THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CRIMINAL APPEAL NO.10 OF 1989

BETWEEN

HAJI MUSA SEBIRUMBI========== APPELLANT

AND

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

(Appeal from the conviction and sentence of the

High Court decision holden at Kampala) dated

18/4/1989)

IN

HIGH COURT CR. SS. CASE NO. 107/87

JUDGMENT OF ODER, J.S.C.

The Appellant, Haji Musa Sebirumbi, was tried and convicted by the High Court sitting in Kampala on all five counts of murder charged in a single indictment and sentenced to death. The victims of the alleged murders were:

Matayo Nkanjirwa, count one; Festo Kibuuka, count two; Kibirige count three; Edidian Luttamaguzi, count four and unknown male person count five. All the offences were alleged to have been committed during a single incident on 9.6.1981 in Kikandwa village, Gombolola Semuto, Luweero District.

The salient facts of the case are that on the material date the Appellant allegedly led a group of Government army soldiers and their supporters in an operation at about 6.00 a.m. at the scene. Kikandwa village was part of an area in which there was an on-going insurgency against the government of the time.

The Appellant was the constituency Chairman of the area of the then ruling U.P.C. Party. During the operation in question, the deceased and others were rounded up and taken to the home of one Kinene, a local resident. There, the deceased were murdered, the Appellant allegedly participating personally in killing two of them by hitting them on the head with a stick. The third deceased was also hit on the head by one Joshua a member of the Appellant's

group. The fourth deceased was killed with a knife and the fifth by shooting with a gun. There-after the Appellant and the soldiers left the scene, and the deceased were buried by relatives and other villagers.

Several years passed before the report of the incident was made to any authority. In 1986 there was a change of government. Then in 1987 at the instigation of John Kaddu (PW8), a brother of the deceased the subject of count four, the Appellant was arrested and charged accordingly.

It was not disputed that the five deceased persons had been killed in circumstances amounting to murder. Their murder was, therefore, a common cause in this case. The bone of contention was the appellant's connection with the crimes.

The Appellant denied any participation in the incident, and put up an alibi as his defence. He claimed that he had been injured in a grenade attack in Kampala on 5/5/1981, as a result of which he was hospitalised in Mulago Hospital for sometime. Subsequently, due to fear of insecurity, he moved to Apollo Hotel in Kampala, from which he continued to report to Mulago for treatment as an outpatient. He had to use crutches to assist him to walk. On the material date he left the Hotel after breakfast and went to Mulago for treatment. Therefore, he could not have possibly been in Kikandwa village and committed the crimes alleged against him.

The prosecution case depended mainly on the evidence of the only eye witness, Livingstone Musakwa (PW1). This witness is so important that for a proper appreciation of the arguments in this Appeal I propose to set out his evidence in some detail. He testified that on the material date there was a funeral at home of Yonasani Kanyike (PW3). He had spent the night there. Others present included Yonasani (PW3), his wife Kasalina Nalubwama (PW5) and Kibuuka, Kibirige and Luttamaguzi - the subjects respectively of counts two, there and four of the indictment. Then at 6.00 a.m. Musakwa (PW1) saw a long line of soldiers, the Appellant among them. They scattered everywhere. The Appellant, who, with Joshua and Mikambo, was leading the soldiers, was dressed in a red T-shirt and a green long jacket. The witness did not apparently take notice of the Appellant's trousers. The former had known the

latter before at rallies, which the Appellant used to address. He also knew Joshua and Mikambo before, who on this occasion were in civilian clothes.

After arriving at Kanyike's home the Appellant ordered the soldiers to take the witness and the deceased, Kibuka and Kibinge to Kinene 's home, half of a mile away. There they found the deceased Nkanjirwa, Lutamaguzi, a man dressed in Police uniform and a teacher. The names of the last two the witness did not know. The Appellant ordered the witness and all the others to lie down. The Appellant then broke a stick from a coffee plant and hit Kibuuka on the head. Kibuka died instantly. Joshua got the stick from the Appellant and hit Kibirige on the head, who also died instantly. The Appellant got hold of the Coffee stick from Joshua and hit Nkanjirwa on the head, who also died instantly. Then the Appellant together with Joshua and soldiers pierced and cut the back of the head of Lutamaguzi with a pocket knife. Lutamaguzi also died instantly. The Appellant had a big knife which he also used for cutting Lutamaguzi. The other persons were shot dead.

Subsequently, the bodies of the deceased were removed, and somebody unknown to the witness put the stick in the house. He next saw the stick in 1986 when it was taken by the police to Kinene's home.

In cross examination, Musakwa (PW1) said that Luttamaguzi was brought to Kinene's home when he (PW1) was already there. He was brought by the Appellant, Joshua, Mikando and soldiers while being knifed or pierced. The Appellant then cut Luttamaguzi with the big knife he had in his possession. About the stick, the witness said that on 10/6/1981 he put it in the ceiling of Kinene's house.

When the Policemen visited the scene, it was still in the ceiling. He was also cross-examined on his previous statements to the police. He admitted that in his statement of 21/2/1987, he had stated that when he was taken to the home of Kinene he did not find anybody there. The witness explained the apparent contradiction by saying that he was not feeling well when the statement was recorded and that the policemen who had recorded the statement did not know much of Luganda, the language which the witness spoke, though the two of them understood

each other. He also admitted that it was recorded in the same statement that he had been shown the stick used for killing Kibuuka, Kibirige, Nkanjirwa, Luttamaguzi and the unknown person. But he denied that that was what he had said. It was the recording Police officer who had made the mistake.

The witness further said in cross-examination that it was Kaddu and others (PW8) who told him and others to report the incident to the Police and they did so.

Five grounds of Appeal are set out in the memorandum. I shall deal with them in the order in which they were argued by Mr. Ayigihugu, learned Counsel for the Appellant. First, ground one, which is that the learned trial Judge erred in law in failing to summon the Medical Superintendent of Mulago Hospital to give evidence regarding the appellant's admission to Mulago Hospital on 4/5/1981 after the learned trial Judge had decided that that evidence appeared essential to the just decision of the case. His failure occasioned a miscarriage of justice because the Appellant's defence of alibi hinged on that evidence.

The sequence of the events giving rise to this complaint was as follows: After the close of the prosecution case, the Appellant gave sworn testimony in his own defence. The gist of his evidence has already been referred to in this judgment. He further testified to the effect that on 16/2/1982, he was detained in Luzira Prison on suspicion of supporting anti-government rebels. By then, he was not yet cured from the injury he had sustained from the grenade attack. Consequently he continued to go from Luzira to Mulago for medical treatment as an outpatient. Subsequently he was released from detention but his medical treatment documents were removed from him and retained by the Prison's authority in Luzira. The defence case closed after the Appellant had completed his evidence. Thereafter the State Attorney for the prosecution applied to the Court to summon the O.C. of Luzira Upper Prison to say something about the Appellant's claim that his medical documents had been removed from him. The counsel for the Appellant at the trial did not object to the application. The result was that the O.C. gave testimony on 3/3/1989. It was to the effect that there was no official policy to remove or confiscate medical treatment chits from prisoners or detainees on being released from Luzira.

However, he was not in a position to inform the trial court whether the Appellant's medical documents were removed from him when he was released from detention on 27/7/1984. The O.C. said further that the first time he heard of the Appellant's medical documents had been on 30/1/88 when the latter asked him (O.C.) to forward an application to Superintendent of Mulago Hospital to furnish the Appellant with his file number and relevant photocopies of his medical treatment documents covering the period he was hospitalised. At that time the Appellant was on remand in Luzira for the present case. The O.C. forwarded the Appellant's request in Mulago on 3/2/1988 and received a reply from the Medical Superintendent. At that point, the O.C. then asked the Court whether he might refer to the reply from Mulago. Mr. Elue, the Appellant's defence counsel at the trial, raised an objection, which the learned Trial Judge sustained. The O.C. then completed his testimony. At that stage the learned trial Judge on his volition decided to summon under Section 37 of the Trial on Indictment Decree the Medical Superintendent of Mulago Hospital. The reason for his order to summon the hospital official were stated by the learned trial Judge as follows: -

> "…..***From the evidence, particularly the evidence of the court witness Mr. Katamba O/c Upper Prison Luzira, I come to the conclusion that the Medical Superintendent Mulago be summoned under Section 37 of the Trial on indictment Decree, as a witness in the case, to give evidence pertaining to the accused's admission as an in-patient in that Hospital on 4/5/1 981, and to produce to the*** *court* ***medical treatment chits or documents in regard to his treatment in the hospital as an in-patient, when he sustained injuries as a result of hand grenade blast in the said date 4/5/1 981, near the City House, William Street, Kampala. The evidence appears essential to the just decision of this case."***

While Mr. Ogwal Olwa the State Attorney for the Prosecution expressed the opinion that the order to summon the hospital official was a proper one, Mr. Elue defence Counsel for the Appellant objected to it on the ground that Section 37 of T.I.D. could not be invoked in the circumstances of this case, where to do so would amount to using the section to bridge gaps in the prosecution case. Right from the time of his arrest the Appellant's case had been that he had been injured in a grenade blast on 4/5/1981, leading to his admission in hospital. The prosecution, therefore, had known all along that the Mulago Medical Superintendent was

material witness in the case and yet they had deliberately refused to call him. For his objection, the learned defence Counsel relied to the case of ***Kalukana Otim v R. (1963) E.A. 253.***

The learned trial Judge overruled the defence objection as misconceived. But he then changed his mind and abandoned his earlier decision to call the medical Superintendent as a witness, on the ground that he did not with to prolong the trial of the case which had already been protracted.

In his submission before us Mr. Ayigihugu contended that where a trial Judge had decided to exercise his discretionary powers to call a witness under section 37 of T.I.D, the section imposes on him a mandatory duty to call the witness irrespective of whether the evidence of such a witness could be detrimental to the case of the defence. In the instant case the learned trial Judge having come to the conclusion that the Medical Superintendent was an essential witness in the case, he was under a Statutory duty to call the hospital official whatever effect his evidence might have on the Appellant's case. Counsel relied on the case ***of Manyaki d/o Nyaganyi & others V. R. (1958)*** E.A. 495 for his submission. It was further contended that the reasons given by the learned trial Judge in the instant case did not exonerate him from calling the medical official. Having failed in that duty, his conviction of the Appellant should not be left to stand.

Section 37 of the T.I.D. reads as follows:-

> ***"The High Court may, at any stage of any trial under this Decree, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> ***Provided that the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case of such time, if any, as it thinks necessary to enable such cross examination to be adequately prepared if, in its opinion, either party may be***

prejudiced by the calling of any such person as a witness"

This section, in my view, embodies an aspect of the well-known principle according to which a Criminal court of first instance in Uganda has a wide discretion in the matter of eliciting evidence of its own motion during a trial. What then, is the scope of the powers conferred upon a trial court by that section? Certain decisions of the East African Court of Appeal, this Court's predecessor, are clearly relevant to the issue, and do provide a welcomed guide in the search for answers to this question. The cases, which relate to the Provisions of either the Tanzanian or Ugandan Criminal Procedure Code, which were similar to section 37 of our TJ.D. are: ***Boniface s/o Muhindi and Anor. v. R.*** E.A. 566; ***Manyaki d/o Nyaganya & others v. R.*** (1958) E.A. *495;* ***Kulukuna Otim v. Republic*** (1963) E.A. 253 and ***Murini v. Republic*** (1967) E.A. 542.

These cases clearly to indicate that the first part of Section 37 of the T.I.D. confers a discretion upon a trial Court to summon or call any person as a witness or examine any person in attendance though not summoned as witness or recall and re-examine any person already examined. under the second part, if it appears to a Judge that the evidence of a person is essential to the just decision of case, the Judge has a mandatory duty himself to call the person; the duty remains even if the evidence to be called supports the case for the prosecution and not that of the accused. Such a person. may be called at any stage of the trial, including after the close of the prosecution case or close of the defence case. On the basis of the cases to which I have referred, that is what I would accept as the proper construction of Section 37. 1 would hasten to add, however, that the basis on which a trial Judge should invoke his powers under this section depends on the facts of each particular case; and that section by no means permits a trial judge to turn into an investigatory Court, his primary role in our legal system being to adjudicate disputes between two contending parties. Finally, the operational of the section is also subject to the proviso attached to it.

In the instant case I think, without any shadow of doubts, that the Medical Superintendent of Mulago Hospital was an essential witness for the just decision of the case. The Appellant's case from the beginning was that he had been previously injured in a grenade attack resulting into his hospitalisation at Mulago. There after he continued to receive treatment at Mulago as

an outpatient from Apollo Hotel. At his trial he testified that on the material date, he was at Apollo Hotel and, after breakfast, went to Mulago for treatment. The prosecution case and evidence was that on that day he was at Kikandwa village committing the alleged crimes between 6a.m. and 10.00a.m. What better evidence than that from the hospital Superintendent would have thrown conclusive light on the dispute? Yet by the close of the prosecution and defence case neither party had called the official. No reason was given for this glaring omission. At that stage the learned trial Judge, I think, had two choices, either to leave matters as there were and subsequently acquit the Appellant in the end if he was satisfied that the Appellant's alibi raised a doubt in the prosecution case; or, having decided that the hospital official was an essential witness for the just decision of the case, to call him under S.37. He chose the latter but did not go all the way. I think therefore, that, in the circumstances of the case, the decision of the learned trial Judge to summon the Mulago Medical Superintendent was justified, whether his subsequent change of mind was a proper thing to do is what I shall now process to consider next.

The question which comes to mind is where a trial Judge has decided to summon a person as witness under S.37, is it proper for him to change his mind? If the answer is Yes, for what reasons can he do so? The case of ***Manyaki*** (Supra), which originated from what was then Tanganyika, appears to suggest that a trial Judge can do so, for proper reasons. In that case, the first Appellant Manyaki was tried and convicted with three others for the murder of her adopted son, Makemba. At the trial Nzota one of the widows of the deceased, who had given evidence at the preliminary inquiry, was not called as a witness. The case for the prosecution turned upon the evidence of Wakuru the second widow of the deceased, who claimed that Nzota was present when Wanyaki and the other Appellants entered their house and attacked the deceased. After the evidence of the first Appellant had concluded, the trial Judge noted in the record as follows: -

> ***"The court intimates that it will call Nzota d/o Sangiri (PW1. PW5) pursuant to section 151 of the Criminal Procedure Code, since her evidence appears to the Court essential to the just decision of the case."***

The Court then heard Counsel for and against calling of Nzota. After an adjournment there was a note by the Judge to the effect that the Court had informed the advocates that on further reflection it was of opinion that the calling by it of Nzota would be prejudicial to the defence, and that it would not therefore call her. The Appellants were nevertheless convicted. On appeal, it was held , inter alia, that due to the operation of section 155 a trial Judge was under a statutory duty, once he came to the conclusion that evidence was essential to the just decision of the case, to call the person who can give such evidence, and to do so whatever the effect might be. The Court in that case said this: -

> ***"We are of opinion that once the learned trial Judge had come to the conclusion (which seems to have been amply justified) that Nzota 's evidence was essential to the just decision of the case, he was under a statutory duty to call her, whether her evidence would be prejudicial to the defence or not, unless, indeed after hearing argument, he changed his mind as to whether her evidence was essential to the just determination of the case. This, in his note on p.48, he has not said."*** (underlining is mine).

I think that there may well be situations which would persuade a trial Judge to reconsider his decision to call a person as witness in a case before him. I agree with the suggestion in Manyaki (supra) that a reversal of such a decision would be valid only if it is based on sound reasons which indicate that the person is no longer considered by the trial Court as an essential witness for the just decision of the case. Any other basis would, I think, be inconsistent with the statutory duty of the Judge under section 37 and therefore render the reversal of the decision invalid.

In the instant case, the learned trial Judge reconsidered and reversed his earlier decision to call the Mulago Medical Superintendent not because of the objection of the counsel for the defence, which he overruled (and has been conceded before us by the learned Counsel for the State as having been rightly taken), but because the learned trial Judge did not wish to prolong the trial which he thought had already been protracted. In my view while I think that the objection raised by the defence counsel to the intended calling of the hospital official was justified, the reason given by the learned trial Judge for not calling the official was not valid

for purposes of Section 37.

In this regard Mr. Mwangusya the learned Senior Principal State Attorney contented that at the close of the prosecution and the defence case overwhelming evidence had been adduced against defence. Consequently, he contended that the prosecution did not have to call the medical Superintendent. In any case the evidence of D/C No.1 6902A, David Okoth (PW7) had proved that no record of the Appellant's medical treatment existed both at Mulago Hospital and Apollo Hotel. I think that these arguments of the learned State Attorney relate more to the issue of alibi, which shall be considered later in this judgment, than to consideration of whether the medical Superintendent was an essential witness. Consequently all that I will say here is that they would not have justified a failure to call the hospital Superintendent as witness under S.37.

The learned trial Judge having acted in contravention of his duty under S.37, as he did, what are the consequence? Unlike the court in ***Manyaki's*** case (supra) we have not had the opportunity to know what evidence the Medical Superintendent would have given had he been called. In might have been in favour of the prosecution and prejudicial to the Appellant, or vise versa, I cannot speculate. Whatever the effects of that evidence the learned trial Judge, having decided that the hospital official was an essential witness, ought to have called him. His failure to do so was a fatal procedural error, which would render the trial a nullity. I think, therefore, that this ground of appeal should succeed.

Next, Mr. Ayigihugu argued grounds two and five together. The substance of these grounds are that at the learned Judge himself and the assessors by finding that though the evidence of Musakwa (PW1) in so far a it is contradicted by the evidence of Yonasani Kanyike (PW3) and Kasalina Nalubwama (PW5) regarding the Appellant's presence at Kanyike's home was false and exaggerated yet the contradiction was minor and should be ignored.

Further that the learned Judge erred to have held that the Appellant's alibi was disproved by the evidence of the prosecution witness which, according to counsel, should not have been accepted as true due to inconsistencies, contradictions and other unreliable aspects of such

evidence.

There is no doubt that the evidence of prosecution witness in this case contained many contradictions and discrepancies, on certain matters. What I have to decide are whether the learned Judge properly considered them, what weight to attach to them and their effects on the credibility of the prosecution witnesses concerned. But first I must analyse the evidence in question.

As already pointed out, the key prosecution witnesses was Musakwa (PW1). He alone claimed to have seen how the Appellant killed the deceased at the home of Kinene. His evidence that the Appellant with a group of soldiers attacked the home of Yonasani Kanyike (PW3) early on the morning of 9/6/1981 was contradicted by the evidence of Kanyike himself and his wife Kasalina Nalubwama (PW5). The former testified that the appellant was not among the people who raided his home. In this connection, Kanyike contradicted his own earlier statement to the Police, recorded on 27/2/1987, in which he had said that the Appellant was among the soldiers who raided his home. In cross examination Kasalina (PW5) also said that the Appellant was not among the soldiers who raided their home and that she saw him that morning at the home of Kinene. Of this contradiction in the evidence of Musakwa (PW1) Yonasani (PW3) and Kasalina (PW5) the learned trial Judge said this in his judgment (pg. 10)

> ***"PW1 testified that on 9/6/1981 at about 6.00 a.m. he saw the accused among the soldiers who raided the home of (PW3), where (PW1) had spent night with others who were arrested with him by the soldiers, and ordered them to go to the Kinene's home. That piece of evidence was contradicted by the evidence of (PW3) and (PW5) when they testified that the accused was not among the soldiers who raided their home and arrested some people who had spent the night at the funeral…….. evidence was exaggerated and false. In any summing up to the assessors I directed them to ignore it when considering the rest of his evidence and the evidence as a whole. In any case, weighed against the rest of his evidence and the whole prosecution evidence, the contradiction was in my view, not a serious nature. It***

could have been ignored.

Mr. Ayigihugu contented that the contradiction referred to and others from this and other witnesses showed that Musakwa (PW1) was a liar, whose evidence should not have been believed altogether by the learned trial judge.

Then there are the contradictions and the inconsistencies within the evidence of Musakwa (PW1) itself and between his evidence and his previous statements to the police. For instance at first he (Musakwa) said that Yonasani (PW3), Kasalina (PW5), Kibuuka (Deceased 3), Luttamaguzi (Deceased 4), Sentongo, Sebyala and himself (PW1) were the only people present at the home of Yonasani (PW3) in the morning of 9/6/1981. Then almost immediately he said that he found at Kinene's home four of those he had named. These were the four deceased persons before they were killed. Yet in his previous statement dated 21/2/1987 he had said that he did not find anybody at Kinene's home. Counsel contended that the explanation Masakwa gave about the recorder of the statement not knowing Luganda well as being the cause of the contradiction was not convincing. Counsel also contended that the witness was not able to see the deceased being killed as he claimed since, according to his own evidence, he was forced to lie down facing down. I think that this attack does not carry much weight since the witness was not apparently asked to explain how he was able to see what was going on when he was lying face down.

Another contradiction concerned how Nkanjirwa (deceased) was killed. Musakwa (PW1) testified that the Appellant got the coffee stick from Joshua and hit Nkanjirwa on the head; and yet in cross examination he admitted that it was stated in his police statement of 27/2/19 87 that one Mikando got hold of a stick and hit Nkanjirwa (Deceased) on the head and he died instantly. He tried to explain this contradiction by saying that there was a mistake in his statement of 21/2/1987, which he did not correct when he made another statement on 27/2/1987. Then almost in the next breath, the witness said that he had forgotten what Mikando did. Another contradiction was about how Luttamaguzi was killed. In examination-in -Chief the witness said that the Appellant together with Joshua, Mikando and the soldiers, using pocket knives, pierced Luttamaguzi and also cut his head at the back and that the appellant had a big knife and use it to cut Luttamaguzi. In cross examination, he admitted that

his statement of 21/2/1987 stated that he had had been shown the stick which had been used to killed Kibuka, Kibirige, Nkanjirwa, Luttamaguzi and unknown male African. But he denied that that was what he had told the Police. In examination-in-chief, the witness said that the Appellant had a big knife, but did not assault him (PW1). But in cross-examination, he said that the Appellant cut him on the head, using his big knife and that he was also pierced at the back. Further, in cross examination, the witness said that he would not tell whether Kasalina (PW5) was or was not at Kinene's home as he (PW1) was suffering and feeling pain; and yet a little later, he said that Kasalina was at Kinene's home.

Musakwa (PW1) was also contradicted by Kaddu (PW8) about the movement of the stick which was allegedly used to kill the deceased and which was produced as an exhibit at the trial. The evidence was such that one might wonder whether the two witnesses testified about the same stick. First, Musakwa (PW1) said in cross-examination that he did not know who removed the stick from the heap of beans; nor did he know where it was put. He next saw it again at the funeral on 10/6/1981. He did not know who produced it on that occasion; and that on 10/6/1981 he (PW1) put the stick in the ceiling of the house of Kinene. Subsequently he saw the stick again when the Police visited the scene, when it was still in the ceiling of Kinene's house. Kaddu (PW8) on the other hand said in cross-examination that on 11/6/1981 he found the stick and left it at Kinene's home. Later after the war Kaddu found the stick in a corner in Kinene's house in April 1986; he then removed the stick and kept it in his (Kaddu's) hut. He was hoping that this case would come.

Further, that when the Police visited Kaddu's home to exhume the dead bodies in this case on 27/2/1987, he (Kaddu) handed the stick to the police. If Musakwa (PW1) on 10/6/1981 put the stick in the ceiling of Kinene's house and it was still there when the Police visited the scene in 1987, it could not have been the same stick that Kaddu (PW8) found in a corner in Kinene's house in April 1986 and kept it in his own hut until he gave it to the Police on 27/2/1987.

Another contradiction in Musakwa's (PW1) evidence to which the learned counsel referred concerned how Luttamaguzi (deceased) was allegedly taken to Kinene's home. In cross-

examination Musakwa (PW1) said that Luttamaguzi was one of the persons he found there and almost in the next breath, the witness said:-

> ***"Lutta was brought at the home of Kinene after I had arrived there. He was brought by the accused, Joshua and Mikando and the army soldiers. He was brought while being knifed or pierced***

There was no explanation of this contradiction in Musakwa's evidence, the two reasons of which could not both be true.

Next the contradictions and discrepancies in the evidence of the other prosecution witnesses. For instance, evidence to the effect that the Appellant was known to the prosecution witnesses, which the learned trial Judge accepted. In this regard, Mirieri Nanfuka (PW4) the mother of Luttamaguzi, said that when she heard her son crying she came out and found that it was the Appellant assaulting him with a stick. In cross-examination she said that she knew the Appellant before, having seen him at rallies in Semuto previously.

On being cross-examined on her Police statement on 27/1/1987 she admitted to have stated therein that she had been told that it was the Appellant who dragged her son from the son's house, but that she did not know the Appellant before and that it was Musakwa (PW1) who told her so on 9/6/1981.

This contradiction in her evidence appear to indicate that, contrary to her claims, she neither knew the Appellant before, nor saw him assault her son (Luttamaguzi). This evidence, and others, counsel contented, was not considered by the trial Judge.

Regarding Livingston Sentamu (PW6) on whose evidence the learned trial Judge relied so much in convicting the Appellant, I discern certain aspects of his evidence which appear to indicate that he did not see what he claimed he had seen. This witness claimed that his home was only 20 metres away from the home of Yonasani Kanyike (PW3). He said further that he

had attended the funeral at the home, from which he departed at dawn on 9/6/1981. As he arrived at his (PW6) home an army Landrover with a mounted machine gun also arrived and parked at his home. The soldier disembarked from the Landrover and shot his six heads of cattle and six goats. The Appellant, who was also armed with a gun, and six soldiers were on the Landrover. Sentamu (PW6) also said that the Appellant was his son-in-law, the Appellant having married the daughter of Sentamu's elder brother. After shooting the cattle and goats the Appellant and the soldiers proceeded to Kikandwa village shooting in the air. Time was about 7.00 a.m. by then. The Appellant was dressed in a red T-shirt and trousers and had only a gun and not a panga as well. Learned counsel referred to some features of the evidence of this witness which he submitted were strange. For example; the home of Kanyike (PW3) was only 20 metres away and yet Kanyike said that the soldiers arrived suddenly; neither Kanyike no Musakwa, or Kanyike's wife Kasalina (PW5), referred to any shootings, sounds of which they should have heard from 20 metres away; none of the other witnesses referred to a gun which Sentamu claimed the appellant had. Finally it was strange that Sentamu (PW6) should have said that after shooting his animals the soldiers went to Kikandwa village and not to Kanyike's home which was only 20 metres away. In the circumstances the counsel contended that contrary to the learned judge's findings, Sentamu (PW6) did not tell the truth. His evidence did not appear to show that the incident which was alleged in fact happened in the village or at Kinene's home.

The principles upon which a trial Judge should approach contradictions and discrepancies in the evidence of a witness or witnesses are now well settled in this country. They were stated by the predecessor of this Court in the well-known case of ***Alfred Tajor v. Uganda,*** E.A.C.A Cr. App. No, 167/1969 (unreported) and followed in many subsequent cases, two of the most recent of which are: ***Bumbakali Lutwama & Others v. Uganda*** Cr No. 38/89 (Unreported). The substance of these decisions is that in assessing the evidence of a witness his consistency or inconsistency; unless satisfactory explained will usually, but not necessarily, result in the evidence of a witness being rejected; minor inconsistencies will not usually have the same effect unless the trial Judge thinks that they point to deliberate untruthfulness, moreover, it is open to a trial Judge to find that a witness has been substantially truthful, even though the lied in some particular respect. The principles apply to contradictions and discrepancies in the evidence of a single or more witnesses supporting the same case.

In the instant case, what appears to be summing-up notes of the learned trial Judge, indicate that only three discrepancies in the prosecution evidence were pointed out to the assessors. These were the same ones which the learned Judge subsequently dealt with in his Judgment. I have already referred to the passage of his judgment in which the learned Judge expressed the view that one aspect of the evidence of Musakwa (PW1) was exaggerated and false due the evidence of Kanyike (PW3) and Kasalina (PW5) which contradicted Musakwa. Immediately thereafter the learned judge considered only two other discrepancies in the whole prosecution evidence. Immediately following the passage of his judgment to which I have already referred this is all that the learned trial Judge said on the matter:

> ***"Another discrepancy is that while PW1 said that he saw the accused wearing a red T-shirt with a long green jacket, PW2 said that she saw him wearing a red sweater. Definitely there are sweaters which look like T-shirts.***
> ***Considering that fact and the fact that the witness was an old woman whose memory was bound to fade with the lapse of time, I would consider that the contradiction was of a minor nature, which can be ignored. Seeing a long green jacket over a red T-shirt is a minor contradiction more so, when weighed against the weight of the whole evidence. In any case, recognition of an accused is not only by the clothes he was wearing at the material tune. It also goes to his identity. The last discrepancy all the eyewitness said that accused had a panga (big knife) PW6 saw him armed with a gun. PW6 was the first witness to see the accused early in the morning at his home, with six soldiers on an army Landrover which was temporarily packed at his home. From the evidence, it appears that the Landrover was not seen by the rest of the eye witness. Be that it might have been, a panga and a gun are not inclusive. It is probable that at the time PW6 saw the accused armed with a gun, the panga was on the Ian dover2jo be used as was thought fit, and the gun could have been left on the land rover which was probably hidden after leaving the home of PW6 for fear that it might warn or alert people who might then have disappeared into the bush. Weighed against the whole prosecution evidence. I would think that the contradiction is a minor one which can be ignored. According to the decision in Uganda Vs F. Ssembatva and Anor. (1974) HC.B 278 minor discrepancies do not usually have the same effect of the evidence being rejected***

unless they point to a deliberate lie or untruthfulness."

(I supplied the underlines before the case cited).

In my view the passage immediately referred to above, shows that the learned trial Judge properly directed himself, as he had done the assessors, with regard to the law on contradictions and discrepancies in the evidence of witnesses. He was also entitled to sever (as he did) the aspect of Musakwa's evidence which he considered to be false from the rest of his evidence which he was entitled to believe. But, with respect, I think, with respect that, his application of that law to the facts of the case before him fell for short of the standard which could be considered as satisfactory. Firstly the learned trial Judge appears to have literally ignored a host of other contradictions and discrepancies, quite a number of which I have been able easily to point out in this judgment. Many of them cannot by any stretch of imagination be regarded as minor. These include the contradictions between the evidence of Musakwa (PW1) and his previous statements to the police concerning whether or not he found the deceased persons at the home of Kinene when he (PW1) was taken there on the morning 9/6/1981. His explanation of the contradictions was not, I think, satisfactory for the officer who recorded the statement D/C No. 1 6902A Okoth (PW7) said that though he was a non-Muganda, he knew Luganda well, having grown up as a policeman's child in Nsambya Police Barracks where Luganda was spoken. Next the contradiction in Musakwa's evidence regarding the killing of Nkanjirwa - whether it was done by the Appellant or Mukando. If it was Mukando, then the witness would have been expected to stick to his story and not say later that he could not remember what Mukando did. Next the method by which Lutamaguzi was killed is important, if he was killed with a knife as the witness described in his evidence, he could not have been killed by beating him with a stick as he apparently said in his police statement of 2 1/2/1987. Next whether the witness (PW1) was himself assaulted. On the one hand he said he was not, but on the other he said that he was cut with a big knife by the Appellant and sustained serious injuries. I would have expected the witness's memory to be stronger or regarding what happened to him than on what happened to others. But apparently that was not so.

Next the evidence of Sentamu (PW6), according to which the Appellant and soldiers arrived at the village in a landrover. This would appear to be different from a long line of soldiers, which Musakwa (PW1) said he saw at the home of Kanyike (PW3) which was only 20 metres away from the home of Sentamu (PW6). Then there was the shootings referred to by Sentamu (PW6) to which Musakwa (PW1) and Kanyike did not refer.
The other major contradictions relate to the discussed. I think that there is considerable doubt about the stick referred to by Musakwa (PW 1) and Kaddu (PW3) being the same stick. Finally with respect, I think that the falsehood and exaggeration which the learned trial Judge found in the evidence of Musakwa (PWI) as not a minor matter.

Another aspect of the learned Judge's treatment of the contradictions and discrepancies in the prosecution evidence to which I must adversely refer concern what I think, with respect, was a substitution of his own speculation for evidence. In the last passage of the judgment reproduced above, I underlined what may be called the offending parts of the passage. There was no evidence that the sweater which one prosecution witness alleged was worn by the Appellant looked line the T-shirt alleged by another. Yet the learned trial Judge speculated that that was the case. Secondly, there was not evidence that when Sentamu (PW6) said that he saw the appellant with a gun, a panga was also on the Landrover, to be used as thought fit and that the gun was hidden in the Landrover after the Appellant had left the home of Sentamu (PW6) for fear that it might warn or alert people. All that, with respect, came from the learned trial Judge's imagination.

In the circumstances, I think that the learned trial Judge erred by his failure to pay any attention to most of the contradictions and discrepancies in the prosecution evidence to which I have referred. As already pointed out, many of such contradictions and discrepancies were not minor. On the contrary, I think that they were grave to extent of adversely affecting the veracity of the prosecution witnesses concerned, as they were not satisfactory explained or in some cases not at all. They tended therefore to point to untruthfulness on the part of such witnesses.

Another attack by Mr. Ayigigu of the prosecution evidence was based on the contention that most of the witnesses had cause to implicate the Appellant. Having been related to the

deceased, as they were, they must have been aggrieved by the killing of the deceased persons and, therefore, had a grudge and malice towards the appellant, who asserted in his evidence that the witnesses especially Sentamu (PW6) and Kaddu (PW8) who were his political opponents. According to learned Counsel the role played by Kaddu (PW8) in this case was motivated by such grudge and malice. It was contended that the learned trial Judge erred by finding that there was no malice or grudge by the prosecution witness towards the Appellant except possibly Sentamu (PW6) and Kaddu (PW8); for finding that the prosecution witnesses were not related, and for failing to address his mind to issue of affinity between the prosecution witnesses and the deceased persons.

According to the evidence as I see it Kasalina Mukuuma (PW2) was the grandmother of Kaddu (PW8), who was the brother of Luttamaguzi (deceased), whose mother was Mirieri Nanfuka (PW4). In fact when Kasalina (PW2) made her statement to the Police she was living in Kaddu's house. Kanyike (PW3) and Kasalina (PW5) were the parents of Kibuka (deceased). Evidence also shows that Kaddu (PW8) was driving force behind the arrest and prosecution of the Appellant. The killings of the deceased had remained unreported to any authority or investigated for about six years until Kaddu set the ball rolling by himself and Sentamu (PW6) arresting the appellant.

Thereafter he mobilised the other prosecution witnesses to make statements to the Police about the case, and accompanied the Police in the course of investigation, including exhumation of the bodies of the deceased, Sentamu (PW6) though related to Appellant's wife had lost cattle and goats killed by soldiers who were connected with the incident. In the circumstances I think that, contrary to the learned trial Judge's findings that there was no evidence of malice or grudge save for political differences with Kaddu and Sentamu, there was ample evidence to support the Appellant's claim of malice and grudge against him by many of the prosecution witnesses, especially Kaddu (PW8), Sentamu (PW6), Kasalina (PW5), Nanfuka (PW4), Kanyike (PW3) and Katalina (PW2). With regard to Kaddu (PW8) he would have had double motive, to implicate the Appellant. The role of Kaddu (PW8) in the case, brings to mind the one that was played by one Sentongo in the case of ***Bumbakali Lutwama and others v. Uganda,*** Cr. App. No. 35 of 1989 (unreported) . In that case the first Appellant and four others were suspected to have killed a former porter of Sentongo on

9/5/1980., There was a history of grudge from land dispute between the first Appellant and Ssentongo. At that time when the deceased was killed a report of sorts was apparently made to the Police. Thereafter , the matter remained dormant for several years. In 1987 Ssentongo, apparently on return from another area where had taken refuge, reopened the complaint and zealously mobilised potential witnesses for statements at the local establishment. Consequently the appellants were charged, tried and convicted for murder of Ssentongo's former porter. Sentongo himself did not give evidence against the appellants. On appeal, one of the grounds was that the learned trial Judge erred in dismissing the grudges which evidence showed had existed between two of the prosecution witnesses and the Appellants. This was one of the grounds on which the Appeal succeeded. In that connection, this court said*:*

> ***"...In view of the evidence of both sides it is evident that there were serious grudges between the Appellants and some of the prosecution witnesses and Ssentongo... with respect, our view is that the learned trial Judge did not appear to have given due consideration to the appellant's allegations of grudges with the prosecution witnesses and the important role Ssentongo appears to have played in this case. He apparently was the driving force behind the arrest of the appellants, taking them to the police station, and reviving a case which has been left dormant by the police and other prosecution witnesses. He also appeared to make statements implicating the Appellants. Had the learned trial Judge given proper consideration to the allegations of grudges, as we think he should have done, he might not have so easily concluded that the prosecution witnesses were not influenced by the grudges in question"***

The role of Kaddu (PW8) in the instant case is almost on all fours with Ssentongo's role in the **Lubwama** case (supra), in which what we said applies equally to the instant case.

In the circumstances, I think that in the instant case the learned trial Judge ought to have found that the evidence of the prosecution witnesses numbers one to six inclusive and number eight was so discredited by the contradictions and discrepancies I have referred to that that they were unbelievable. Credibility of these witnesses was also weakened by the apparent

motive of malice and grudge for which there was ample evidence.

Under the grounds now being considered the second leg remaining to be dealt with is the complaint against the learned trial Judge for having held that the Appellants alibi was disproved by the prosecution evidence. Having come to the conclusion, as I have done, that the prosecution evidence was discredited by contradictions, inconsistencies and other factors, it might appear superfluous to consider this complaint, I think, however, that because of the nature of the alibi in this case should express my views on the matter. Most of the arguments and evidence relevant to this point have already been referred to when I were dealing with S. 37 of the T.I. D and the complaint relating to contradictions and discrepancies. So I need not repeat them here.

The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see) ***Leonard Aniseth v. Republic*** (1963) EA 206.

In the instant case the learned trial Judge relied heavily on the evidence of D/C No. 16902A Okoth David (PW7) for his finding that the appellant's alibi was disproved.

To recapitulate, the evidence of this witness briefly is that he was the investigating officer in the case. In the course of his investigation, the appellant informed him about his grenade attack on 4/5/1981, resulting to his admission in Mulago. On the date of the alleged offence 9/6/1981, he was in Mulago. The Appellant also informed him of his discharge from Mulago and subsequently stay in Apollo Hotel. PW7 further said that he then checked with Medical Superintendent, Mulago Hospital, but found no evidence that the Appellant had been admitted in Mulago on 4/5/1981. He also checked at Apollo Hotel and found no record of the Appellant having stayed at the Hotel.

In his judgment, the learned trial Judge said this about (PW7)'s evidence and the appellants defence of alibi.

> ***"...PW7s evidence was not challenged, It was given in a straight forward manner. Without any evasion to answer any question without apparent exaggeration. There was no apparent evidence to support any cause of grudge on his part against the accused which could have influenced him to come to Court to give false evidence against the accused, whom he did not know before 20/2/1987, when the accused was arrested and he was assigned to investigate the case. In the circumstances in agreement with the assessors, I accept his evidence as a truthful evidence. It there folio was that the defence of alibi cannot be sustained as it is disproved. The defence is rejected for the reason of serious and unexplained discrepancies which seem to point to deliberately to untruthfulness. In view of the ample prosecution evidence which I have accepted as credible, the fact that the accused was at the scene of the killings, that is, at the home of Kinene, at Kikandwa village on 9/6/1981 was proved beyond reasonable doubt"***

With respect I am unable to agree with the learned Judge's finding that the alibi was disproved beyond reasonable doubt. The evidence of the D/C. (PW7) on which the learned trial Judge relied so much in this regard was not the best evidence. No relevant record, or first hand information from the officials, of Mulago Hospital and Apollo Hotel, was produced or adduced to support the witness claim.

In the case of Mulago hospital the Appellant's documents of treatment should have been produced or direct evidence from an official of the hospital to the effect that no such record existed, if that was the case. In the case of Apollo Hotel, a register of guests or an official from the Hotel should have been produced or called. No explanation was given by the prosecution why such steps were not taken. They knew of the Appellant' s defence of alibi from the beginning. It was their duty to disprove it by adducing relevant evidence from the hospital and the hotel to the effect that at 6.00 a.m. on 9/6/1981 the Appellant was not at Apollo Hotel and did not, after breakfast, go for treatment as an out-patient at Mulago Hospital, which was the Appellant's alibi. That failure by the prosecution left a gap in their

case which remained gaping to the end. In my opinion the Appellants' objection to the intention of trial Judge to call the Medical Superintendent of Mulago at the time when it was raised, and the learned Judge's subsequent decision not to call the hospital official did not exonerate the prosecution of their burden in this respect. In any case at that stage the prosecution case had long been closed.

In the circumstances lam satisfied that the Appellant's alibi was not disproved by the prosecution. I find that his complaint in this regard was well founded. The substance of the remaining two grounds is that the learned trial Judge erred to have adapted a biased approach against the Appellant in his summing up to the assessors and throughout the Appellant's case, and to have decided the case before considering the Appellant's defence.

I agree with this complaint, summing of the learned trial Judge amply support it. I shall refer to a few passages, which with respect, I think, clearly show a tendency of bias on the part of the learned trial Judge.

Firstly, when the learned trial Judge was reviewing the prosecution evidence in his summing up to the assessors the notes state as follows:-

> ***"... The witnesses all agreed with the exception of the contradictions of the evidence of (PW1) who saw the accused wearing a red T-shirt with a long green jacket and (PW2), who saw the accused wearing a red sweater, that he was wearing a red T-Shirt with a pair of trousers whose colour they did not observe. The contradiction appears to be minor one, if you consider the evidence as a whole, the identification of an accused is not only the clothes he was wearing at the material time. It also goes to his identity. In any case so far as the evidence of the eye witnesses was concerned, unchallenged as it was, the case was not whether the witnesses had correctly identified the accused, it was whether they had recognised him as their knowledge of him before was unchallenged or disproved."***

This passage, with respect, gives the impression that at this stage of summing up to the assessors the learned trial Judge had already accepted the prosecution evidence because it was corroborated; unchallenged, and the contradictions he referred to in the notes were minor.

When summing up to the assessors, the learned trial judge referred to the Appellant's evidence that when he was injured on 4/5/1981, he lost consciousness for nine hours and regained it between 3.00 p.m. and 4.00 p. m at Mulago Hospital, and that after 30 to 40 minutes one Asafu and Kigwe visited him in his hospital room. Then the summing up notes reads:-

> ***"This piece of evidence appears to be tainted with serious discrepancies. If the accused was unconscious for nine hours and due to the loud blast he heard at between 8.00 and 8.30. a.m., he would have been unconscious till between 500 p.m. and 5.50, p.m. He would not have been able to receive two visitors after 50 to 40 minutes in his hospital room. It is improbable that an operation could have been carried on upon him, when he was unconscious unless*** *the* ***operation the operation was a local minor one. It is also improbable from that he sent his daughter Sara Nalumazi to fetch a radio from his home at William Street, Kampala at about 5.00 p.m. which he listened to BBC at 7.00 p.m this is particularly so as on his own evidence, his condition was bad. It is a contradiction that his people who were in his room at the hospital also wanted to listen to the radio*** *"*,

Here, the learned trial Judge was not apparently telling the assessors what facts to consider but rather criticising the Appellant's evidence, as such evidence was inconsistent with what should have been the position as the learned trial Judge reasoned it out.

The learned trial Judge in summing up notes next considered what in his view were discrepancies in the appellant's evidence and said this:-

> "***..As if that contradiction was not serious enough, at the end***
> ***of his cross-examination he said he will provide evidence to prove that he was***

injured on 5/4/81. One wonders where the evidence would come from since on his own evidence his medical treatment chits or documents had been destroyed in Apollo Hotel and, removed by Nasa boys from his Hotel room in his arrest and subsequent detention, and further when the medical treatment chits or documents he had while in detention for his continued treatment of the injuries were confiscated or removed from him when he was released from prison in 1984."

The passage I have referred to and others in the summing up notes appear to indicate that the learned trial Judge went beyond his duty under Section 81 of the Trial on Indictment Decree. With respect, instead of soliciting the views of the assessors on the facts, the learned trial Judge appeared to be attacking the defence evidence. And in considering the prosecution evidence, he was looking for corroboration to support the prosecution witnesses; but in the evidence of defence he tended to have too readily found lack of corroborations and presence of contradictions all of which, without exception, he regarded as major, discrediting the credibility of the Appellant.

In the circumstances I think that grounds three and four should also succeed. I am satisfied that for the reasons I have given the indictment against the appellant was not proved beyond reasonable doubt. It would be unsafe to leave the conviction to stand. In the result I would allow the appeal and quash the conviction of the Appellant on all the five counts and set aside the sentence.

Dated at Mengo 22nd day of June 1992.
A.H.O ODER
JUSTICE OF THE SUPREME COURT.

JUDGMENT OF MANYINDO - DCJ:

The Appellant above named was indicated in the High Court on five counts of murder, contrary to Section 183 of the Penal Code. It was alleged in the particulars of offence that on 9.6.81 at Kikandwa village in Luwero District he, with others at large, murdered Matayo Nkanjirwa (count 1), Festo Kibuuka (count 2), Kibirige (count 3), Edidian Luttamaguzi

(count 4) and an unknown person (count 5), hereinafter called the deceased persons

After a protracted trial lasting about 16 months, the appellant was convicted as charged on all the counts. He was sentenced to death.

The undisputed facts of the case are that at the material time there were rebels in Luwero District and that Government troops were there to engage them and their supporters. The appellant was the Parliamentary Constituency Chairman of the ruling Party (UPC). On the fateful day the deceased persons were rounded up at Kikandwa Village and murdered on the ground that they were supporters of the rebels led by Mr. Museveni.

The prosecution case, which was denied by the appellant, was that the deceased persons were killed by the appellant, and Government soldiers who were led there by the appellant and other political leaders. The prosecution called ten witnesses, including six eye witnesses. The appellant's defence was an alibi, that on the day of incident he was in Kampala where he was treated, at Mulago Hospital, for the leg injuries he had sustained on 4/5/81, when someone tried to blow him up with a hand grenade on Kampala Street, At the request of both parties the Court called one witness, a Mr. Katamba who at that time the officer in charge of Upper Prison, Luzira when the appellant was detained there in connection with this case.

Katamba was called by Court to testify regarding the appellant's claim that his documents showing that on the day of incident he was at Mulago Hospital were taken away from him by the prison authorities at Upper Prison Luzira hence his inability to tender them in evidence at his trial.

He denied the claim. He might also testify as to whether at the request of the appellant, he wrote to the Medical Superintendent of Mulago Hospital requesting for confirmation that the appellant had been treated there for his leg injuries at the material time.

At the trial Katamba sought to put in evidence the reply he received from the Medical Superintendent of Mulago Hospital but Counsel for the appellant successfully objected to that on the ground that it was hearsay evidence. At the close of the case for both sides the trial Judge intimated to the Counsel in the case that he wished to summon the Medical Superintendent to come and testify in person regarding the appellant's alibi as he was a material witness. Under Section 37 of the Trial on Indictments Decree a trial Judge may summon a material witness.

Counsel for the appellant objected to the Court calling the witness as that would amount to filling in gaps in the prosecution's case which would be prejudicial to the appellant. He was overruled, the Court holding that if anything, the evidence sought might have helped the defence rather than the prosecution.

Surprisingly, the learned Judge then went on to shut out the evidence on the ground that to call it would entail prolonging the trial. The decision is the subject of the first of the five grounds of appeal.

The ground states as follows:

> ***"1. The learned trial Judge erred in law in failing to summon the Medical Superintendent of Mulago Hospital to give evidence pertaining to the accused's admission in Mulago Hospital on 4/5/81, after he (the learned trial Judge) had decided that the evidence appeared essential to the just decision of the case. His failure occasioned a miscarriage of justice because the Appellant's defence of alibi hinged on that evidence."***

The above ground, and indeed all the grounds as will be seen later in the judgment, are narrative and argumentative. This is improper and contravenes the clear provision of Rule 63 (2) of the Rules of this Court which provides as follows;-

> ***"63 (2) The Memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have been wrongly decided."***

Now section 37 of the Trial on Indictments Decree states as follows;-

> ***"37. The high Court may, at any stage of any trial under (his Decree, summon or call any person as a witness, or examine an person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to just decision of the case."***

There is a proviso to the section but it is not relevant here. Mr. Ayigihugu who represented the appellant on appeal submitted that under the above section, the trial Judge had no choice but to summon and examine the Medical Superintendent once he had decided that his evidence was essential to the just decision of the case and that he had to call that witness no matter whether his evidence would damage the appellant's case or not. This can be done even after the parties have closed their case; See: ***Manyaki d/o Nyaganya and Another v. R.*** (1958)E.A. 495. Mr. Ayigihugu contended, the failure to call the Medical Superintendent rendered the trial a nullity. He relied on Manyaki (supra) for that proposition.

As I understand Section 37 quoted above, the first part of that section confers a discretion but the second part clearly makes it mandatory for the trial Judge to call a witness if it appears to him or her that his evidence is essential to the just decision of the case. The duty arises only if the trial Judge has come to the conclusion that the evidence is essential to the just decision of the case.

So the submission of Mr. Ayigihugu on this point is correct.

In ***Kulukana Otim v. R*** (1965) E.A. 253, the trial Judge did not reach such a conclusion in respect of one Ongom to whom the appellant had confessed his part in the crime. On appeal it was held that the trial Judge was not duty bound to call Ongom since he had not found his evidence essential to the just decision of the case.

However, the same Court of Appeal for East Africa took a different position in Manyaki (supra) where the trial Judge had decided to call one Nzota, a material witness to the case but had later changed his mind on the ground that her evidence would prejudice the appellant's defence. The Court of Appeal held that the trial Judge was in error as it was mandatory under Section 151(1) of the Tanganyika Criminal Procedure Code (similar to our former Section 148 of the Criminal Procedure Code and now section 37 of the Trial on Indictments Decree) to call the witness regardless of the effect her evidence would have on the case.

The question is, does the failure to call such a witness render the trial a nullity? The case **Manyaki** which Mr. Ayigihugu relied on does not assist matters here. In that case the learned trial Judge decided the case almost entirely on the evidence of one Wakuru who was an accomplice and who had made a false statement to the Police for reasons best known to herself.

The evidence of Nzota which appeared, from the deposition, to favour the defence was not called by the trial Judge. In those circumstances the Court of Appeal was satisfied that the trial was unsatisfactory. It was on that account that the appeal was allowed. The Court stated very clearly that the evidence of the only witness who was an accomplice and a liar was unsafe to found a conviction unless supported allunde i.e. by other evidence. The question of nullity was not in issue and the Court never decided it.

In the instant case I was surprised to see the appellant raise ground one of appeal since it was his Counsel (presumably with his consent) who blocked the evidence of the Medical Superintendent of Mulago Hospital which was in the hands of DW1. If the evidence was in favour then *why* would the appellant not want the Court to receive it, especially when the State Counsel was not objecting to its admission?

In my view the that Judge should have called the Medical Superintendent of Mulago Hospital since in his opinion he was a material witness. His explanation that to do so would prolong the trial is not satisfactory. He had just called DW1, he might as well have called that one more witness in the interest of justice. Be that as it may, I cannot agree that the failure to call the witness occasioned a miscarriage of justice since the appellant did not want the Court to hear the said Medical Superintendent.

It would perhaps have been a different matter if he had wanted the evidence to be taken but the Court had refused to do so.

At first, Mr. Ayigihugu conceded that it would have been better if no objection was made and the evidence was received but then he changed his mind and submitted that Counsel for the appellant in the lower Court was right to block the evidence! As I see it, the appellant and his Counsel have themselves to blame for what happened. I see no merit in this ground of appeal. It must fail.

Briefly, the prosecution case was this. On the morning of the day of incident many residents of Kikandwa Village had gathered at the house of Kanyike (PW3) to bury his dead grandson. Some had even spent the night there. As already pointed out, it was then that the assailants struck. According to Masakwa (PW1) the attackers arrived at about 6.00 am. They included the appellant who immediately on arrival ordered the soldiers to take PW1 and two other persons to the home of one Kinene where they found the late Luttamaguzi (count 4) and Kibirige (count 3). At Kinene's home the appellant assaulted Kibuuka (count 2), and two other men to death with a coffee stick, lie also cut Luttamaguzi to death with a big knife. Altogether seven people were killed. PW1 was also assaulted by the appellant and the soldiers.

That morning Katalina (PW2), the grandmother of Luttamaguzi, paid a visit to him at his house in Kikandwa Village. While there the appellant and some soldiers arrived. They were looking, for Luttamaguzi.

They forced him in his house and brought him outside whereupon the appellant assaulted him with a coffee stick many times, until it broke into pieces after which they led him to the nearby house of Kinene, The witness later went to Kinene's place where she found Luttamaguzi already dead. There were several other dead bodies. The appellant ordered the soldiers to escort PW2 and other persons back to the house of Luttamaguzi lest they he killed by other soldiers who would come to the scene later in the day. PW2 fled the village and stayed away for a whole year.

Yonasani Kanyike (PW3) did not mention the appellant as one of the people who invaded his house that morning, arrested PWI and others and took them to Kinene's home. However, he did testify that when later in the day some soldiers took him and his wife (PW5) to Kinene's home he found there the appellant who asked him about the whereabouts of Mr. Museveni. When PW3 could not give him useful information the appellant almost killed him but then spared his life after he had shown that he belonged to a political party (the Conservative Party) not detested by the appellant.

Nanfuka (PW4) is a widow of the late Kibuuka (count 2) and mother of late Luttamaguzi (count 4). On the fateful morning she was at her house, which was
near that of Luttamaguzi, when she heard people crying at Luttamaguzi's place. She rushed there. She found him seated in the court-yard being beaten by the appellant with a stick. She panicked and ran back home. She returned to the scene of crime later only to find Luttamaguzi dead.

Kasalina (PW5) is a wife of Kanyike PW3. Her evidence was like that of her husband. She too did not mention the appellant as one of the people who invaded their home, but she claimed to have found him at Kinene's house later in the day. He was seated about three metres from where the bodies of the deceased persons lay.

The last eye-witness was Sentamu (PW6), It was his evidence that on that day at about 7.00 a.m. he had just returned home from Kanyike's house where he had spent the night when an Army truck pulled in at his house which was 70 metres from that of Kanyike. In the truck were five soldiers and the appellant. There were other soldiers who came on foot. The gang

then shot his cattle and goats before leaving for Kanyike's home. The witness did not follow them, instead he fled the village for a whole year.

The trial Judge believed the evidence of PWI, PW2, PW4 and PW6 to the effect that the appellant went to Kanyike's house that day. He rejected that of Kanyike and his wife (PW5) to the contrary, hence the second ground of appeal which states as follows-

> ***"2. The learned trial Judge erred in law and fact in misdirecting himself and the assessors that evidence of PW3 Yonasani Kanyike and of PW5 Kasalina Nalubwana that the appellant was not among the people who raided their home on 9/6/81, was exaggerated and false and that it should be ignored and further that in any case the contradiction was of a minor nature."***

In his long and considered judgment the trial Judge examined the discrepancies in the case, starting with the one raised in the second ground of appeal quoted above.

This is what he said:-

> ***"There are some discrepancies in the evidence of PW1, PW2, PW3, PW4, PW5 and PW6. PW1 testified that on 9/6/82, at about 6.00 a.m., he saw the accused among the soldiers who raided the house of PW3 where PW1 had spent the night with others who were arrested with him by the soldiers and ordered them to go to Kinene 's home. That piece of evidence was contradicted by the evidence of PW3 and PW5 when they testified that the accused was not among the soldiers who raided their home and arrested some people who had spent the night there at a funeral.***
>
> ***The piece of evidence of PW1 was exaggerated and false. In my summing up of the evidence to the assessors, I directed them to ignore it when considering the rest of his evidence and the evidence as a whole. In any case, weighed against the rest of his evidence and the whole prosecution evidence, the contradiction was in my view,***

not, a serious nature. I could have ignored it."

At the hearing of the appeal Mr. Ayigihugu submitted that PW 1 must have lied in view of the version of PW3 and PW5, which the trial Judge accepted as true. In the circumstances, he argued, the evidence of PW1 should have been rejected altogether. It would seem from the evidence of PW1 that he was the first to see the attackers arrive at Kanyike's house and that on their arrival there they scattered. Then PW1 was taken to Kinene's home by the appellant, one Joshua and one Mikambo. It may well be that PW3 and PW5 simply did not see the appellant. That they saw him at Kinene's home later clearly corroborates the evidence of PW1 in part. I think this was not a lie but a contradiction, which as the trial Judge found, was a minor one when weighed against the rest of the prosecution evidence.

The trial Judge did in fact consider all the other important contradictions regarding the dress of the appellant at the time, the weapons he had and contradictions in testimony and the statements the witnesses made to the Police.

He held that they were minor and did not effect the credibility of the prosecution witnesses. He was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt for three reasons.

Firstly, the incident occurred in broad day light and lasted several hours. Secondly, all the eye-witnesses knew the appellant very well before the incident as he was a political leader in the area, a fact he freely admitted. Thirdly, the attack was spread over four places at the houses of Kanyike, Kinene, the late Luttamaguzi and Sentamu (PW6) who had seen the attackers at his house before they moved on to the other three houses. At each of those four places the appellant was recognised by at least one of the eye - witnesses.

This then brings me to the third, fourth and fifth grounds of appeal, which relate to the appellant's defence of alibi, I find it convenient to consider them together.
They were set out as follows:

"3. The learned trial Judge erred in law in failing to direct the assessors on the burden of proof of an alibi and further erred to adopt a biased approach to the appellant's defence by subjecting to serious discredit (sic) and telling the assessors that it was unbelievable.

4. The learned trial Judge erred in law to decide the case before considering the defence at all and further erred to incorporate his biased summing notes with regard to the Appellant's defence in the Judgment.

5. The learned trial Judge erred to hold that the defendant's alibi was disproved by the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 which evidence was riddled with discrepancies, contradictions and unbelievable (sic)."

The trial Judge did not, even for once, use the word alibi when summing up the case to the assessors. But, and this was conceded by Mr. Ayigihugu, he did direct the assessors that if the appellant's explanation (the alibi) raised a doubt in the prosecution case, then the defence must succeed. With respect, that is the correct position in law. As for the alleged bias, Mr. Ayigihugu could not show us any. It is true that the trial Judge subjected the appellant's evidence to tough examination but then he merely posed questions for the assessors to answer. I can see nothing wrong with that.

Ground four was not seriously persued and the allegation in it is not borne out by the record. I have already dealt with the points raised in ground 5 elsewhere.

I am satisfied that there was ample evidence to warrant the convictions of the appellant. His alibi was false in view of the overwhelming prosecution evidence, which put him at the scene of crime at the material time. The evidence of Detective Corporal David Okoth (PW7) that the records at Mulago Hospital and Apollo Hotel which he personally examined did not show that the appellant had been there on that day put the matter beyond doubt in my view. The

alibi did not cast any doubt in the prosecution case. It was rightly rejected. I would accordingly dismiss the appeal. I called for all the three Judgments and as Platt JSC also agrees the appeal is dismissed.

Dated at Mengo this 22nd day of June 1992.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

JUDGMENT OF PLATT. J.S.C.

I have had the advantage of reading the judgments of Manyindo D.C.J and Oder, J.S.C. as a result of which it has become necessary for me to spell out the reasons for my conclusion. The facts have been set out by my Lords.

The appeal raises important matters of law concerning the procedure to be adopted in dealing with an alibi defence. The application of the well-known rules concerning an alibi has been made more difficult because of the interaction of Section 37 of **the Trial on Indictments Decree.**

The first ground of appeal is set out as follows:-

1. The learned trial Judge erred in law in failing to summon the Medical Superintendent of Mulago Hospital to give evidence pertaining to the accused's admission in Mulago Hospital on 4/5/81 after the learned trial Judge had decided that that evidence appeared essential to the decision of the case. This failure caused a miscarriage of justice because the Appellant's defence of alibi hinged on that evidence.

Counsel for the Appellant was within his rights, when he argued that if the trial Judge had found a witness essential to the just decision of the case, that he was duty-bound to call that witness. But there are limits. Section 37 of the **Trial on Indictments Decree,** upon which the submission was based, provided as follows:-

> ***"37. The High Court may, at any stage of any trial, under this Decree, summon or call any person as a witness, or examine any person in attendance though***

not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

The proviso is not applicable in this case.

That provision is similar to legislation on this subject in Kenya and Tanzania.
The Court of Appeal for East Africa had had occasion to consider the terms of such legislation in **Manyaki d/o Nyaganya & Another** v. **R** (1958) EA 495; **Kulukana Otim** v. R. (1963) EA 253 and more generally still, in a case only cited in argument in the High Court, **Murimi v. R.** (1967) EA 542. It was accepted that the Judge has a mandatory duty to call a witness essential to a just decision of the case, but in **Murimi** it was questioned that a "just decision" of the case arose when (a) there had been no case to answer, (b) when the defence had left the prosecution unproved beyond reasonable doubt, and (c) when the prosecution could have called the missing witness. It is also to be gleaned from the authorities, that once a Court has decided that a witness is essential to a just decision, it has the duty to call that witness, until the Court decides that the witness is not essential. However, on appeal, the Court of Appeal (or Supreme Court in Uganda) can reconsider the decision whether that the witness is essential.

In **Murimi** the evidence of the missing witness did appear essential throughout the case; indeed, it was the vital link in the case against the accused. It was also vital as rebutting the defence of innocence. But it could have been called and was not called. It was held that it could not be called after the defence, even though it was described as essential to a just decision.

This approach is very important to two aspects of the problem arising on this appeal.
First, the nature of a criminal trial presupposes that all the evidence for the prosecution will have been called by the time that the prosecution closes its case (see Section 71(1) of the Trial on **Indictments Decree).** At that stage the Court is called upon to decide whether the

accused should enter upon his defence, or whether a finding of not guilty should be recorded.

If the defence is entered upon, then the prosecution has two exceptional chances where further evidence can be adduced. One is under Section 74 of the Trial on Indictments Decree where evidence in rebuttal can be sought to be adduced by the prosecution, to counter new matter introduced by the defence, which the prosecution could not by the exercise of reasonable diligence have foreseen. The Court may allow evidence in reply.

The second is where the character of a prosecution witness has been put in issue, the prosecution may ask to adduce evidence of the accused's character, even if he has previous convictions.

Apart from these matters the Court has general powers to call witnesses and it is instructive to compare Section 163 of the Evidence Act with Section 37 of the Trial on Indictments Decree.

There are two conflicting principles in operation. The first is that the Court is given power in order to discover or to obtain proper proof of relevant facts by asking questions and calling for the production of documents, and it may also call a witness at any stage of the trial. The conflicting principle is to limit the general powers, so that the Court is not drawn into the forum, and so be seen as becoming the advocate for the prosecution or the defence. It would act sparingly in calling witnesses after the prosecution has been closed, and even more so after the defence has been closed. In general, it would be less objectionable if the Court acted in calling a witness before the defence was commenced. After the defence is closed, it might well be that the provisions in Section 74 for evidence in reply would be enough; but one cannot foresee all the circumstances that might arise, and Section 37 could well come into play, where evidence essential to a just decision of the case, is necessary.

This approach is helpful when relating Section 37 of the Trial on Indictments Decree to the defence of alibi. The burden of proof in a criminal case remains throughout on the prosecution. The accused assumes no burden to prove his alibi. The evidence for the

prosecution must be weighed with the defence, and if the alibi raises no reasonable doubt that the prosecution has proved the case beyond reasonable doubt, a conviction may be had. But if the alibi raises a doubt, the accused is entitled to be acquitted.

Patel v. R (1951) 18 E.A.C.A 188). But in that case, there would be evidence upon which the Court could act, unlike the situation in **MURIMI.**

Applying these principles to the facts in the present case, after the defence had been closed, the Prosecution applied to the Court to summon the officer commanding Luzira Upper prison to come and give evidence, whether or not prisoners released between 1982 and 1984 had their medical documents removed from them. The defence did not object and the witness was called. Presumably this was understood to be rebutting evidence under Section 74, The evidence left open another question The Court remarked;-

> ***"From the evidence, particularly the evidence of the Court witness Mr. Katamba O/C Upper Prison Luzira, I come to the conclusion that the Medical Superintendent Mulago Hospital, be summoned under section 37 of the Trial on Indictments Decree, as a witness in the case, to give evidence pertaining to the Accused's admission as an inpatient in that Hospital on 4/5/81, and to produce to the Court medical treatment chits or documents in regard to his treatment in the Hospital as an in-patient, when he sustained injuries as a result of a hand grenade blast on the said date 4/5/81,. . . The evidence appears essential to the just decision of this case."***

It was therefore a firm decision based on Section 37, and the production of documents could be ordered under Section 163 of the Evidence Act. The learned Judge then heard argument. The Prosecution was delighted with the idea, but Defence Counsel, this time objected, on two main grounds, (a) that the Court should not fill up the gaps of the prosecutions having in mind that the defence had disclosed its alibi from the beginning: of the investigations, and (b) the prosecution having; refused to call this obvious witness there could be no ground for evidence in reply, and all that would be achieved would be to drag the Court into the arena.

The learned Judge then held (at the end of a long ruling) that the Court after hearing arguments, and in view of the protracted hearing of the case, had changed its mind as to whether the Medical Superintendent's evidence would be essential to the just determination

of tae case. The Court abandoned the conclusion to summon the witness.

This ruling is perhaps open to more than one interpretation, but I would think that there were two reasons for abandoning action under Section 37; the first arguments, though misconceived in law, and the second, the delay. In the end the Judge changed his mind on the point whether the medical evidence was essential. It would seem to be fair to hold that he concluded that it was not essential. In that case he was not under a duty to call the witness.

It is true that if it were simply a matter of delay that would not be good enough the Judge repeated ***that Kulukana Otim v. R.*** (1963) E.A. *253* did not decide that defence counsel contended; he also held that he was to call the witness to bolster up the defence rather than bridge gaps in the prosecution case. It seems that while he did not agree with some of the reasoning of the defence nevertheless he sided with the defence, and he changed his mind. It seems to me reasonable to hold that the Judge thought that the witness was not essential.

On the other hand, if he changed his mind for an improper reason, then it could be agreed that he should have called the witness. On this point I would object that in law the witness was not essential and to call him would exceed the suggested limits set out above to Section 37. To begin with, the prosecution could and should have investigated the matter fully. It: was not a case where the right of reply existed under section 74. It would appear to be doing the work of the prosecution. While it is true that if evidence is called under Section 37 it is not pertinent whether it favours the prosecution rather than the defence, but if it is crucial evidence not properly dealt with by the prosecution, the Court should not be zealous to call the witness. Secondly from the terms of the judgment, it is clear that the evidence was not necessary. The judgment discarded the alibi without hesitation, and found for the prosecution. It was therefore not essential.

Accordingly in principle I would dismiss ground I of the appeal. But I notice that in any event the facts are wrongly stated. The defence was that the appellant had been injured on 4th May 1981. The offence is alleged to have taken place on 9th June, 1981. What was needed was evidence of where the Appellant was on 9th June, 1981. The medical papers for 4th May

1981 may nave been useful, but the vital papers concerned 9th June 1981. On the latter day he had been discharged from Mulago Hospital and was staying at Apollo Hotel. He stayed in that Hotel until 16th February 1982 when he was detained in Prison.

He had had his breakfast at the Hotel and went to Mulago for treatment, according to him. He was using crutches after he left the Hospital, where he had stayed for about three weeks.

After treatment he had returned to Apollo Hotel. The Appellant said that he had his medical papers, but these had been taken from his room at the Apollo Hotel after his arrest. It is not clear how, but some other medical documents were said to have been taken from him in the prison. While in custody he had been taken to Mulago Hospital and Apollo Hotel. At Mulago the Appellant's records could not be obtained. The accountant was absent at Apollo Hotel. The visits failed, and the Appellant was not taken back again.

On the evidence, one must compare the findings of Detective Constable David Okoth (PW7). The Appellant told him what had happened. Mr. Okoth understood that on 9th June 1981, the Appellant had been at Mulago being treated as a result of the hand grenade attack on him on 4th May 1981. Mr. Okoth relates:-

> ***"I checked on this information from the Medical Superintendent. I checked on the record. I did not find record on his being admitted at Mulago Hospital. Accused showed me a scar on one of his legs showing that he had been injured by a grenade.***
> ***Accused told me that he had been discharged from Mulago Hospital, and that he was at Apollo Hotel.***
>
> ***I cross checked his reported stay at Apollo Hotel. There was no record of that he-was staying at Apollo Hotel,***
>
> ***I investigated the period between May to July 1981 if the accused had been accommodated at Apollo Hotel. I did investigate the records for May, June and July***

if the Accused had been admitted at Mulago Hospital"

The quality of this evidence is not first rate. It is not the best evidence. The prosecution should have called the Medical Superintendent of Mulago and the Accountant at the Apollo Hotel. It was the records that had to be seen by the Court; not Mr. Okoth's account of them. While it may be that Mr. Okoth could not find any trace of the Appellant's treatment at Mulago or stay at Apollo Hotel as a fact relating to his investigation, it was for the Court to decide the value of the records seen by him. Were they contemporaneous; were they relevant; were they in chronological order. Was it useful for Mr. Okoth to find that there was no entry showing that the Appellant had been "admitted" on 9th June, 1981? No procedure was explained whether the records of admission would be the same as those .for an outpatient receiving treatment? It would not be surprising if after five years of turmoil in the country that the records were sketchy. If follows therefore that Mr. Okoth's evidence afforded the prosecution case no evidence in rebuttal of the coming defence alibi. The prosecution ought to have called the Medical Superintendent of Mulago, and the Accountant or other officer of the Apollo Hotel, to give evidence and produce the record, if any. It would have been within the learned Judge's rights to have called these witnesses and documents as soon as Mr. Okoth's inconclusive evidence had ended. What would have been an acceptable use of the discretionary, or mandatory, powers provided by Section 37 of the **Trial on Indictments Decree.**

That brings one then to the last assertion in ground 1 of the memorandum of appeal; viz that the failure to call the Medical Superintendent caused a miscarriage of justice because Appellant's defence of alibi hinged on that evidence.

It is rather rich, to say the least that the Judge should be criticised for not calling the Medical Superintendent at Mulago, after defence Counsel had objected to this evidence being called by the Court. But as I have endevoured to show, there was no duty on the learned Judge in fact to call for evidence. If it had been his duty to call for this evidence, I would have thought that no adverse inference could have been drawn against the Appellant.

First of all, defence Counsel was within this rights to object to the learned Judge calling the additional witness. It was indeed a case where the prosecution had failed to call rebutting evidence against an expected alibi. It did smack of filling up the gaps in the prosecution case. The learned Judge might protest that he was trying to bolster the defence. His proper course to investigate the matter whichever way the evidence went. The appellant had made some effort to trace the records. He could not get them. He might well suspect that they were not available, for there was no need for the Appellant to return again to Mulago. The Medical Superintendent could simply forward them to the Appellant in prison. The Appellant could well suspect that not much attention was being paid to his defence by the Medical and Hotel authorities, and he could not foresee what damage that might do to his defence. I would not myself draw any adverse inference against the Appellant for opposing summons to the Medical Superintendent.

On the other hand I would not have thought that it was necessarily fatal to the conviction. That would depend on all the circumstances. But in my view that decision is not necessary in view of the decision that the Judge was not bound to call the witness, whereas the prosecution should certainly have done so.

Ground 2 of the memo seems to proceed upon a misconception. The complaint is that the evidence of PW3 Yonasani Kanyike and of PW5 Kasalina Nalubwama (namely that the Appellant was not amongst the people who raided their home on 9th June 1981) was exaggerated and false and should be ignored and further that in any case the contradiction was of a minor nature.

In the summing up to the assessors the following directions appear;-

> ***"PW1's piece of evidence would appear to have been exaggerated and false. For that reason it would be excluded from the appraisal of the evidence as a whole."***

In the Judgment the learned Judge noted that he had directed the assessors to ignore it when considering the rest of his evidence and the evidence as a whole. He found that this piece of evidence was exaggerated and false. Yet he continued: -

> ***"In any case, weighed against the rest of evidence and the whole prosecution evidence, the contradiction was in my view, not of a serious nature. It could have been ignored."***

The result is that it was not the evidence of PW3 and PW5 which was being ignored but that of PW1. But then once evidence upon a vital point, such as the Appellant's identity, was exaggerated and false then that is the most serious type of discrepancy. Difference in an account of what happened according to the ability of a witnesses not related to falsehood, can be understood and allowance made. Once falsehood has been detected, the witness guilty of that falsehood, must be suspect throughout his evidence and only if some fact can be severed, and shown to be true by other evidence, can it be accepted in fact. The falsehood can never ignored. I would leave out the evidence of PW1.

Ground 3 then contends that the trial Judge failed to direct the Assessors on the burden of proof of an alibi and further erred to adopt a biased approach to the Appellant's defence by subjecting it to serious discredit and telling the assessors that it was unbelievable.

That seems to be a misconception The standard of proof was set out in the summing up, as well as the approach to an alibi defence. It is said:-

> ***"As far as the Accused is concerned he is entitled to an acquittal if his evidence or explanation does no more than raise a doubt in the mind of the Court and in the minds of you gentlemen assessors."***

A further statement on the basis of ***R. v. Carr Briant*** (1943) 1 KB 607 follows, and then the final statement is to the effect that it is sufficient for the Accused to raise a doubt as to his

guilt; he is not bound to satisfy the Court and the assessors of his innocence. That was a useful explanation to the assessors and for the Judge himself.

It is then said that the summing up was biased. I doubt whether that could really be said. The defence was certainly criticised in terms that were not those of a classic summing up. Too little was left open to the assessors for them to answer; such as “here is this evidence, weigh it with that evidence, which do you believe.?” The Judge gave a lead that certain statements in the defence case were improbable. It is a heavy handed summing-up.

In my view it is more a fault of style than substance. But perhaps the ultimate test is this; did the appellant set up an alibi which from its nature showed that he might not have been present at the scene of the alleged crimes? The appellant was not admitted in hospital. He was at the Apollo Hotel. He had breakfast at the Hotel and went to the hospital at an unspecified time. He was treated at an unspecified time and returned at an unspecified time. He did not state which Doctor saw him, or who gave him treatment. Short of all that the learned Judge thought improbable, there was basically a vague defence to put to the assessors. The assessors expressed themselves emphatically that the defence must be rejected. They thought that Mr. Okoth was worth believing. But they went as far as saying that the appellant had lied to the Court. It is unfortunate that Mr. Okoth’s statement was not more carefully explained to the assessors.

They thought that the appellant also lied on the question whether the Appellant’s medical documents had been taken from him, and never returned to him when he left prison. Altogether the Assessors would not have come to a different conclusion on a more classic summing-up. It seems to me that they would have come to the same conclusion.

Ground 4 was obviously misconceived and was not pressed.

Ground 5 raised the questions of discrepancies in the evidence. I have been guided by the opinions of my learned brothers. Having weighed these arguments with the submissions of counsel, I have come to the conclusion that there was evidence before the learned Judge which he could properly judge admissible, and weighing that evidence with the defence, he

and the Assessors could have concluded that the Appellant had committed these offences. The Appellant was so well known, there was ample light and time within which to recognise him, and he could well have committed these offences and gone for treatment later on.

I have accordingly come to the conclusion that the Appeal should be dismissed on all counts.

Dated at Mengo this 22nd day of June of 1992.

H.G. PLATT
JUSTICE OF THE SUPREME COURT