IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CRIMINAL APPEAL NO. 23 OF 1989

BETWEEN

AMOS BINUGE & OTHERS:::::::::::::::::::::::::::::::::::: APPELLANTS

AND

UGANDA : : : : : : : : : : : : RESPONDENT

(Appeal from conviction and sentence of the

High Court of Uganda (Mr. Justice C. Kato)

Holden at Hoima on 29.5.89)

IN

H. C. Cr. SS. CASE NO. 202 OF 1387

JUDGEMET OF THE COURT

The three appellants and one Alfred Sabiiti were jointly indicted for the murder of the deceased, Josephat Mugisa in Count I and aggravated robbery to the prejudice of the deceased, in Count II. After a protracted trial lasting more than ten days, they were ‘convicted as charged on both counts and were sentenced to death on each count. Sabiiti was acquitted and discharged at the close of the prosecution case as he had no case to answer.

The appellants have now appealed against the convictions only. However, we wish to say this about the sentences.

We accept the position that where an accused person is indicted and convicted on more than one count each count should normally carry a sentence or penalty. But we do not consider it proper, where the offences carry death sentences, for the trial Court to impose multiple death sentences. We think that the correct course is for the trial judge to pass the death sentences on all the counts but then suspend them except on one count only. This is the stand this Court took in: Moses Kalyowa and 3 others v Uganda, Criminal appeal No.4 of 1985 (unreported).

In their appeal the appellants attacked the convictions on three fronts. First, they claimed that conditions did not favour correct identification of the attackers by the eye - witnesses. Second, that the evidence of the key witnesses for the prosecution was

contradictory in major respects and third, that their defence of alibi should have been accepted in the circumstances.

The State Attorney who argued the appeal was in a dilemma. He thought that the State had put up a good case against the appellants but that it was bungled by the Court, to the prejudice of both parties. He complained that the appellants had not been accorded a fair trial and that some of the evidence adduced by the prosecution had not been considered by the trial judge. In the circumstances he did not support the convictions. We think he was right not to support them.

In the case of the first appellant he was prejudiced when his objection to the admissibility of his extra-judicial statement was summarily dismissed by the trial judge. That statement had been recorded by Police Inspector Bikanga. When the Inspector sought to put it in evidence the defence Counsel objected on the ground that his client had not made it voluntarily, whereupon the prosecuting Counsel rose and made this remarkable statement to the Court.

"These statements (the vernacular and the translation thereof) were voluntarily made without any inducement and there is no basis to challenge its admissibility." Then there follows this entry: -

"Court: The objection is rejected as there is nothing to suggest that the admission was not voluntary."

The Inspector then continued with his evidence and even tendered the extra-judicial statements in evidence. It is not clear why the Counsel who represented the appellants in this appeal did not take up this point which we consider to be grave. It is trite law that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish, by evidence, his grounds of objection. This is done through a trial within a trial. The procedure to be followed in a trial within a trial was fully set out in the celebrated case of: Kinyori s/o Karuditu (1956) 23 E.A.C.A. 480. The only improvement on that Case is that today the Assessors remain in Court during the trial within a trial under Section 80 of the Trial on Indictments Decree. The purpose of the trial within a trial, is to decide, upon the evidence of both sides, whether the confession should be admitted. See: M'Murari s/o Karegwa v R (1954) 21 E.A.C.A. 262 and Mwangi s/o Njerogi v R (1954) 21 E.A.C.A. 377.

We cannot appreciate how a trial judge or Magistrate can, by simply looking at a statement, conclude that it was made voluntarily. It appears that the Assessors also read it because both relied on it in their opinion that the appellants were guilty as charged. The trial

judge must have kept it at the back of his mind although for reasons which were not stated he decided not to rely on it.

We are satisfied that by allowing himself and the Assessors to peruse the contested confession the trial judge ruined the trial as far as the first appellant was concerned as the confession had not been proved.

Then there was the question of common intention. This was not considered by the trial judge at all. The fact that very many properties allegedly stolen during the robbery were found with one of the appellants was not properly considered by the trial judge. It appears that the trial judge made up his mind very early about the guilt of the appellant hence the clumsy handling of the case.

In the result we allow this appeal, quash the convictions and set aside the sentences. It is ordered that the case be retried by another Judge.

Dated at Mengo this 31st day of May, 1991.

SIGNED:
S.T. MANYINDO
DEPUTY CHIEF JUSTICE

H.G. PLATT
JUSTICE OF THE SUPREME COURT

E.E. SEATON
JUSTICE CF THE SUPREME COURT

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

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT