the offer. Before discharging Mr. Lugayizi, the learned Judge fully explained to the two Appellants their right under the Constitution, to conduct their own defence in compliance with Article 15(2) (d) of the Constitution. Thereafter, the recording of the evidence commenced and the two accused were each offered opportunity to cross-examine in accordance with the provisions of section 70 of the Trial on Indictments Decree.

The record of proceedings shows what occurred after the complainant, Dr. Rissom (PW1) gave her evidence;

***"A1XX: I have heard what she told the Court.***

***I am not prepared to cross-examine her.***

***A2. Cross-examined; I have no question in cross- examination…….***
***Assessor No.1: No question***
***Assessor No.2: No question***
***Omoding (State Attorney): I do not have to re-examine her because there has been no cross-examination."***

More or less the same occurred after Army Sgt. Byaruhanga Stalisbus (PW2) gave his testimony:

***"Al: I do not wish to ask any question***
***A2: I have not. Jam not ready to ask him.***
***Assessor No.1: No question***
***Assessor No.2: No question***
***Prosecutor: No re-examination……."***

The testimony of John Byaruhanga (PW3), shamba-boy of the complainant, was interrupted by the first Appellant's sudden illness. The trial was adjourned to 31st July, 1989. On the latter date no one appeared for the state nor was John Byaruhanga (PW3) present. Mr. Muguluma was in Court. When he stood up, the learned Judge informed him as follows

***"According to the record, you are no longer on record either as a private brief or state brief Lawyer. If you wish to make an application, it should primarily be filed in the Criminal Registry and properly be served upon the other side and then be heard, in open court any time between now and the fixed date for mention."***

The case was adjourned for mention on 7th August, 1989 with instructions to the Registrar to notify the Director of public prosecutions and to remind witnesses accordingly.

On the 7th August 1989, Mr. Muguluma made an application under notice of motion first for leave to represent the two Appellants and secondly for an order that the Appellants be allowed to have Dr. Rissom and Byaruhanga (PWI and PW2) recalled and that through their Counsel they be given a chance to exercise their right of cross-examining the said witnesses. We express surprise at the procedure adopted. Notices of Motion are normally associated with civil proceedings not with criminal proceedings. We are not aware of any requirement in criminal law when Counsel has to make an application to represent an accused person. The normal procedure is for Counsel to appear at the bar and announce to the court at the appropriate moment whom he represents. If for any reason Counsel is absent from the proceedings he would explain his absence when he next appears and carry on as long as he represents the accused person.

Be that as it may the State Attorney informed the Court that the Army Sgt. Stalisbus (PW2) was stationed in Gulu. The Judge ruled that the right to recall witnesses was within his powers to grant but that -

> ***"…..the defence has no sufficient grounds which have been shown to justify the recalling of the two witnesses and, that such a recall will just delay justice and be contrary to the spirit of the law in Article 15 of the Constitution."***

The Judge, however, granted Mr. Muguluma permission to peruse the evidence that was recorded in the court file and to resume the representation of the two Appellants, "on condition that the case will resume from the stage where the trial has reached." The date set for the hearing to resume was 16th August 1989. The trial then proceeded. Further prosecution witnesses were heard as were the Appellants and their defence witnesses. Then judgment and sentences were given.

In these circumstances it is contended on behalf of the Appellants that there was a violation by the Judge of Art. 15(2) (d) of the Constitution which gives accused persons the right to have legal representation of their own choice. It was conceded that the Court is not bound to

adjourn the commencement of a case at the instance of the prosecution or the defence and that the conduct of the Appellants' Lawyer, Mr. Muguluma, in not appearing may have been improper. Nevertheless, Counsel submitted, in the instant case, an adjournment should have been granted because the Appellants were not prepared to conduct their own defence. Further, Counsel submitted, by denying defence Counsel's application to recall prosecution witnesses for cross-examination, the learned Judge opted for an expeditious trial at the expense of the interests of Justice.

On behalf of the Respondent, learned Counsel observed that it was clear that the defence Counsel did not appear when the trial was due to be heard nor did he give reasons for his absence. Consequently the Court did what was most practicable in the circumstances by assigning to the Appellants another defence Lawyer. When that Lawyer appeared on the 28th July, 1989 and the Appellants chose not to avail themselves of his services, the court did not, it was submitted, owe to the Appellants any duty beyond what it did.

Learned Counsel believed that the Appellants had also failed in their duty by not exercising their right to cross-examine the first three prosecution witnesses; it was a bit of high-handed conduct, he submitted. They were not ignorant or unsophisticated persons; one was a painter, the other was a builder. Counsel was of the view that in the circumstances, the court should have asked the prosecution witnesses a few questions to seek clarification of some glaring omission in the evidence, for example, with regard to the arrest of the Appellants. Nevertheless, an accused person's rights had to be reconciled with the right to be tried within a reasonable time according to Art 15(1) of the Constitution. In the circumstances of the instant case, if further adjournment had been granted it would have meant the case being carried over to the next criminal session which, throughout the trial it had been the learned Judge's concern to avoid.

It seems to us that the rights of an accused person under Art 15(2) of the Constitution are not absolute. One has a right to be defended by Counsel of one's choice but if such Counsel is absent, how long must the court wait for his appearance?
We have considered ***Galos hired v. The King*** (1944) **A.C.** 149, a Privy Council case which originated in British Somaliland, as it formerly was. The right of being represented by

Counsel on appeal was therein involved. The difficulty of the passage across the Gulf of Aden was well known and on some previous occasions the Protectorate Court of Sessions had adjourned a hearing in order that Counsel, who was the only person enrolled to practice in British Somaliland, should have time to come to Somaliland from Aden, where he was permanently practising. In the case before them, their Lordships pointed out that there did not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable the Counsel to attend and to argue the case or appeal.

In their judgment their Lordships observed (at p.155);

> ***"The importance of persons accused of a serious crime having the advantage of Counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by Counsel. See Holdsworth, History of English Law, vol. 1X, P.226 et seq. This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the Counsel for the accused, so, it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the Appellant was entitled of right to be heard by a Counsel assigned to him by the Government who was unable, without any fault on his part, to reach the court in time to conduct the appeal."***

The appeal was accordingly allowed.

In the instant case, according to the record, on the 28th July, 1989 when Mr. Muguluma did not appear, Mr. Omoding, the State Attorney, informed the Court that he had received a copy of the letters from Kirenga and Ndozireho, Advocates, dated 28th July, 1989, (the date of the hearing), to the Registrar of the High Court, and copied to the Director of Public prosecutions, that Mr. Muguluma had lost his mother and requesting an adjournment for two weeks.

The learned Judge ignored that information and we cannot fault him for doing so. It was the duty of defence Counsel, having been briefed, to appear, or, if he was unable to do so, to have another Lawyer hold his brief and appear with instructions to make before the court any necessary application for adjournment. That duty does not appear to be particularly onerous where (as was the case) defence Counsel is a member of a firm of practising advocates. In the circumstances the instant case can be distinguished from ***Gatos Hired v. The King*** (above-cited) where the Appellant's Counsel was unable, through no fault of his own, to reach the court and he was the only licensed advocate available. We are inclined to agree with learned Counsel for the respondent that the learned trial Judge did not improperly exercise the discretion which was his, in ordering that:

> ***"Since: there is no Lawyer present briefed by them (the Appellants) and they have rejected the Lawyer briefed by the state. Therefore, the Prosecution Case shall commence and they will conduct their own defence."***

That disposes of one limb of ground one. The other limb was the refusal to allow witnesses to be recalled. It is rather more difficult to accept the reasons for such refusal. In an Affidavit supporting the notice of motion Appellants' then Counsel, Mr. Muguluma, swore,

> ***"That the recall of PW1 and PW2 will enlight the Court by having their version tested by cross-examination and also enlight the Court on conflicting evidence given by the said prosecution witnesses,"***

In a counter affidavit, Mr. Omoding, the State Attorney, swore,

> ***"(i) That to recall PW1 and PW2 would constitute an undue delay and frustrate the progress of the trial, especially as PW2, Sgt. Byaruhanga, is an NRA Soldier stationed at Gulu," and***

***"(ii) That it is unnecessary to recall PWJ and PW2 for cross-examination since any conflicting prosecution evidence as alleged in paragraph 9 of Mr. Muguluma's affidavit will always be resolved in favour of the accused."*** The Judge's ruling refusing the application was given on 28th July 1989 as transpired, the trial had to be adjourned for one reason or another and it was not until 12th January, 1990 that all the evidence was heard. Judgment and sentence were not given until 19th April, 1990. It is hard to believe that the recall of the two prosecution witnesses would have greatly lengthened this trial, which had begun 21 months earlier.

In any event, the optimism expressed in Mr. Omoding, State Attorney's, second reason fur objecting to the recall proved to be misplaced; conflicting prosecution evidence was not resolved in favour of the accused in the instant case, as we shall see when we come to the second ground of appeal.

But first we would advert to ***Adamu v. Attorney General of Bondel State*** (1986) LRC *(Crm.)* 27, a Nigerian case, which Counsel for the Appellants brought to our attention. The Appellant was convicted of murder by the High Court at Igarra, **Bendel State.** He appealed against conviction on several grounds, including violation of his right to a fair trial under section 33(6) of the Constitution of the Federal Republic of Nigeria 1979 and the Judges' conduct of the trial. For the purposes of this appeal we need only concern ourselves with the constitutional issue and the conduct of the trial, it appears that section 33(6) of the Nigerian Constitution contains the provisions similar to Art. 15(2) (d) of the Ugandan Constitution. The relevant holding of the Court of Appeal was thus summarized in the head note to the judgment.

(i) ***There had been no breach of the Appellant's constitutional right to a fair trial under section 33(6) since there to (sic) his right to defend himself in person or by legal practitioners related to a matter of his own choice. He had exercised that choice by failing to protest at the absence of his counsel when prosecution witnesses were being heard and by proceeding to conduct his own defence. Furthermore, his counsel was subsequently given the opportunity to recall those prosecution witnesses for***

***cross-examination.***

The Appellants failed on the grounds above-mentioned but they succeeded on other grounds relating to the merits of the case and the appeal was accordingly allowed.

It will be observed that in Adamu's case (above-cited) the prosecution witnesses had been cross-examined by the Appellant in the absence of his Counsel. Subsequently, when the latter joined in the proceedings, he recalled the witnesses who had testified and been cross-examined. Thus he had the second opportunity to cross-examine them again. The circumstances of that case are in (stark) contrast to those of the instant case.

We are of the view that as the Appellants were unprepared to cross-examine the prosecution witnesses, the refusal to recall the witnesses at the request of defence Counsel was a violation of their constitutional right of fair hearing. This ground of appeal, therefore, succeeds.

For reasons which shall appear later, we shall consider the second ground of the appeal which was that the learned trial Judge erred in law by failing to evaluate the whole evidence at the trial and basing his judgment on the prosecution evidence.
Counsel for the Appellants submitted that the Judge based the conviction of the Appellants on the unchallenged evidence of the first three prosecution witnesses. According to the evidence of the complainant, PW1, she was returning to her residence at lunchtime on the day in question, driving her motor vehicle. As she neared her gate in Bugolobi area, a man whom she identified the second Appellant, Musisi, spoke to her at a very close range in a language she did not understand. In response to her query as to whether she could be of any assistance to him, PW1 testified that the second Appellant pointed a gun at her. He was followed by two other men who appeared at the scene and forcefully ejected her from her car, whereupon the assailants, including the two Appellants, tried but unsuccessfully to drive the car away.

PW3, John Byaruhanga, testified that he arrived at the scene, as a result of hearing the screaming outside PW1's home. There he found the second Appellant, Musisi, armed with a

pistol, who threatened the witness by aiming the pistol at him. Two other people were standing near the car and PW1 was making the noise. On the witness enquiring, PW1 shouted "Thieves". PW3 also started making alarms and the neighbours responded.

The evidence of PW2, Army Sgt. Stalisbus Byaruhanga, was that he was living in the neighbourhood of the crime. In answer to the alarm, he found two men pulling a European out of a car, while a third was standing, whom he identified (by pointing to him in the dock) as the second Appellant, Musisi. He also identified the first Appellant, Sawoabiri, as one of the men who were pulling the European out of her car.

PW2 rushed back to collect his own gun; when he returned, the robbers had run away but the vehicle was still there. PW2 followed with others the direction the robbers took and found the two Appellants already arrested. He asked the second Appellant, Musisi, about the pistol, who, the witness testified, first denied knowledge of it but when he was beaten up, he then revealed where he had thrown it and led them there. According to PW2, the first Appellant, Sawoabiri, had with him a handbag belonging to the European. The two Appellants were then taken back to the scene of the crime.

The learned trial Judge in his judgment set out the above testimony and then went on to state (at p.101) as follows;

***"The above unchallenged extracts of the evidence from the three prosecution witnesses, establish beyond doubt, that the accused attempted to steal the motor vehicle of PW1 and that they used actual violence in pulling her out of the vehicle against her wish and with the intention to deprive her the ownership of it and that they threatened to use what appeared to be a deadly weapon to the witness."***

The learned Judge found that there was no conclusive proof that the weapon, which the Appellant threatened to use, was a deadly weapon or the ammunitions which were adduced, were alive and capable of causing grievous harm, if used, as required in S.3 1(4) of the Fire Arms Act and the decision in ***Charles Komiswa v. Uganda*** (1979) H.C.B. 86, to clearly establish whether the offence was a simple robbery under S.272 or an aggravated robbery under S.273(2) as charged in the Indictment. On the other hand, he found there was strong

evidence, that assailants used physical violence to throw the complainant out of the car and occupied it themselves but failed to take it away and abandoned it. In fact, the car moved to safety by moving within the enclosure of the complainant.

The learned Judge then turned, in his judgment to the issue of identification and stated (at p.1 02) as follows;

> ***"....the above three prosecution witnesses identified A2 (i.e. the second Appellant) as having been the person who spoke to the complainant in Swahili and then brandished a pistol to threaten the complainant. He is equally identified to be the person who was armed with a pistol and ready to prevent people coming to assist the complainant. He scared PW2 and PW3 whereupon one of them had to run back to get his own gun. The time was during lunchtime, otherwise in broad daylight and as such the weather condition was favouring the correct identification, although the attack was abrupt but there was sufficient opportunity to identify the attacker and they were seen by the three witnesses from different directions. I have, therefore, believed the prosecution it' evidence of identification of the two accused as having been correct."***

We pause here to observe that the learned trial Judge has thus far already considered it established "beyond doubt" that:

1. The Appellants attempted to steal the motor vehicle of PWI;

2. They used actual violence against her; and

3. They threatened to use what appeared to be a deadly weapon. He has also accepted as "correct" the prosecution witnesses identification of the

appellants.

Having in effect found the guilt of the Appellants proved, if not of the offence charged, at least of some lesser crime, the learned Judge then turned to a consideration of the defence. He stated (at p.102 of the judgment) as follows;

> ***"…….I have considered the unsworn defence which raises an alibi of having, on that day, been working in place situated at Kibira Road, and the time when robbery was alleged to have been committed. But the accused themselves showed in their evidence, as well as their witnesses that Kibira Road and Bazarabusa Road are more or less in the same area of Bugolobi. DW4 showed that at the time of the alleged crime, they had already left the place of work and, therefore, he would not know where they were or what they were doing. The place of the arrest is not far from the scene of crime - I cannot, therefore, believe the defence of alibi."***

The learned trial Judge then alluded to one contradiction in the prosecution evidence, as to how long it took to take the Appellants back to the scene after their arrest: PW1 said 30 minutes, while PW2 said about 2 hours. The judgment observed (at P.103);

> ***"…….but these contradictions were not challenged, by cross-examination, therefore, on the strength of the decision in the case of Alfred Tajor v. Uganda (Cr. App. No.167/6 9) (Unreported) and the other Uganda v. Sabuni 1981 H.C.B.I, the contradiction is a minor one and does not go deep to destroy the prosecution evidence."***

In the two following paragraphs of the judgment the learned Judge indicated the unanimous opinion of the assessors (to acquit the Appellants) and his disagreement with them. Then he convicted the Appellants of "attempted simple robbery" under S.272 and 274 of the Penal Code.

This Court has frequently inveighed against the practice, surprisingly continuing in some judgments, of considering in isolation the prosecution evidence or the defence evidence. This practice gives the impression, particularly when the prosecution evidence is considered first, and accepted as true, that the mind of the trial Judge is already made up by the time he turns to consider the defence evidence. How can that impression not be given when, as in the instant case, the learned Judge states that he has found certain facts attested by prosecution witnesses to be proved "beyond doubt"? Or, that he has accepted evidence of identification by prosecution witnesses as "correct"? All this when he has not even begun to consider the defence case.

This impression, that the trial Judge gave only superficial consideration to the defence case because his mind had already been convinced of the guilt of the Appellants is strengthened by a closer analysis of the manner in which the learned Judge dealt with the witnesses' evidence. One does not know what to make of the remark (at p.102) in the judgment that;

> ***"I have considered the <u>unsworn</u> defence…."***
> (Underlining added.)

It is apparent from the record that both the Appellants gave sworn testimony and they called between them a total of three witnesses who also gave sworn testimony in their defence.

Nor is it easy to understand the acceptance of the facts stated by the prosecution witnesses because they "were not challenged, by cross- examination." It was the learned Judge's decision to proceed in the absence of defence Counsel and to refuse Counsel's request to recall PWs I and 2 that made their evidence unchallenged. ***Uganda v. Dusman Sabuni*** (above-cited) decided, inter alia, that:,

An omission or neglect to challenge the evidence-in-chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue.

There was an “omission or neglect” by the Appellants in the instant case to challenge the evidence-in-chief of PWs 1 and 2 on material and essential points by cross-examination. But they explained why they did not do so; they said they were unprepared to ask any question. As for PW3’ s evidence, this was challenged in vigorous cross-examination by Mr. Muguluma, who had by then resumed the defence of the Appellants. In the circumstances the inference that the evidence of PWs 1 .,2 and 3 was accepted was rebutted. Therefore, it was an error for the Judge to use the “non-challenge” of PWs 1,2 and 5’s evidence as reason for its acceptance.

As to the discrepancy in time, it was more than the difference between 30 minutes and 2 hours to which the judgment alluded. There were also discrepancies between prosecution witnesses as to when the events occurred outside the gate of the_complainant. Sgt. Stalisibus Byaruhanga (PW2) testified it was 11.00 a.m. whereas according to John Byaruhanga (PW3) it was at 1.30 p.m.

These discrepancies were not insignificant when the defence was relying on an alibi.

There was an important gap in the prosecution evidence which went unremarked in the judgment. According to the complainant, Dr. Risson, it was a lady soldier, a Captain in the NRA who arrested the Appellants after they had run away and who brought them back to the scene. The Captain’s name, according to Sgt. Staslisbus Byaruhanga, was Nalweyiso. He testified that he followed the direction the attackers had taken through Silver Springs going towards Mbuya, and found the Appellants already arrested. He took them back to the scene where the complainant identified them as the robbers.

It was important for Capt. Nalweyiso to be called. She could have explained how and why she arrested the Appellants. Was it because they were seen by her running from the complainant’s gate pistol in hand? Or was it, as the Appellants testified, because, after finishing work they happened to be on the road to Silver Springs walking normally, when they were, surrounded by a crowd of people shouting from behind them, beaten and had their shirts removed. In the absence of the arresting officer, we fail to see how the court could not

have been Left in doubt as to whether the alibi was true or untrue. And if there was such doubt, the court was bound to give the benefit of it to the Appellants.

There was also a gap in certain evidence relating to the complainant's handbag. According to Sgt. Stalisbus (PW2), when the Appellants were arrested, the first Appellant had the handbag, which contained money and papers identified by the complainant as hers. Byaruhanga John (PW3) testified that the hnt1hag had been taken from the complainant's car. But the complainant (PW1) never testified how or from where the handbag was taken and neither the handbag nor its contents were made exhibits.

In all the circumstances, we find that there is merit in the complaint under ground 2 that the learned trial Judge erred in law by failing to evaluate the whole evidence heard at the trial and basing his judgment on the prosecution evidence. This ground of appeal also succeeds.

It is apparent that, the Appellants having succeeded on both grounds, their appeals must be allowed. Because of our finding on the first ground of appeal, that the Appellants have not had a fair hearing, the trial must be deemed to have been a nullity. We accordingly allow the appeals, quash the convictions and set aside the sentences.

Counsel for the Appellants has pointed out that if a retrial is ordered, it is likely that the re-hearing will not take place for several months, if not years, given the current number of cases pending in the High Court. Were the Appellants to be remanded in custody during such period, it would make success in this appeal a pyrrhic victory, even if they were eventually acquitted at the trial.

We do not quite share learned Counsel for the Appellants' foreboding. Always available to persons on remand is the right to apply for bail. There is no reason to despair of the Appellants' chances of success in such an Application. Further, if they were to be acquitted on a retrial, they would have cleared their names, which we would have thought a gain of considerable value. The principles on which a retrial should be ordered were laid down in

***Ahmed All Dharami Sumar v. Republic*** (1964) E.A. 481, 482. We approve of these principles. Whether or not a retrial will be ordered depends on the particular facts and circumstances of each case. One relevant consideration is whether on a retrial the prosecution would be enabled to fill up gaps in its evidence at the first trial.

On the whole we are not of the view that the interests of justice would be served, in the circumstances of the instant case, by ordering a re-trial. Such an order would be likely to cause an injustice to the Appellants. In the circumstances there will be no order for a re-trial, it is accordingly ordered that the Appellants shall be set free forthwith unless they are otherwise lawfully held.

Dated at Mengo this 4th day of June 1991.

**S.W.W. WAMBUZI**
**CHIEF JUSTICE**

**A.H.O. ODER**
**JUSTICE OF THE SUPREME COURT**

**E.E. SEATON**
**JUSTICE OF THE SUPREME COURT**

**I CERTIFY THAT THIS IS A**
**TRUE COPY OF THE ORIGINAL,**

**W. MASALU MUSENE,**
**REGISTRAR, THE SUPREME COURT.**