THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CRIMINAL APPEAL NO. 8/88

(CORAM: MANYINDO, D.C.J., PLATT, J.S.C., SEATON, J.S.C.)

CHRIS RWAKASISI ========== APPELLANTS ELIAS WANYAMA

AND

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

(Appeal against conviction and sentence of High Court decision holden at Mbarara by the Hon. Mr. Justice I. Mukanza dated 30th day of June, 1988 from Original H. C. CR.S. Case No. 17/87)

JUDGMENT OF SEATON, J.S.C.

In May 1981 the Government was led by Milton Obote as President for the second time since Independence. Some people resented the government. They took to the bush, held meetings and waged guerilla activities.

The first appellant Rwakasisi was a Minister of State in the President's office. His home area was Mbarara. In this area a group of guerillas was believed to exist. Plans were made to act against them. A number of people were brought to Nile Mansions in Kampala. Some of them were subsequently taken to Kireka Barracks on the outskirts of Kampala where they were killed.

These events led to criminal proceedings six years later. The first appellant, Rwakasisi, the second appellant, Wanyama and three co-accused, were charged and tried in the High. Court

on an indictment containing 16 counts of murder, kidnapping with intent to murder and robbery.

The trial resulted in conviction of the first appellant Rwakasisi on five counts of kidnapping with intent to murder. The second, appellant Wanyama was convicted on six counts of murder. On 30th June 1988 they ware sentenced to death. This appeal is against the convictions and sentences.

The offence of murder is set out in S.183 of the Penal Code (Cap. 106). It consists of the unlawful act or omission of one person, which causes the death of another person with malice aforethought. The elements of the offence are thus (1) the unlawful act or omission; (2) the death being caused as a result of the act or omission; and (3) malice aforethought, that is the intent to cause death or knowledge that the act or omission would, probably cause death (at least serious bodily harm).

Kidnapping with intent to murder is an offence under S. 235(1)(a) of the Penal Code. The relevant provisions of the Code state as follows:-

> ***"235. (1) Any person who by force or fraud kidnaps abducts takes away or detains any person against his will,***
>
> (a) ***With intent that such person may be murdered or may be so disposed of as so be put in danger of being in danger of being murdered commits an offence and shall on conviction be liable to suffer death."***

The elements of the offence are thus: (1) the seizing of a person; (2) the abduction or compelling of that person by force or fraud to go away from any place; and (3) the intention that such person may be so disposed of as to be put in danger of being murdered.

The elements (1), (2), and (3) must be contemporaneous. A subsequently conceived intention will not suffice. It will not make the acts of seizing and compelling an offence under the sub-

section:

> ***"that such person may be murdered, or that such person may be disposed of as to be put in danger of being murdered."***

The offence therefore may be committed with any one of the two intentions mentioned in S. 235(1)(a).

In the instant case the intention with which the first appellant Rwakasisi was alleged to have acted, in each of the five counts on which he was convicted, was "that the victim may be murdered". Thus count 8 in the particulars of offence alleged as follows:-

> ***"Chris Rutimbiraho Rwakasisi and others still at large, on or about 15th day of May 1981, at Rubaya Trading Centre in the Mbarara District forcibly took away Rwanchwende against his will with intent that the said Rwanchwende may be murdered."***

The particulars of offence alleged in counts 9, 11, 12 and 13 were similar, except that the names of the victims were different. In count 1, the particulars alleged as follows:

> ***"Elias Wanyama and others still at large on or about 20th day of May 1981 at Kireka Barracks in the Mpigi District murdered George Kananura Rwabutoto."***

Count 2: The victim was Agaba
Count 3: The victim was Haji Mbiringi
Count 4: The victim was Rwanchwende
Count 5: The victim was Kabazaire
Count 6: The victim was Muhumuza
Count 7: The victim was Mwiine

The prosecution case according to the evidence adduced was that on or about 13th May 1981 a meeting was held at the Nile Mansions. The meeting was
called by the first appellant Rwakasisi in his capacity as Minister of State in charge of security matters; it was attended by the second appellant Wanyama and high ranking Police Army and Special Force Officers after the meeting; the first appellant, Rwakasisi came out with a list which contained a number of names of people. He ordered some security officers to go to Mbarara and have these people arrested and brought before him; the reasons for having them arrested was that they were waging guerilla activities; in order that the people mentioned in the list might be identified, the officers were directed by the first appellant Rwakasisi to get in touch at Mbarara in the Parliamentary Constituency of the area, two intelligence officers from the President's office and two others from Special Branch.

The persons named would identify those suspected of being guerillas, who were to be arrested and brought to the first appellant in the Nile Mansion, Kampala; these instructions were carried out, seven victims were seized on the 19th May 1981 at their homes in two successive operations in Mbarara carried out by a "posse" of soldiers and special forces men; some of the victims properties were also seized; they were carried by force or ruse to Mbarara Police Station, where they were put into a uniport that normally served as clerks' offices; subsequently the victims were taken to Nile Mansions, Kampala where they were interrogated in Room 223 by the first appellant Rwakasisi; sometime later they were taken to Kireka Army Barracks and eventually put to death; and that the second appellant Wanyama was present and participated in the murder of the victims.

The defence of the first appellant Rwakasisi was a denial that he had carried out any of the acts alleged by the prosecution; he was not the Minister in charge of security matters he had neither held nor attended a meeting at Nile Mansions where a decision was made regarding anti-guerilla actions; he had not ordered the Mbarara victims' kidnappings and knew nothing about their ultimate fate; alternatively, the orders for the seizure and taking away of the Mbarara victims, according to the evidence adduced, was a security exercise carried out, not by one man's decision but as the result of a decision taken by high ranking Army, Police and Special Forces Officers as part of their duty to protect the Government; the arrests were lawfully carried out against persons suspected of treasonable activities; if, subsequent to the

arrests unfortunate acts were carried out, these were not intended by or in the contemplation of those who gave the lawful orders for the arrest of the victims.

The defence of the second- appellant Wanyama was alibi; he was not in Mbarara, not at Kampala Nile Mansions nor at Kireka Barracks on the date of the alleged killings but in Bushenyi District.

In his Judgment the learned Judge found that the evidence against the first appellant Rwakasisi was mostly circumstantial, the only direct evidence of his participation came from PW23 Katabazi, an Army Corporal stationed at Nile Mansions who claimed to have witnessed the meeting at: Nile Mansions from which the first appellant emerged to give orders for the seizing of the victims in Mbarara and bringing them to him and of the subsequent interrogation of the victims by the first appellant in Room 223 of Nile Mansions. The Judge held that Katabazi was an accomplice but he found corroboration of his evidence and accepted it; he also accepted the testimony of other witnesses of the first appellant's visit to Kireka Barracks to see the victims in their cells shortly before they were taken out and killed and of his evasive attitude when relatives of the victims sought help from him in ascertaining their whereabouts; from this evidence the Judge inferred the first appellant's intent that the victims might be murdered.

With regard to the second appellant, Wanyama, the learned Judge found that his alibi was disproved by evidence of PWs 20, 21, 22 and 23, Adam Muhanguzi Atukunda Hope, John Fisher Lwanga and Ismail respectively, who identified him at Mbarara, Nile Mansions and Kireka at the time when he claimed to have been in Bushenyi.

The learned counsel for the first appellant Rwakasisi first argued together the following grounds of appeal:-

(i) The learned trial Judge erred in law and fact in holding that the arrests of the victims in counts 8, 9, 12 and 13 amounted to the offence of "Kidnapping with

intent to murder". He particularly erred to hold that the essential ingredient of "intent to murder " was proved.

(ii) The learned trial Judge misdirected himself on the ingredient of the charge of kidnapping with intent to murder.

It was not contested that the arrests of the five victims in the counts mentioned took place. What was contested was that those arrests amounted to kidnapping with intent to murder. It was submitted that they were ordinary arrests of suspected criminals. The definition of the offence in Archbold, 41st Edition, para 20 - 24 was quoted as follows:

> ***"-..... the stealing and carrying away a secreting of any person of any age or either sex against the will of such person…"***

The ingredients of this offence had been considered in many decisions of this Court in cases , one of which counsel cited: ***Kimeze & Anor v. Ug.,*** Cr. Appeal No. 3 of 1979, reported, in (1983) H.C.B. 9, in which this Court held that the offence has two ingredients:

(1) Seizing and. carrying away of a person by force against his will;

(2) Contemporaneous intent that the victim may be murdered.

"Stealing" and "seizing" convey the meaning of surprise, quick grabbing and carrying away; here there is no room for telling the victim the reason for his arrest, counsel submitted, because "seizing and carrying away" has the element of speed, something that is done speedily and a person is carried away by force, that is "abducts and carries away".

Counsel pointed out that the offence of which the first appellant was charged did not involve "detaining" the victim. Although that word "detaining" is used in S.23 5(1) of the Penal

Code, that constitutes a different type of kidnapping. In the instant case the prosecution alleged that the first appellant, “seized and took away”, so this was the one type of kidnapping which they were bound to prove.

Counsel argued that any arrest ordinarily involves some kind of violence if a person violently resists the arrest. In proper arrests, the person being arrested is told the reason for his arrest, unless the circumstances are such that he would know the reason for the arrest; in the latter case, it is then unnecessary. The circumstances of each count were then reviewed by counsel, according to the evidence adduced. He then submitted that these were all lawful arrests which could not by any stretch of imagination amount to kidnapping.

There were people suspected, of having committed crimes, namely, guerilla war, a treasonable activity; they were arrested by policemen, assisted by soldiers, and taken to the Police station; this was the start of the process of bringing them to justice.

Counsel for the respondent on the other hand submitted that these actions, as described by the prosecution witnesses, were not only kidnappings but kidnappings most “horrendous”. He also reviewed the evidence as it related to each count and submitted that the methods of arrest proved the elements of the offence charged, that is to say, seizing and taking away without the will of the victim. I have perused the evidence as recorded of the arrests of the victims.

Count 8 - Re Rwanchwende: The witness Erinore Rwanchwende (PW16) testified that on or about 15th May 1981 at about 5.00 a.m. she was at her home at Rubaya in Mbarara District with her husband Rwanchwende and two children when very many armed soldiers came. They were in a vehicle accompanied by two men in civilian dress who forced them to open the door. Her husband was pointed out by one of the co-accused, Grace Murungi, as the wanted man; he was arrested and taken to the Landrover and was finally taken to Kireka Army Barracks. Herbert Natukunda (PW1 8), the son of Rwanchwende, confirmed that his father was forcibly taken away on the night in question, the witness was asleep in his room with his young brother Agaba whom the assailants attacked and his brother escaped from the house only to be arrested later, kidnapped and disappeared. His father Rawanchwende talked

to one Katabazi (PW23) who appeared to be the leader of the group; he informed Rwanchwende that they had instructions from the President's office to arrest those people.

Count 9 - Re George Albert Kananura.

The witness Frank Gordon Karokora Rwabutoto (PW6) on 15th May 1981 was at home at Nkokonjeru, Mbarara, together with his father Kananura, his brothers Donald Nyakura Kayoma and Micheal Mugisha. Also present were their neighbour, Martin Mushabe, and a girl working for them called Mariam. The witness who was in the living room heard a noise as though someone was coming in; he woke up to see A5 Murungi and another man, who moved up and down with a pistol. After entering Murungi introduced himself and the man Katabazi from the President's office (PW23). Murungi told Kananura that he was wanted somewhere. The latter said he was not going anywhere. Eventually they were all invited to the sitting room. Murungi then explained that Kananura was wanted in a meeting. Katabazi talked to Murungi and then said that Kananura was wanted in a meeting with the Minister in the President's office that was concerned with security matters whom Katabazi said was Chris Rwakasisi (the first appellant) that he knew he was in charge of NASA, an intelligence organ.

Katabazi was brandishing a pistol. There were other men in the Landrover who were armed with guns. Kananura conceded to go and was allowed to change his clothes; while he was doing that, soldiers were searching the house; after this Murungi and Special Force men made them carry their properties to the waiting vehicle. Properties that were carried away included watches, briefcases, clothing, music system, radios, cameras and money including shs.2,000/= from the witness. They did not carry these properties willingly but were forced to do so; they were assaulted with the butts of guns.

When the looting was finished, Kananura, the witness and his brothers were sent outside of the house, Kananura bade them farewell and was carried away in a Landrover.

Count 11 - Haji Mbiringi - The witness Bwami Bwete (PW9) was engaged with his elder brother Suleiman Mbiringi in business in Mbarara town. On 15th May 1981 at about 11.00 a.m. he was with Mbiringi at their place of business when a Landrover pulled in. On it were about six people. One of them was a Policeman, namely A5 Mbiringi and the others were

Special Force men. Mbiringi who wanted to know if he could travel in his car but Murungi told him that they were going to travel together. Mbiringi was then thrown aboard the Landrover and the witness followed him up to the Police Station but was not allowed to see him. Later Mbiringi' s wife was able to see him at the Station and took him his cheque book, from which he issued to her a cheque of 5,000/=

Count 12 - Kabazaire:- The witness Hilda Jane Kabazaire (PWI 5) was the wife of Constatine Kabazaire. On 15th May 1981 at about 5.00 a.m. she was in her house with her husband and children, they heard two gunshots outside and some people ordered them to open the door, which they did. Those who entered were army men, who ordered them to light a lamp. Her husband was slapped and ordered to go outside and lie down. He asked why they had given him such treatment. Among the army men was Murungi A5, who informed them that they had been sent by the first appellant to arrest Kabazaire. Outside the house were more soldiers, two of whom guarded her husband. The men demanded by force money from the witness and she gave Murungi shs. 200,000/=. They also took bedsheets, a radio and other items. Then Kabazaire was ordered to enter the Landrover which was outside and those people drove off with him.

Count 13 - Masaki Muhumuza:- There really was no evidence as to how his arrest occurred. The witness Judith Tukahirwa (PW14) testified that she used to operate the Tip Top Bar in Mbarara town. Her elder sister. Faith Nkore (PW13) used to work with her. She also had two brothers; who had a shop in the town, one of whom was called Muhumuza, and a father, Yoweri Tibenderana. On 15th May 1981 she was in the Tip Top Bar with her brother Muhumuza, when they received information that one Hope Mirembe and one Jovia Bwaniaga had been arrested. Hope Mirembe was Muhumuza's girlfriend. He took his motor cycle and went to the Police Station. Later she received further information that Muhumuza had been arrested. On the following day the witness went to take food to Muhumuza only to be told that he and others had been taken away.

The witness Yoweri Tibederana (PW12) testified that Masaka Muhumuza was his son, who during May 1981, used to stay in used to stay in Mbarara together with his sisters, Faith Nkore (PW13) and Judith Tukahira (PW14). While he was at home the two girls came and

told that Muhumuza had been arrested by soldiers. The witness contacted different people trying to trace his son but in vain. Faith Nkore (PW1 3) gave evidence more or less to the same effect as that of her sister Judith Tukahirwa (PW14).

The learned trial Judge in his Judgment (p.68) observed that A4 and A5, Nsasirwe and Grace Murungi, apart from being Special Branch Policemen, appeared to him to have been UPC supporters. He took judicial notice of the fact that during Obote II regime the UPC functionaries were above the law. He found that the arrests of the seven victims in the kidnapping counts of the indictment (known as "the first Mbarara group") was neither a Military nor a Police exercise, "It was an exercise by Intelligence Officers from the President's Office……."

The learned Judge noted that if that was a normal arrest exercise the Police at Mbarara would have been involved in the arrests, and he asked:-

> ***"……Why only 2 officers of the Special Force were chosen to assist in the exercise and not employ the CID Department with trained Personnel to carry out the investigations?*** ".

The Judgment went to explain why the arrests could neither have been considered as a military exercise. In his view (at pp. 68 - 69);

> "….***the army in Mbarara could have carried out the arrests locally here because..... the army here knew the victims better than those people sent by Al (the first appellant from Kampala. The fact that there were some soldiers from Kampala who assisted the Katabazi group which involved special forces and special branch men that alone did not make the expedition a military exercise***

The learned Judge observed that A4 and A5 as special branch officers had powers of arrests under the Police Act. However, although the arrested persons in the instant case were taken from Mbarara Police Station to Kampala and the usual formalities were not observed;-

> ***"…….The records of their arrests were made in the Station Diary at Mbarara as per the evidence of Tibenderana PW18. PW23 (Katabazi) testified that after the arrest A4 and A5 remained behind. They did not accompany the victims to Kampala… "(p.70).***

The Judgment found that Rwanchwende, Mbiringi, Kananura, Kabazaire and Muhumuza were seized and taken away against their will (p.74). Considering the excessive number of men who went to secure each victim, the violence that accompanied most of the seizures, the failure to disclose the nature of the crimes for which they were being arrested, the looting of properties in the victims' houses, I am of the view that there was ample evidence to justify that conclusion except in count 13 which related to Misaki Muhumuza.
There remain to be proved (i) that it was the first appellant, Rwakasisi, who was responsible for the arrests; and (2) the element of the offence that there was an intention on the part of the appellant to have the victims murdered.

This leads us to the next three grounds of appeal, which may be grouped together thus:

(i) The learned trial Judge erred to believe and act on the evidence of PW22 Lwanga whose evidence was fabricated. He further erred to hold that it was necessary to call a State Attorney to prove the Summary of Evidence and that the inconsistencies and contradictions in Lwanga's evidence were minor and did not point to deliberate untruthfulness.

(ii) The learned trial Judge erred, in law in holding that the first appellant Rwakasisi procured the arrests of the victims. He particularly erred- to believe and act on the evidence of PW23, Katabazi.

(iii) The learned trial judge misdirected himself on the law of accomplice evidence. He also erred to hold that there was evidence corroborating PW23's evidence.

The learned Judge was aware that the prosecution evidence did not allege that the first appellant was present when the arrests were being carried out. He observed (at p.70 of the Judgment) that the evidence in respect of the first appellant was purely circumstantial. However he accepted as witnesses of truth the witnesses PWs 6, 9,12, 17, 18, 20, 22, and 23. On the basis of their evidence, he found that the inculpatory facts were incompatible with the innocence of the first appellant and were incapable of explanation upon any other reasonable hypothesis other than that of guilt; that there were indeed no other co-existing circumstances which would weaken or destroy this inference. I have perused the evidence of these witnesses for the prosecution, of whom Ismail Katabazi, PW23, was described by the learned Judge as "the star or the key witness" on the charge of kidnapping; he was in 1981 a soldier in the Uganda National Liberation Army (UNLA); he was on duty guarding room No. 223 in the Nile Mansion. That room, according to Katabazi, was being used by intelligence officers from the President's office, to interrogate people who were arrested as guerillas; that office was under the then minister of State, the first appellant Rwakasisi, who used to come to room 223 with Paulo Muwanga (then the Vice President in the Obote II Government) and one Peter Otai, Minister of State for Defence.

On 13th May 1981, Katabazi testified, the first appellant Rwakasisi came and entered room 223, locking it behind him. Then came high ranking officers from the police and the army: Ogola, the Inspector General of Police, Kanywamusayi, the Director of CID, and others. They all entered room 223 and shut themselves in with the first appellant Rwakasisi. They remained inside for about two hours holding a meeting; at a certain stage Katabazi was called for by the Chief Presidential escort, Odongo Oduka; he and two other soldiers joined those in the meeting for a time. After the meeting those inside the room came out, including the first appellant Rwakasisi who was holding some papers; Rwakasisi came to where the witness and others were sitting and addressed all the soldiers who were in that room in Swahili; he directed them to go to Mbarara where they would meet people, whom he named, who would identify the Mbarara guerillas; Rwakasisi further informed them that those people who were going to assist in the identification had already been briefed and already supplied with list of

the names of people to be arrested; Rwakasisi instructed the soldiers to “go to Mbarara and bring my guerillas here and I want them here”; he said that Odongo Oduka would do the rest of the briefing and left; then Odongo Oduka told them that the vehicles were ready to go to Mbarara; there were three Landrovers which carried the witness, very many Special Force Officers and three girls, including one named Hope, whose task was to show to the soldiers another girl whom they were to arrest and bring to Nile Mansions.

When they reached Mbarara, they went to the Police Station and the higher ranking officer entered the office and spoke with the O/C Police, Mbarara while the witness and others of low ranks remained outside. Later they went to the house of the Commanding Officer Mbarara Major Obonyo; there they found the Brigade Commander Smith Opon. A4 and A5 together with the 0/C Police Mbarara and two Special Force Policemen went inside the Commanding Officer’s house, while the witness remained outside; those inside the house were eventually joined by the Chairman and the Secretary of the UPC. The next morning they were shown the uniport where the people arrested were to be detained; work was distributed and they started the operation, joined by A4, A5, youth -wingers and the UPC Secretary. The witness described the arrests of seven victims in which he participated and their return to Kampala. As they did not find the first appellant at Nile Mansion the prisoners were deposited at the Nile Mansion Conference Police Post.

On the following day the first appellant was seen at the Nile Mansion by the witness Katabazi, who further testified that the seven victims were produced and brought to room 223 he saw the second appellant Wanyama who took the two prisoners and then returned to the room with two new prisoners who were also locked inside; at that time the witness went off duty; on the following day he could not see the seven victims brought from Mbarara.

According to Katabazi, after interrogation at Nile Mansion in Room 223, suspects were taken either to Nakasero or Kireka and others released there and then; any prisoner taken to Kireka was never brought back to Nile Mansion.

Counsel for the first appellant criticised the learned trial Judge who, at p.64 of his judgment, while still reviewing the evidence of Katabazi, commented:-

> ***"…….In fact when PW23 reported off duty 4 of the Mbarara group had been interrogated by Al and A2 (the first and second appellants respectively) in the inner room of R.223. I am of the view that Al and A2 also interrogated the rest of the victims when PW23 was away***
> (Underlining added")

Counsel submitted that the Judge drew conclusions before he should and that this and other passages showed his biased approach; had the learned judge analysed the evidence impartially, he would have observed that Katabazi was contradicted by the admitted evidence of Francis Omiya Amigos, a station duty Constable who was posted as a Sentry to the Nile Mansion Police Post on 18th May 1981. Amigos stated that he reported on duty at about 6.15 p.m. and they had in their custody seventeen suspects; of these, two suspects, namely Rwanchwende and Karuhanga at 7.41 p.m. were escorted by Cpl. Katabazi, who told him that he had taken them to Room 211 for interrogation; he readmitted them into their cells and at 8.44 p.m. a military cadet officer attached to Room 211 in Nile Mansion came and told him to hand over Agaba, Karuhanga, Kyeyune, Kananura, Mwine, Rwanchwende and Kabazaire to him for interrogation; the witness did so and those suspects never returned to their cells up to the time he reported off duty on the 19th May 1981.

Counsel for the appellant pointed to other evidence which showed that Katabazi played a more active role in the arrests than he had admitted in his testimony. Whereas Katabazi testified that:

> ***"I arrested 2 people only but 1 was in the groups which came to arrest If there is evidence that I arrested more than 2 people that evidence could not be correct "(pp. 194-5 of the record)***

The learned Judge found at p. 58 of the Judgment) from the evidence adduced that:

> ***"……Katabazi and A5 played a significant role in the seizure and taking away the 7 victims."***

But the evidence was “overwhelming” that Katabazi arrested nearly everyone of the victims, submitted counsel; thus Frank Rwabutoto, PW6, testified that Katabazi was in the group that arrested his father, whom Katabazi told he was wanted in a meeting with the Minister in the President’s office; Meno Dembe, PW7, testified that it was Katabazi who had arrested the victim Mwine (but query whether this was hearsay): Herbert Natukunda (PW 18) testified that when his father Rwanchwende was arrested, Katabazi appeared to be in charge of the soldiers and who told Rwanchwende that these people came from the President’s office with an order to make search and also take those people whom they had been instructed to arrest and take away; and Katabazi himself admitted in cross-examination that he had arrested the three girls.

Counsel for the first appellant also pointed to contradictions in Katabazi’s testimony. At one stage (p.225 of the record) he testified that he had made a statement to the police once at the Police Station in Kampala; it was read back to him and he found it correct; it was written in English and he signed it; he identified his signature in court; he could not remember whether in that statement he had mentioned that two prisoners of the Mbarara group were taken in to the inner Room at Nile Mansion but it was the truth; the Prisoners were returned to the Police Post and then he went off duty. Later in his testimony (p.228) under cross examination he admitted that what he had said earlier that he left the first appellant interviewing them was not correct “because the counsel was confusing him. “ At one stage (p.l96) Katabazi testified that he had not read the list of people to be arrested at Mbarara because he was illiterate: he did not know how to read and could “only write while spacing letters”; but according to Meno Dembe (PW7) when he met Katabazi and Mwine in Mbarara coming from the town, Katabazi asked for his name and, when he informed him, he jotted down some particulars on a piece of paper this proving he was not illiterate.

Counsel further pointed to Katabazi’s untruthfulness about the role the played; in his testimony (p.200) he denied that he had beaten up prosecution witnesses, but the witness Atukunda Hope (PW21) one of the three girls arrested, testified that on reaching Nile Mansion, Katabazi and one driver Bosco, started beating them and asking them about the meeting they had attended concerning Museveni. Later in cross-examination Katabazi

admitted having beaten arrested persons and explained (at p.205):

> ***"…..I did not want my in-charge to know that I had sympathy with those people. That is why I beat them."***

Katabazi admitted he was a sympathizer of the alleged guerillas and testified (at p.204)

> ***"When I went to Kampala I was detained on allegation that I was releasing information to the guerillas who were in the bush. I was arrested on reaching Kampala after arresting Mbarara people for the second time. Yes at times I used to release information to the guerillas……."***

Counsel submitted that this showed that sort of person Katabazi was: he was one who could not have been considered reliable as a witness. The trial Judge should have pointed out the inconsistencies in his evidence and tried to see whether they could be resolved. It was not enough to say, as the learned Judge did (at p. 72 of the judgment):

> ***"It is true there inconsistencies in the testimonies of PW20, PW22, and PW23 but those were minor in my opinion and they did not point to deliberate untruthfulness. I believe those witnesses as having told this Court the truth."***

Katabazi's character and the role he played were such, counsel for the appellant submitted, that not only was he an accomplice but his credibility as a witness was such that even though his evidence was corroborated, no conviction could be based on it.

Counsel for the respondent pointed out that because Katabazi participated in the arrests and even beat some of the victims, which he accepted, this did not make him a liar; it had to be remembered that the witness was testifying seven years after events had taken place and it may have been that he put some things out of the chronological order in which they occurred but the thrust of his evidence was very clear; whether he was literate or not was one of the

things the Judge found minor and not deliberate untruthfulness. Counsel submitted that there was no evidence to show that Katabazi was an accomplice to kidnapping with intent to murder; the Judge preferred to err on the side of the accused and give them every benefit of the doubt, hence he had held Katabazi to be an accomplice because he was to some extent involved in the arrests.

With respect, I am of the view that Katabazi did more than merely following orders; according to his testimony, he had been briefed by the first appellant and by Odong on what to do in Mbarara; he knew what happened to persons who were brought to Nile Mansion for questioning, namely, they went from there either to Nakasero for further questioning and torture or they went to Kireka Barracks, from which they never returned; he therefore knew what was to happen to the victims and why they were brought from Mbarara to Kampala.

In my view Katabazi was rightly held by the learned Judge to be an accomplice. Not having had the advantage which the Judge had of observing his demeanour in the witness box, I do not feel I can differ from the learned trial Judge on the question of credibility: I did observe inconsistencies and discrepancies in his evidence and between his evidence and that of other prosecution witnesses but I cannot say that the learned Judge ought to have found that they showed deliberate untruthfulness or were so grave as to make the witness one whose credibility could not be accepted.

The learned Judge correctly warned himself of the need to look for corroboration of the evidence of Katabazi: He purported to find such corroboration in the- testimony of Adam Muhanguzi, PW20 and John Fisher Lwanga, PW22. I will turn therefore to their evidence, beginning with that of Adam Muhanguzi. This witness was a prisoner at Kireka Military Barracks when seven people were brought in, of whom he recognised three as Mbiringi, Kananura and Karuhanga (the first two are victims in counts 11 and 9 respectively). On the same day, 19th May 1981 at 5 p.m. Muwanga the Vice- President, the first appellant Rwakasisi, the second appellant Wanyama and Omoya, an intelligence officer, cane to Kireka Barracks.

The soldiers opened the door for them and Muwanga stood in the gate and called for Kananura and Mbiringi; he asked them whether they still denied they were guerillas; he warned them what would happen to them if they denied they were guerillas, and that Mbiringi should inform their friends accordingly; Muwanga had a list of names which he gave to Omoya; the seven victims from Mbarara were killed shortly afterward; the first appellant Rwakasisi did nothing on that occasion but the learned Judge commented that:

> ***"…..I do not think that his accompanying the Vice President was really an innocent one in the light of the evidence adduced against him……."(P.67 of Judgment).***

The witness Lwanga was severely cross-examined during the trial because in his testimony he said that Omoya and several other soldiers had come from Nile Mansion and returned to the intelligence room and started calling Mbiringi and his group one by one; they were severely beaten and burnt using plastic polythene papers and then brought back. This accorded with what appeared in the Summary of Evidence but differed from the witness' statement that had been recorded on 18th May 1986 at his home by the Police. It was suggested at the trial and submitted by counsel for the appellants during the hearing of this appeal that Lwanga must have fabricated this evidence. There were other discrepancies between what this witness testified in court and what was in the Summary of Evidence or the statement to the Police. When these were pointed out to him in cross-examination, the witness offered the explanation that he relied on his statement to the Police but he was not responsible for what was mentioned in the Summary of Evidence because he did not make it. It was suggested that the witness had made another statement from which the Summary of Evidence was made, to which he replied (at p.173 of the record):

> ***"The statement I made at the police station is the one from which Summary of Evidence was made. If you have another one you can produce it…."***
> ***In re-examination, however, the witness stated (at p. 175):***

"I made only one statement to the Police and it was recorded at my home. I made Ex D.I (The witness identified D.I.) my signature appears on the- last page…."

All of this led counsel for the appellants to submit that this witness Lwanga lied in Court and his evidence should not be believed. This court was asked to infer from the evidence that there must have been two statements made by the witness, one of them made at the Police Station and then another one made at his home; since the one from which the Summary of Evidence was prepared was not made available to the defence, the witness could not be cross examined on it regarding his testimony; this was a matter to which the learned Judge paid scant attention infact he missed the point completely when he observed in his Judgment (at p.71).

Lir Ayigihugu made a forceful submission attacking the evidence of the prosecution witnesses. He fabricated that Lwanga 's evidence (PW22) was submitted and made Lwanga an accomplice of an immoral character who did not respect the sanctity of an oath and that what was contained in the statement against Al and A2 does not appear in the Summary of Evidence..."

Counsel for the appellants submitted that had the learned Judge appreciated his submission, which was that what was contained in the Summary of Evidence did not appear in the Statement to the Police, and had he properly directed his mind on this point, he would have found the evidence of Lwanga highly suspect and unbelievable and rejected it, particularly its very serious allegations.

Contrary to counsel for the appellant's submissions, the learned Judge had given the following favourable assessment of Lwanga's testimony, including that relating to his Police statement and the Summary of Evidence (at pp.71, 72 of the Judgment):

"I was opportuned to peruse the summary of evidence and the statement of PW22 he made at the Police Station. The statement by PW22 was admitted as Exhibit Dl.

Some of the statement in Exh. DL do not appear in the Summary of Evidence. The defence wanted the summary of evidence to form part of the records. However since no effort was taken by the defence to call the State Attorney who prepared the summary of evidence to come to court and testify as to why the summary of evidence did not contain some material evidence which was featured *in* ***Exhibit DI, I did not regard Exh DI as a document to be reckoned with. If ruled to see how this Summary of Evidence could form part of the record when no one had to identify them for the purpose of making them part of the record All the same it is what a witness states in Court that the court will accept as the witness' evidence because it is stated on*** *oath* ***and the defence had an opportunity to cross examine the witness, but what a witness says to the Police is neither stated on oath nor is the witness cross examined there by defence and can therefore not be treated as that witness' evidence by the Court. Uganda vs. Lote Joseph (1978) Vol. 10 HB p. 270. i the premises I believe Lwanga s testimony as being the true account of what happened...."***

It appears that the summary of evidence was eventually made part of the record. I have perused it as well as the Police Statement Exh. D.I. It is my view, with respect, that the witness Lwanga could not be held to be a liar because his evidence in court did not tally with the Summary of Evidence. It is understood that the Summary is prepared by State Attorneys and they may make errors.

What was to be considered with care was his testimony in Court and whether it differed in an important aspect from the Police Statement. I do not see that it did. Nor do I feel that there must have been two Police Statements. On the whole I cannot say that the misdirection by the learned. Judge as to the learned defence counsel's submission or his failure to appreciate it precisely caused him to arrive at any wrong conclusion regarding Lwanga's evidence on this aspect.

Counsel for the appellant pointed to other alleged inconsistencies and discrepancies in Lwanga's evidence. For example in his testimony in court, he told of seeing the second appellant Wanyama cutting Kananura "with an axe" and he described its size 11/2 feet long;

in his statement to the police he had said that the second appellant Wanyama cut Kananura with a panga. When this was put to him in cross examination, he explained that;

> ***"The correct name for that instrument is not known, it could have been a panga or an axe. I know the difference between a panga and an axe."***

Again, with regard to the time of the day when the victims were brought to Kireka barracks and the length of the period that they stayed there; Lwanga said they were brought in the morning; Muhanguzi (PW20) said they were brought in during the night. Lwanga said the victims stayed there three days; Muhanguzi indicated that after they came, they stayed with him until the following day when they were killed which meant they stayed there only one day. If Muhanguzi was to be believed and the victims were at the Kireka Barracks for only one day, then, counsel submitted, the first appellant, Rwakasisi could not have had an opportunity of interrogating the detainees. The witness Lwanga apparently contradicted himself by saying at one stage of his testimony that after the first appellant arrived at the barracks, the cell guard informed the prisoners from Mbarara that:

> ***"their masters who had brought them wanted to talk to them.."***

Later the witness gave a different version: that when the first appellant arrived at the barracks the guard came and said that:-

> ***"The Mbarara group should get out because Rwakasisi had come….."***

Lwanga was alleged by counsel for the appellants to have deliberately lied on the question of lighting at the barracks when he testified that there was security lighting on a tree that was near the prisoners' cell, whereas Muhanguzi testified that as it was night, lamps had to be brought. Apart from these contradictions, the witness Lwanga's evidence was attacked by counsel for the appellant as unworthy of belief because he always seemed to be giving himself opportunities to see things that other people couldn't and didn't see.

As to the witness Adam Muhanguzi, PW2O, he was a soldier in the Uganda Freedom; Movement (UPM) Army. In January 1981 he was captured by UNLA soldiers and, because he had sustained serious injuries, he was transferred to the Military Barracks. He stayed at Kireka Barracks for a period of two to three months during which time some prisoners were brought in on 19th May 1981 from Mbarara.

Among them were Mbiringi, Kananura and Karuhanga, who were put in the same cell as the witness. On that day at around 5.00 p.m. Muwanga, the Vice President, Rwakasisi, the first appellant, Wanyama, the second appellant, and Omoya an intelligence officer, came and talked to the prisoners, suggesting that they knew what would happen to them if they continued to deny that they were guerillas and then those people left and the cell door was locked. At around 7.00 p.m the cell door as opened and about 18 people were taken out by soldiers; among the people were Mbiringi, Karuhanga and Kananura. Soon afterwards the witness climbed on a drum and saw the victims had their hands and legs tied with sisal ropes; that was followed by rapid gunfire of many shots and then people crying and screaming; the witness, who had climbed down from the drum when the gunfire started, stood, again on the drum afterwards and saw the soldiers lifting people and dropping them in a Landrover, which took them away.

The witness Muhanguzi's testimony was discounted by counsel for the first appellant Rwakasisi on the ground that it could not afford corroboration on a charge of kidnapping although perhaps it would have been corroborative of murder; it was too remote to corroborate kidnapping, which is complete on seizure and carrying away.

It was further submitted by counsel for the first appellant that this testimony of Muhanguzi has no value because he testified that the first appellant Rwakasisi was just present, he did not say anything at all; mere presence does not raise an inference of guilt; the first appellant may have been there innocently.

Counsel for the respondent, while conceding that the intent "that such people may be murdered" in S.235, P.CA which was alleged in the particulars of the instant case, must be there at the time of seizure. He submitted that nevertheless whether or not the intent was there

would be based on inferences drawn from events **at** or even **after** the time of seizure. He referred to some cases including, some decisions of this Court, Major John Oringa v. Uganda Cr. App. No.11 of 1986, ***Kadiri Matovu v. Uganda*** Cr. App. No. 8 of 1983, ***Paddy Kalenzi v. Uganda*** Cr. App. No.4 of 1988 (all unreported).

In my view the legality of the arrest, or rather the circumstances of the arrest how it was made, under what authority, whether or not reasons were given to the victim whether excessive violence or abuse was used-is only one among incidents that can indicate, and from which inferences may be drawn as to, the intent of the person making (or ordering) the arrest.

It is in the light of this consideration that other circumstances after the actual arrest and carrying away may be looked at to see whether they throw any light on the matter of the intention of the accused person at the time of the kidnapping.

Counsel for the respondent submitted that if the evidence of Katabazi was accepted, when the first appellant Rwakasisi ordered the arrest of the Mbarara people, he had already condemned them as guerillas, who must be treated in a certain way rather than in the normal manner of treating offenders for treason.

He referred to the evidence of Detective Inspector Kwarakunde (PW17), a 20- year veteran of the Police Force; this would be the man who would normally be involved in any crimes committed in the area of Mbarara, rather than Special Force men who have powers of arrest but would not be involved in investigations. In the instant case corporals were doing the arrests and refused to inform the witness, who was their senior officer; and the uniport, according to this witness, was normally not used as a lockup for prisoners. Counsel submitted that this showed the taking of the victims to the Police Station was no more than a facade, finding a safe, convenient holding centre, or the witness Kwarakunde would not have been treated in the way he was.

Counsel further submitted that what was the first appellant's intention was shown by his attitude to Tibenderana and Faith Nkore, PWs 12 and 13 the father and sister Nkore respectively of the victim Muhumuza. After being informed of his son's arrest, Tibenderana

went to Bushenyi to see one Rubagakye in his capacity as a Leader in the area to get some assistance. On failing to do so, he then went to the home of the first appellant, Rwakasisi, at Kabwohe Gombolola Kagango, Bushenyi District. He found him there with one Myers Kyawe and was soliciting help for his son whom he told the first appellant was among then people arrested at Mbarara; the first appellant inquired from Myers Kyawe if the witness' son was among them. Rwakasisi replied that they were not kidnapping people but those whom they arrested were merely being detained. Then he told the witness to see one John Nganwa and Myers Kyawe (A3) who would tell him what to do; the witness left and nine days later went to Kampala and saw the first appellant that unless he was told where his son was detained, he was not leaving; the first appellant, told him that when he returned he should take with him his daughter (Faith Nkore) knew matters connected with his son. The witness (Faith Nkore) who (PW 13) gave testimony relating her visits to the first appellant Rwakasisi in June 1981, at his home in Kampala as a man whom she knew from her area, as well as his parents; when she reported to him of her brother's arrest and asked whether he knew of his whereabouts, the first appellant replied that at that time he could not tell her the answer but that she should wait until the Government would carry out investigations then thereafter she would know the whereabouts of her brother. Later she went to see the then Minister of Industry, Mr. Tiberondwa, and when she explained about her brother, he advised the witness to return to Mbarara and that he would work on the matter and would inform her of the position; after two weeks he told her that he had failed to trace her brother and advised her to go and rest.

The learned trial Judge directed himself on the definition of accomplice, citing ***Davies v. Director of Public Prosecutions*** (1954) Vol.1 ALL E.R. *507* (H.L) at *514*, cited with approval in ***Jethwa v. Anor & Rep.*** (1969) EACA *459* and ***Githaie v. R.*** *(1956)* 23 EACA 440 at 441. He also directed himself on the rule of practice which has become a rule of law regarding accomplice evidence, citing ***Uganda v. Leubeni*** Kasisi H.C.B. P.91, ***Mohamed Tahi v. R.*** (1961) EACA 206 1977, rep. Vol.1 Judgments of the Court of Appeal for Uganda Case No. 1. I am of the view, with respect, that the Judge correctly held that Katabazi (PW23) was an accomplice whose evidence required corroboration before it could be acted upon but I do not find any corroboration in the evidence of Tiberendarana and Faith Nkore (PWs 12 and 13), as the learned Judge did. The first appellant's attitude was the same as that of other politicians solicited for assistance. I disagree, however, with respect, with counsel for the appellant's view that Lwanga and Muhanguzi (PWs 22 and 20) were accomplices.

I find that the Judge did not err in law and in his decision to believe and act on the evidence of Katabazi and Lwanga. Nor did he misdirect himself on the law of accomplice evidence. Save for the finding with regard to the attitude of the first appellant Rwakasisi, to the relatives of the victim Muhumuza, I do not find that the learned Judge erred to hold that there was evidence corroborating PW23's evidence. This ground of appeal therefore fails.

Whether the learned trial Judge correctly evaluated the evidence of the prosecution witnesses and acted on the evidence in examination-in chief and failed to consider cross-examination was another matter that formed a ground of appeal. Another way of putting it would perhaps be to question whether the learned trial Judge considered all the relevant evidence or overlooked some material aspects in reaching his decision.
This was particular relevant on the question of the first appellant's participation and the intent to be inferred. Countering the evidence of Katabazi, Lwanga and Muhanguzi (Pws 23, 22 and 20), counsel for the first appellant, Rwakasisi, pointed to the evidence of the girls who, according to Katabazi were arrested earlier than 15th May 1981 and who went to Mbarara with him and whose task was to identify another girl who was to be arrested and brought back to Nile Mansions with the seven victims; after some days in Kampala, Katabazi said he was ordered by Odong to return the girls to Mbarara and he did so. Two of them gave evidence Jane Kabazaire Lwanga PW7 and Atukunda Hope PW21. They were living testimony that not everyone who was taken to Nile Mansions was actually murdered. The girls survived although their names also were on the list of those who were arrested in Mbarara. Further, the evidence showed that these girls never saw the first appellant Rwakasisi at Nile Mansions. According to Jane Kabazaire, she spent a month in the Nile Mansions; while there she was interrogated by army men about Museveni and the meetings which had been held at Rushere; yet she never identified the first appellant Rwakasisi as ever interrogating her.

Atukunda Hope testified of having been detained at Nile Mansions after her arrest on 11th May 1981. She was put in room 211 and she was beaten and interrogated on different occasions by Katabazi and other soldiers about the meetings she had attended concerning Museveni; she was taken later to a house at Nakasero where again she was beaten and interrogated and then after four days returned to Nile Mansion; on 14th May 1981 they were brought from Kampala to Mbarara and put in the uniport where they spent the night and she

saw the seven victims brought in who were the subject of the kidnapping charges; after two days, the witness was taken back to Kampala where they were all taken first to the Police post at Nile Mansions and later on the witness was taken with two other girls to room 211; after three days there and further beatings by Katabazi, she and the two other girls were released and brought to Mbarara The witness identified the first appellant Rwakasisi in court as someone whom she had seen "long ago in. the regime of Idi Amin in Nairobi". She mentioned the names of persons whom she used to see coming in and going out while she was at Nile Mansions and some of the soldiers whose name she did not know who used to torture prisoners; she herself was tortured by Katabazi. Counsel submitted that had the first appellant been in Nile Mansions, the witness would certainly have recognised and identified him.

The learned trial Judge stated (at p.7 1) of the Judgment that:

> ***"I believe the prosecution witness as hearing told this court the truth. I was impressed by PW20, PW23, PW18, PW17, PW13, PW6, PW9 and the rest as being witnesses of truth."***

It will be observed that he did not particularly mention the two girls, Jane Kabazaire PW7 and Atukunda Hope PW21; he classed them along "the rest". Presumably he did have in mind survivors of the Mbarara group arrests. Could he have overlooked that they did not identify the first appellant at Nile Mansion and thus cast some doubt on Katabazi's testimony that he was there? Or, that that supported the first appellant's defence that he was never at Nile Mansion? It would have been helpful if these matters had been addressed in the Judgment. I cannot say, however that he would have come to a different conclusion than he did, because he did not treat the girls' evidence as corroboration of Katabazi; they merely were among the witnesses believed. I have considered whether the fact that they survived weakened the inference that was drawn by the Judge of the first appellant's guilt. It would seem that the learned Judge reached some of his conclusions from sources other than the evidence adduced. The first appellant in his unsworn statement said that in 1981 his assignment in government was to take the post mortem of the general elections; he continued in this assignment until early in 1982 when administration was transferred from the office of the Prime Minister and

placed under his office, including security and following his presentation to the cabinet of a paper, the creation of NASA was approved but in 1981, he had nothing to do with security.

The learned Judge dealt with this aspect at p, 68 of the Judgment as fellows: -

> "…….***This exercise of arresting people emanated from the Intelligence office in the Nile Mansion of which A1 was its head and he admitted being the head of NSS National Security Service and then finally NASA which he said was founded in 1982. I am of the view time that NASA was in existence even right up at the time when the victims were arrested. I do not agree with Al that NASA was filled with learned men/graduates as he wants this court to believe. On the contrary it was staffed with UPC functionaries who went and tortured the public as they wished. I take judicial notice of the fact that during Obote II regime the UPC supporters and functionaries including the army were almost above the law. They committed activities against the citizens*** *of* ***this country with impunity. And no wonder that 7 victims on being arrested instead of being taken to the police and face some charges in court they ended up in military barracks which was a place notorious for torturing people..."***

I am of the view with respect, that invocation of judicial knowledge to contradict the statement of the first appellant was inappropriate and erroneous. There was evidence from Katabazi, unchallenged apparently during cross- examination that during the period when the arrests allegedly occurred and the killing of the seven victims from Mbarara, there was a routine system, that was followed: arrests of victims, bringing them to Nile Mansion for interrogation, dispatch of them either to Nakasero or to Kireka Barracks; in the event they went to Nakasero, they would be tortured and brought back; if they went to Kireka barracks, they were not seen again.

There is evidence that this routine was followed in the instant case. Katabazi testified that he saw four of the victims being taken to be interrogated, two at a time, at Nile Mansions; the witness Atukunda Hope, testified that after interrogation at Nile 'Mansions, she was taken to

Nakasero and tortured, then she was brought back; the witness Lwanga testified that the seven victims were brought to Kireka barracks, and after being interviewed by the first appellant and the Vice President Muwanga, they were later killed. If Lwanga is to believed the first appellant, Rwakasisi expressed no surprise or disapproval at seeing the Mbarara victims (whom he had ordered to be arrested) at Kireka barracks instead of at a Police Station or a court being dealt with according to the judicial process.

This was evidence from which, together with other circumstances as to arrest and statements, inference might be drawn as to the intent of those who ordered the arrests and carrying away of the victims, Learned counsel for the appellant submitted that at most an inference could be drawn of intent to expose the victims to the danger of being murdered; but this was not the intent alleged, in the particulars of the charge. Learned counsel for the respondent submitted that where a person is seized at gun point, denounced as a guerilla, taken first to Nile Mansions, and then to Kireka barracks under the system operating at the time, the court was entitled to infer that the intention was such person **may** be murdered. The operative word in the charge in the instant case was "may"; this involved the willingness and approval of the victim being murdered and it was the prosecution allegation in the instant case that the seven victims, from the time of their arrests, were destined to follow the rout/nexus of Nile Mansions, Nakasero and/or Kireka barracks. Counsel submitted, that as the first appellant Rwakasisi was a party to this whole arrangement, he was guilty of the offence charged.

I have considered the whole of the evidence including the first appellant's statement. I am of the view that the evidence of Jane Kabazaire and Atukunda Hope that they never saw the first appellant at Nile Mansion should have been considered by the learned Judge in the light of the first appellant's denial that he ever conducted interrogation of persons there; I cannot say whether he did or not, since he did not mention it in his judgment. But even if he had considered it, it would not necessarily lead to the conclusion that Katabazi was lying on this point; the first appellant might have been there without the girl witnesses seeing him; they testified of other persons than the first appellant interrogating them. On the whole of the evidence I am of the view that the learned trial Judge did not err in law and there was ample evidence to justify the conclusion to which he came, namely that the first appellant Rwakasisi, was guilty of the offences charged in counts 8,9,11,12, and 14 but not in count 13

relating to the victim Muhumuza for reasons I have already indicated. Save to this extent, therefore, the appeal against conviction would fail.

We now turn to the appeal of the second appellant, Wanyama. The grounds of appeal were the following:-

1. The learned trial Judge erred in law in dismissing the accused alibi when the prosecution case had failed to disprove it

2. The learned trial Judge erred in law when he failed to find that the identifying evidence was of a sole identifying witness and that there could, only be a conviction after ruling out honest mistake by the identifying witness.

3. The learned trial Judge erred in law in failing to find that circumstances of identification were not favourable.

4. The learned trial Judge erred in law when he decided that the contradictions in the prosecution were minor when they pointed to deliberate untruthfulness of the witnesses.

Ground I

The evidence against the second appellant Wanyama was given by prosecution witnesses Katabazi PW23, Lwanga PW22 and Muhunguzi PW20. According to Katabazi, the second appellant was one of the intelligence officers at Nile Mansions who were using room 223 in 1981 to interrogate people arrested as guerillas.

The second appellant Wanyama in his unsworn statement had explained that by training and vocation he was a Communications Engineer and by 1980 he was the overall Emergency for Kampala zone. As part of his duties he helped in installations including the State House and Nile Mansions which was housing by the most of the Ministers; on 9th May 1981 he left Kampala for Bushenyi for the preparation of Heroes Day due on 27th May 1981; he had to

install a communication socket to link Bushenyi Lodge and State House in Kampala; he left Bushenyi on 29th May 1981 and returned to Kampala to continue his duties, which involved purely in communication.

The second appellant denied Katabazi's allegations that he had attended the Minister's conference with other related Army, and police officers. He also denounced as total lies the testimony of Lwanga and Muhanguzi that they had never known these prosecution witnesses before his imprisonment and committal in connection with the present case in 1985; nor had he ever met the first appellant before both were put in Luzira Upper Prisons in 1985.
The learned trial Judge said, after directing himself correctly as to the law on the defence of alibi of the second appellant Wanyama:

> "*... is destroyed or disapproved by the evidence of PW22 (Lwanga) who said that he saw A2 on the fateful night when the Mbarara group were shot down. Also on the 20th May 1981 he was seen by PW20 (Muhunguzi) when he went there with Muwanga and Rwakasisi and Omoya and that was the day when the victims were killed in the night. I am of the view that the evidence of those two witnesses which I regard as nothing but the whole truth leaves no doubts in my mind that the alibi put forward by A2 has been disproved. I believe, those prosecution witnesses most especially PW2O, PW22 and PW23 as having told this Court the truth."*

The learned Judge went on in his judgment to find that the second appellant Wanyama and the soldiers had a common intention in killing the seven victims from Mbarara in respect of whom the first appellant was charged (excluding Agaba).

Counsel for the second appellant Wanyama adopted on behalf of her client the arguments put forward by counsel for the first appellant Rwakasisi regarding the lack of credibility of the witness Katabazi. She submitted that the learned Judge based himself on the testimony of Katabazi that the second appellant, Wanyama was an intelligence officer and participated in the activities that went on at Nile Mansions whereas the second appellant in his defence

stated he was a technical engineer; in fact Katabazi admitted that room 211 was also being used as a base for the Army and this room was also being used as a base for the radio; nowhere did Katabazi say that the second appellant was seen at Mbarara nor at Kireka barracks, which was the alleged scene of killings. Counsel submitted that as an accomplice, Katabazi's evidence regarding the second appellant's intelligence role at Nile Mansions required corroboration and there was none; the girl witness Atukunda Hope (PW21) after saying that she knew the second appellant and identifying him in Court, did not say that she was ever taken before him. Regarding the witness Lwanga (PW22) and Muhanguzi (PW20), learned counsel for the second appellant submitted that although both witnesses agreed on seeing the second appellant Wanyama at Kireka barracks the alleged scene of the killings, they differed on several points of significance.

According to the witnesses' evidence, the second appellant Wanyama came to the barracks between the 19th and 20th May 1981. Muhanguzi testified that the second appellant cane at 5 p.m. with the first appellant, the Vice President Muwanga and Omoya an intelligence officer. The witness Muhanguzi identified the second appellant in Court. Then the witness Muhanguzi testified that the soldiers opened the cell and Muwanga talked to the prisoners from Mbarara. Later the cell was locked and Muwanga went away with his companions; at around 7.00 p.m. the same day a number of soldiers came; names of persons read out, including Mbiringi, Kananura and Karuhanga; the victims went out and the door was closed; Muhanguzi stood on a drum and saw through the ventilation the persons who had been taken out had their hands tied with sisal ropes.

He claimed down from the drum out of fear and then heard gun shots followed by screaming from the people outside; after the gunshots stopped, he stood again on the drum and saw soldiers lifting the people and dropping them in the Landover. Muhanguzi testified that he could not recognise any of the persons with the group of soldiers except Omoya because it was at night. Yet the witness Lwanga claimed to recognise the second appellant Wanyama in the group and cutting Kananura with an axe.

Counsel for the second appellant submitted that the conditions for identification at Kireka barracks were not favourable; despite the fact that the witness Muhanguzi testified there was lighting outside the cells, security lights and lanterns, the witness was not sure when he

climbed on top of the drum; at first he said he did so when he heard the firing, later he said he did not climb up after the shots had stopped. Counsel submitted that in view of the suddenness of events and the witness fear he could not have seen what he claimed to have seen.

Counsel for the appellant pointed to discrepancies between the prosecution witness accounts of what they saw from the same point of view, that is to say a ventilator. Both Muhanguzi and Lwanga climbed the same drum, according to their testimonies; the place outside the cell where the killing took place was narrow, 41/2 by 21/2 metres. The ventilator through which they pepped was 11/2 metres by 1 foot and had eight bars; there were four people peeping through the ventilator.

Commenting on the above evidence, the learned Judge held that the conditions were favourable for correct identification. Muhanguzi said he didn't recognise the people who were with Omoya because it was night. Yet Lwanga claimed to recognise them. The learned Judge did not consider this a reason for doubting Lwanga because: "there was no evidence that they looked in the same direction", (p.78 of Judge).

The learned Judge believed Lwanga's testimony that he saw the second appellant Wanyama among the group killing the prisoners and that in particular he witnessed the second appellant "cut Kananura with a panga / axe on the neck and the body of the said Kananura started struggling on the ground." Lwanga impressed the Judge as truthful witness who, despite protracted cross- examination, never budged. Muhanguzi also impressed the Judge "as being very truthful". The Judgment states (at p.83): -

> "…….***I do not agree with the submissions of the learned Defence counsel that the evidence of these witnesses, PW23, PW20 and PW22, was discredited. There might have been discrepancies here and there but those were not fatal to the prosecution case."***

As this is a first appeal, I was bound to review the evidence. I find that the defence counsel's criticisms were not wholly devoid of substance. The eye witnesses who claimed to have identified the second appellant, Wanyama, all alleged that they had known him prior to the incidents to which they testified. Katabazi (PW23's) testimony that he recognised the second appellant at Nile Mansions is relevant on the question of alibi but of little significance on the question of participation in the offence of murder with malice forethought in view of the defence explanation of the communications work in which he was engaged. Muhanguzi (PW20's) recognition of the second appellant on 20th May 1987 was when he came to Kireka Barracks in the day time with the Vice President Muwanga and the first appellant, Rwakasisi, and talked to the Mbarara prisoners. This witness did not recognise the second appellant among the group that came in the evening of that day around 7.00p.m. with Omoya, according to his testimony during examination-in-chief. It was after cross- examination by defence counsel had ended, when under re-examination by the prosecution that Muhanguzi stated (at p.121 of the record):

> "..... ***I now say I saw Wanyama at Kasubi once and at Luzira once, and Kireka about 40 times. The first time he came with Rwakasisi and Muwanga. And on the 2nd time case with Omoya in the evening and the third time Wanyama brought in prisoners and Wanyama looked as the in-charge of those people who brought the prisoners. And on the 4th time he came and asked the two girls with whom I was in the cells, he took them outside and be talked to them On the second tune when Omoya read the names of the 18 people whom I told you about. Yes I climbed on the Iron box and I saw those people being shot."***

Lwanga (PW22), when testifying of the visit of what he called "the killing group" between 7.00 and 8.00 p.m. on the 20th April 1987, stated that "John Omoya came and one well known person from Nile Mansion known as Wanyama A2 also came". He did not explain what he meant by "well known", whether he was well known to him or well known to other persons in the cell who may have mentioned his name to the witness. He testified about seeing the second appellant cutting Kananura and he did say how far he was from the scene of the killing (10 metres) but now how long the incident lasted.

Lwanga claimed to have seen the second appellant Wanyama regularly at Kireka Barracks holding “kangaroo court” where they used to torture people. He purported to identify the second appellant by pointing him out in the court but this kind of identification is of little value.

I have looked at the witness Lwanga’s Police Statement, Exh DI as well as the Summary of Evidence. I have noted that the name of the second appellant is mentioned in the Police Statement as having been seen by Lwanga cutting Kananura with an axe. In the Summary of Evidence the cutting is mentioned by not the name of Wanyama. From my perusal of the evidence of the four prosecution witnesses upon whose testimony the learned Judge mainly based his finding of the guilt of the second appellant, I am of the view that Katabazi (PW23’s) testimony, even if believed, goes at most to discrediting his alibi. This may also be said of the testimony of PW2 1, Natukunda Hope that the second appellant was one of the people whom she used to see at Nile Mansion and she did not know what they were doing but she used to see prisoners being tortured and beaten up there.

The evidence of Muhanguzi (PW20) was contradictory and to some extent inconsistent with that of Lwanga (PW22). As to the latter, there was artificial lights upon the scene of the killing - hurricane lamps, security lights. But could he recognise the features of the persons present and see what they were doing from his cell 10 metres away? Was he able to see clearly enough from his position on top of a drum with two to three other people at times peeping through a ventilator 1 1/2 metres by 1 foot? There are questions which I think the learned Judge was bound to ask himself. I agree that there was ample evidence, which, if believed, would justify a finding that the second appellant was at Nile Mansions and not at Bushenyi as his alibi claimed. I would have thought, however, that properly directed, a reasonable tribunal might have had doubts as to his identification at Kireka barracks on the night of the killings of the Mbarara victims. This is not necessarily because Muhumuza and Lwanga were liars. They may have been honest but mistaken.

In the circumstances of the instant case, it was for the prosecution to disprove the second appellant’s alibi. It did so only partially. The prosecution still had to prove the second appellant was a party to the killings on the night between the 19th and 20th April, 1981. Upon

perusal of the whole of the evidenced the learned trial Judge found that the prosecution had discharged their burden and proved that the second appellant and the soldiers had formed a common intention to kill the 18 deceased people including the 7 Mbarara victims.

The learned Judge had the advantage of seeing the witnesses and observing their demeanour, which I have not had. Nevertheless from my perusal of the record, I am left with some lingering doubts. It is because of this that I have set out at some length the evidence of the main witnesses from which I have received a different impression than the learned Judge. Upon such evidence I am of the view, with respect, that it was unsafe to base a conviction for the six counts of murder as charged.

I would dismiss the appeal of the first appellant. In my view, the appeal of the second appellant succeeds.

Dated at Mengo this 20th day of March 1991

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.

JUDGMENT OF MANYINDO, D.C.J.:

The facts of the case have been fully set out in the Judgment of Seaton, J.S.C., just delivered. I agree that the appeal of the first appellant must fail on counts 8, 9, 11, 12 and 14 but must succeed on count 13 for the reasons stated in that Judgment. In my opinion that of the second appellant must also fail. On his own admission, the second appellant was a member of the Internal Security Organisation which was based at the Nile Mansions at the material time.

According to Katabazi (PW23) the second appellant was in charge of that room which was the operations base for the Intelligence officers. There was evidence of (PW23) that the second appellant interrogated suspects in that room.

There was also evidence that suspected guerillas were first taken to Nile Mansions and then transferred either to Kireka Barracks or somewhere in Nakasero. According to Lwanga (PW22) the second appellant used to try such.

As the trial Judge pointed out in his Judgment, there were contradictions, for example regarding points of time and places but there were minor and did not affect the credibility of PW22. In the result I would dismiss the appeals of both appellants and since Platt J.S.C., agrees, by a majority of two to one, it is so ordered.

Dated at Mengo this 20th day of March 1991.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

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

W.MASALU MUSENE,
REGISTRAR, THE SUPREME COURT.

JUDGMENT OF PLATT. J.S.C

With respect, I agree with the Judgment of Seaton, J.S.C., and the by Chief Justice that the Appeal of the Appellant Rwakasisi, should be dismissed.

With respect I agree with the judgment of Manyindo, D.C.J., that the Appeal of the Appellant Wanyama should also be dismissed.

I agree with the orders stated by the Chief Justice.

Dated at Mengo this 20th day of March 1991

HG. PLATT
JUSTICE OF THE SUPREME COURT

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

W.MASALU MUSENE,
REGISTRAR, THE SUPREME COURT.