THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA, JJ.S.C)

CRIMINAL APPEAL No.13 OF 2003

BETWEEN

1. MUREEBA JANET]
2. ALIGA ISMAIL] :::::::::::::::: APPELLANTS
3. BYARUHANGA KASSIM]

AND

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

[Appeal from the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine, Engwau and Kitumba, JJ.A) dated 23rd March, 2001) in Criminal Appeal No.56 of 2000]

JUDGMENT OF THE COURT

The three appellants, Mureeba Janet (A1), Aliga Ismail (A2) and Byaruhanga Kassim(A3) were convicted by the High Court (Kania, J) after a full trial on two counts of murder and they were each sentenced to death. The prosecution case and the conviction of the appellants were based on circumstantial evidence.

Their appeals to the Court of Appeal were dismissed. They have now appealed against that decision.

The prosecution alleged that on 6th of June, 1999, at Ntinda village, the three appellants together with other persons, murdered Namara Norah, alias, Peace Kamusiime (1st deceased) and Gabriela Mureeba d/o Charles Mureeba (2nd deceased).

The evidence adduced by the prosecution and the facts found by the two courts below show that there was a struggle of two women for the heart of one man, Charles Mureeba. He ~~was~~ is a brother of the Director of the Population Secretariat in the Ministry of Finance, where the 1st deceased worked as a receptionist. The second deceased was the offspring of the relationship between Charles and the first deceased. The two deceased lived together in Ntinda, a suburb of Kampala, at the time they were murdered.

The prosecution adduced evidence to the effect that the first deceased was a long time girl friend (or customary wife) of Charles Mureeba who was the husband of the first appellant. It is not clear when the first deceased and Charles started cohabiting together as wife and husband. However, the evidence shows that in 1996, when the first deceased was working at the Uganda Population Secretariat as a telephone operator/receptionist, Charles hired a house for her in Kamwokya, a suburb of Kampala, where she had a neighbour called Kato Muhammad (PW1).

At some point in time she introduced Charles to Muhammad. In 1997, the first deceased informed PW1 about A1's threats to her life. A1 was

regularly sighted in Kamwokya. The deceased informed Muhammad that because of A1's threats to her life, she wanted to relocate to another place. She later moved to Najjanankumbi, another suburb of Kampala. Shortly after moving there, she again sighted the first appellant in her new place. Once more the deceased informed PW1 in 1998 that she must again relocate to yet another place. By that time the first deceased appears to have become so scared and frightened of the alleged menacing threats of the 1st appellant to her life that she persuaded her cousin, Kasabiti Rosette, (PW3) to join her and live with her in her new residence at Najjanankumbi. PW3 joined the first deceased about November, 1998. By then the first deceased had become overwhelmed by the fear that the first appellant would kill her. So on 31/12/1998, the first deceased and PW.3 relocated to a new residence at Ntinda.

Meantime, during 1998, the first deceased reported to Naomi Kibaju (PW4) who was then Ag. Head of the Population Secretariat that the first appellant had threatened to invade the office of the deceased to shoot her there. The deceased was panicking while making the report. She requested PW4 to provide transport to take the deceased home. PW.4, provided the required transport to the deceased and at the same time advised her to report the matter of threats and fears to the police. Because of the persistent reports by the first deceased of the menace of murder threats by the first appellant and reports to PW4, the latter transferred the deceased from the reception office to an inner office and assigned her other duties different from those of a receptionist.
Even after that reorganisation, the deceased persisted in reporting to PW4 the constant threats to her life from the first appellant.

About late May, 1999, A2 and A3 visited a Garage in Kisenyi, Kampala, where Bright Mugabi (PW5) worked as a mechanic. PW5 and A2 had been in the army together and they knew each other well. A2 and A3 informed PW5 that they were desirous of hiring a self-drive vehicle. A2 informed PW5 that a certain rich woman had hired A2 to kill another woman who lived in Ntinda. PW5 was unable to provide the desired vehicle. Shortly after, on a Sunday (6/6/1999) A2 and A3 returned to the garage at about 4.00 p.m, driving a white double cabin pick-up for repair. PW5 participated in repairing the vehicle. After the repairs, he opened the rear cabin door of the vehicle to clean the inside of the cabin. He found inside the vehicle, a brown bag containing a blue overcoat and a gun which he thought was an SMG. Before he left, A2 requested the manager of the garage for a gunrivet and a drill. These implements are normally used for pulling off or fixing number plates on vehicles. At about 5.30 p.m, on the same day, the two men drove away in the same vehicle.

That same evening at about 6.30 p.m; Jolly Kapere (PW2) who lived about 100 metres from the deceased's residence, in Ntinda, and has business there, saw a white double cabin pick-up drive past her. There was a driver in the driver's seat while two other people sat in the back seat. Later, as she was going for a party, she found the same vehicle parked by shops on a road which is normally not busy. One of its doors was open. She stopped on the way after hearing gunshots. As she was returning home, she saw a man running towards the pick-up. He wore an overcoat and was carrying some object. The man ran from the direction of the deceased's residence, which was 100 metres away. He was as dark skinned as A2. He entered the pick-up whose door was

open, put the object which could have been a stick or a gun into th vehicle which then sped off. PW2 was able to observe this because c security electric lights. It was 7.35 p.m. Afterwards, PW2 went to th scene where she saw the dead bodies of the two deceased persons.

At about 7.30 p.m, the same evening Bessi Tumusiime, a niece of Charles, living in the same home with A1 received a telephone call. A1's house girl, Ayabare Mariam (PW.6) heard Bessi ask the caller **"have you finished."** A1, who had gone up country with Charles, returned to Kampala that evening about an hour after the call. After A1 had returned home, Ayebare PW.6 noticed that A1 was in an exhilarated mood and was exceedingly happy apparently after learning of the murder of the deceased from Bessi Tumusiime. A1 and Bessi indulged in rejoicing and dancing. A friend of A1 called Gorreti also arrived and joined in the rejoicing and dancing. They danced around as they said that now AI was the winner and she would now have all the properties. This is how Ayebare described the situation;

> ***"Gorreti, Bessi and Janet entered the house and they became very happy. They kept on rejoicing and dancing. Bessi told Janet that what has been troubling her was now over. The Malaya is killed. Now all properties are yours..... Janet told Bessi..... "Leave me, my daughter" She said all these words with a smile and joy."***

On 7/6/1999, at about 8.30 a.m, A2 and A3 returned to the garage in the same pick-up. As PW5 was cleaning that vehicle, he heard A2 saying to A3 in Luganda **"How could you fail to beat a mere a woman."**

According to PW5 **"to beat"** a woman meant to shoot. The two then conversed in a language, which PW5 thought was Nubian. A2 and A3 drove away in their pick-up. This time the vehicle bore no number plates in the usual place, but there was a number plate placed on its (front) dashboard. Later the same day PW5 learnt of the murder of the deceased.

On 9/6/1999 a witchdoctor visited A1's home where he slaughtered a chicken in what Ayebare (PW6) believed was a ritual.

Subsequently the appellants and two other suspects were arrested and charged with the murder of the two deceased persons.

During trial all the three appellants denied the charges.
In her own defence, A1 made an unsworn statement. She denied the offences and denied that she knew the deceased. She claimed that she had been upcountry and by the time the deceased was murdered, she was away. She returned home at about 9.00 p.m on 6/6/1999. She went about her business until she retired to sleep. She said that she used to drive to Kamwokya everyday to pick-up her child. She also said that on 9/6/1999 she had a moslem male visitor who slaughtered a chicken in her home. The visitor slaughtered the chicken because he was a moslem. A2 gave evidence after affirmation. He said he was a mechanic and a driver. He denied the offences and raised an alibi to the effect that on 6/6/1999 he was in Kayunga Hospital attending to a sick child. He denied knowledge of Jemba Garage (Singha Singha's garage). He only knew PW5 and A3 while they were all in Luzira Prison in 1996. He implied that PW5 testified against him because of a grudge. The

grudge arose from the fact that while the two were in Luzira prison in 1996, PW5, smuggled a saw into prison for purpose of furthering a plot to escape from prison. For that, A2 reported PW5 to the prison authorities and as a result PW5 was punished. In his sworn defence, A3 denied the offences. He admitted he had known A2 since 1994. They were close friends. They met in Upper Prison, Luzira. He also met PW5 in the same prison from where PW5 developed a grudge against him because he (A3) was friendly to A2 who reported PW5 to prison authorities because PW5 attempted to escape. He denied he visited Jemba garage with A2. He denied talking to A2 about shooting a woman.

It is clear from the foregoing that the evidence against the appellants was circumstantial. In a long and well reasoned judgment, Kania, J; who tried the case, believed the evidence of PW1, 2, 3, 4, 5, 6 and 8. He disbelieved the defence and convicted the three appellants. He acquitted two other co-accused. The three appellants unsuccessfully appealed to the Court of Appeal. They have now appealed to this Court.

Initially, M. Owor & Co., Advocates, lodged a memorandum of appeal on behalf of the first appellant. Subsequently the first and the second appellants filed a joint memorandum of appeal that contained nine grounds of appeal, through a new counsel, Edward Ddamulira Mugulumia. The third appellant lodged a separate memorandum of appeal through the firm of Messrs. Kunya & Co., Advocates.

Subsequently, following the decision of the Constitutional Court in **Constitutional Petition No.6 of 2003 (Suzan Kigali & 417 others Vs Attorney General)** Messrs. Katende, Ssempebwa & Co. Advocates, sought to argue the appellants' appeal against sentence in the event that this Court upholds the convictions of the three appellants. However, that aspect was not argued and is still pending.

The nine grounds in the memorandum of appeal for the first and second appellants were framed this way:

1. ***That the learned Justices of Appeal erred in fact and law when they upheld the finding of the trial judge of the High Court that the appellant A1 procured A2 and A3 to kill the deceased Namara and Gabriela and as a result came to a wrong decision.***

2. ***That the learned Justices of Appeal erred when they upheld the finding that A1 was the first wife of Charles Mureeba and co-wife of Namara.***

3. ***That the learned Justices of Appeal erred in fact and law when they upheld the finding that A1 had common intention with A2 and A3 to murder the deceased Namara and Gabriela and thus came to a wrong conclusion.***

4. ***That the learned Justice of Appeal erred in fact and law in upholding the finding that A1 and A2 participated in the murder of Namara and her son Gabriela and as a result came to a wrong decision.***

5. *That the learned Justice of Appeal in fact (sic) and law upholding the finding of the High Court trial Court that A2 was on[illegible] fateful night identified at Ntinda and thus came to a wrong decision.*

6. *That the learned Justice of Appeal erred in fact and law when they upheld the finding that the vehicle No.426 IDI seen in Ntinda by PW2 Jolly Kapere on the fateful night was the same vehicle seen at Kisenyi by PW5 Mugabi.*

7. *That the learned Justice of Appeal erred in fact and law when they upheld the finding of the trial Judge that here (sic) was enough circumstantial evidence was so water tight as to warrant a conviction of murder and as result came to a wrong decision.*

8. *That the learned Justices of Appeal erred in fact and law when they failed adequately to evaluate evidence as a whole, and thus came to a wrong decision.*

9. *That the learned Justice of Appeal erred in fact and law when they failed to consider the defence of the ALIBI put by the first and the second appellants.*

Mr. Muguluma for A1 and A2 abandoned ground 2. He argued ground 1 and 3 together and ground 4 separately, but during his submissions on

these grounds, he in effect argued the substance of the other grounds of appeal.

The substance of grounds 1 and 3 can be summarised in this way:

> ***That the Court of Appeal erred when it confirmed the finding of the trial judge that the first appellant procured A2 and A3 to kill the deceased and that the three of them had a common intention to murder the deceased.***

Learned counsel contended that his clients did not murder the two deceased. Counsel submitted that the evidence of Bright Mugabi (PW5) first needed corroboration and secondly it was inconsistent. On the need for corroboration, learned counsel contended that PW1 did not know A1 so presumably the rich woman allegedly mentioned by A2 and A3 could not be A1. That PW5 connected A2 with the murder because of what he allegedly heard and what he saw in the pick-up in Singha Singha garage.

Counsel contended that PW5's evidence regarding the gun, the murder weapon, was inconsistent with the evidence of Gakyaro Francis (PW13), the Ballistics expert. This is because whereas PW5 claimed that the gun he saw in the brown bag was an SMG, PW13 testified that the cartridges and the fired bullets which were submitted by police to him for examination were of an AK47 gun.

Learned Counsel further contended that A1 should not be held guilty because of the evidence of a fellow co-accused (Tumusiime) who was acquitted by the trial judge. He also contended that the words **"Have you finished,"** and **"leave me alone",** which PW6 stated were uttered by Tumusiime and A1 respectively, were hearsay and inadmissible.

Mr. Vincent Wagona, a Principal State Attorney (PSA) in the DPP's chambers, on behalf of the respondent, supported the decisions of the two courts below. The learned PSA took a cue from counsel for the appellants and also generally argued all the grounds together. He contended that the circumstantial evidence on the record was so water tight that it warranted the conviction of the appellants. He adopted the prosecutions' submissions made during the trial and those made by Mr. Simon Mugenyi Byabakama, a Senior Principal State Attorney, on behalf of the respondent in the Court of Appeal.

According to Mr. Wagona:

- Under the provisions of S.30 of the **Evidence Act** and the doctrine of res gestae, prosecution evidence of the threats by A1 incriminates her. He relied on the evidence of PWs 1, 3, 4 and 8 as incriminating A1. He cited Criminal Evidence by **Richard May 4th Ed.** (1999).
- The search by A2 and A3 for a self-drive vehicle and the statements made by these two, especially about shooting a woman. This evidence incriminates A2 and A3.
- PW6's evidence about the conduct of A1 after learning of the murder of the deceased, incriminates A1.
- The evidence of PW2 of sighting a white double cabin pick-up near the scene of crime and the evidence of PW5 of seeing A2 and A3 driving the same pick-up in Kampala before and after the murder incriminates these two.
- The distinction between PW5 and PW13 in the description of the gun as an SMG or AK47 is technical and not substantial to affect incriminating evidence against the two appellants.

We think that the arguments of the learned Principal State Attorney have force.

As we observed at the beginning of this judgment, the case against the three appellants is dependent on circumstantial evidence. The question of common intention which was argued by Mr. Muguluma is tied to circumstantial evidence. There is no eye witness to the murder of the deceased persons. In the trial court the prosecution and defence counsel addressed the trial judge on the law governing circumstantial evidence and its application to the facts of this case. The learned trial judge in a long judgment evaluated the whole evidence and considered the various aspects of the circumstantial evidence incriminating each appellant before he convicted each of them.

In the Court of Appeal, counsel for the three appellants argued all the grounds of the Appeal in the two memoranda at some length. We note that when presenting their oral arguments in the Court of Appeal, all counsel for the three appellants were critical of the evidence of the key witnesses, especially PW 1, 2, 3, 4, 5, 6 and 8, contending that the evidence was unreliable or inconsistent or both. Mr. Simon Mugenyi Byabakama, Senior Principal State Attorney, who represented the respondent, opposed the appeal and took pains to explain why the evidence of those key witnesses (namely PWs 1, 2, 3, 4, 5, 6 and 8) was reliable and how it established the guilt of each of the appellants.

In a reasoned judgment, the learned Justices of Appeal rejected the arguments of the appellants' counsel and concurred with the learned trial judge that PWs 1, 2, 3,4,5,6 and 8 were reliable. The learned Justices concluded that A1 procured A2 and A3 to murder the deceased persons

and that the prosecution evidence established a common intentior among the three appellants in the murder of the deceased Consequently the court dismissed the appeals.

Before us we have two concurrent findings by the two Courts below that the evidence of the prosecution is reliable and that the chain of evidence established the guilt of each of the three appellants beyond reasonable doubt.

This Court and its predecessors have decided, in a string of cases, that except in exceptional cases we are not required on second appeal to re-evaluate the evidence as a first appellate court does: See **Kifamunte Henry Vs Uganda S.Ct. Criminal Appeal No.10 of 1997**-(Supreme Court of Uganda Certified Criminal Judgments 1996/2000), at page 280 and **Bogere Moses & Another Vs Uganda,** (Supreme Court of Uganda certified Criminal Judgments 1996/2000) at page 185 and **Bogere Charles Vs Uganda (Supreme Court of Uganda Certified Criminal Judgement 1996/2000) at page 213.**

On the facts, this appeal is not one of such exceptional cases where we are required to re-evaluate the whole evidence to enable us to make our own inferences.

As found by the two courts below, the conviction of the appellants depended wholly on circumstantial evidence. There are many decided cases which set out tests to be applied in relying on circumstantial evidence. Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused. In **R.Vs. Kipkering Arap Koske and**

Another (1949) 16 EACA.135 it was stated that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That statement of the law was approved by the E. A Court of Appeal in **Simon Musoke Vs. R.** (1958) EA 715 [and see Bogere Charles case (supra)]. In the instant case, the learned trial judge and the Court of Appeal evaluated the circumstantial evidence and applied the tests set out in these three decisions.

In summary, the evidence as found by the two Courts below begins with the relationship between Charles and the first deceased. This is followed by the threats of A1 reported by the first deceased to PWs 1, 3, 4 and 8. Then there is evidence of the conduct of the first appellant towards the deceased. There is evidence of the conduct of the first deceased about A1's persistent threats and the reaction of PW4 to her reports of those threats. There is the evidence of PW5. He saw the second and third appellants at garage in Kisenyi thrice; once while they were looking for a vehicle to hire and once before and once after the murder of the deceased. A2 and A3 turned up at the same garage at 8.30 a.m on 7/6/1999, in the same vehicle whose number plates had been removed. PW5 heard the two conversing about the shooting of a woman in Ntinda. There is the evidence of PW2, who sighted a white double cabin pick-up on 6/6/1999 at about 7.35 p.m at Ntinda, just 100 metres away from the residence of the deceased just before and after the shooting of the deceased. Lastly there is the evidence of PW6 concerning the behaviour of A1 on the evening of 6/6/1999 after learning of the murder of the deceased and further her (PW6's) evidence on circumstances under

which a chicken was slaughtered on 9/6/1999 by a moslem man, a witchdoctor.

Normally we would consider the case of each appellant separately, but in this appeal, the case against A2 and A3 is intertwined. We will first consider the case of A1.

Was the first deceased a wife to Charles? Describing the deceased as a wife may not be accurate. But the evidence of PW1, PW3, PW8 explains the relationship. PW3 referred to Charles as a husband of the deceased and AI as her co-wife. The evidence of PW1 who was a neighbour and friend of the deceased since February, 1996 shows that in 1997 the deceased introduced Charles in 1996 as a boy-friend. Charles used to visit the deceased regularly and spent nights at the home of the latter. The relationship resulted in the birth of the second deceased. Ordinarily the deceased could be described as a customary wife to Charles.

Threats: From the evidence on the record it would seem that the deceased trusted PWs 1,3,4,6 and later PW8. The deceased first reported A1's threats to PW1, a close neighbour and friend in 1997. She repeatedly reported these threats to PW1 even after she relocated first to Najjanankumbi and eventually to Ntinda, where she was murdered. According to PW1-

> ***"Norah died around 5/6/1999. I last talked to her 3 or 4 days before she died, on phone. She told me she had no life. When I last talked to her, she was pregnant. The same day she told me she talked to Mureeba Charles who did not care."***

During cross-examination, this witness repeated receiving reports from the deceased about A1's threats to kill the deceased and that in 1998 the deceased reported sighting A1 in Kamwokya, where the witness and the deceased lived. Although it is possible to explain the appearance of A1 in Kamwokya on presence of her relatives in that area, on the evidence available most likely she went there to check if Charles was at the residence of the deceased, where his car could be parked.

The evidence which this witness stated in court is substantially the same as the contents of his statement to the police which he made on 10/6/1999, barely 4 days after the murders. We do not quite appreciate why his police statement (Exh. DI) was tendered in court on the application of second counsel for the first appellant. Indeed on the basis of section 155 of the **Evidence Act,** that statement corroborates the evidence of PW1:

That section reads as follows: -

> ***"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."***

In this case PW1 made the statement barely 4 days after the murder of the deceased to the police who are the authority legally competent to investigate the fact of the murder circumstances. In the police statement PW1 mentioned A1's threats.

According to PW3, the threats of the first appellant had created a lot of fear in the first deceased. So the first deceased asked PW3 to join her

and live with her in Najjanankumbi, where the deceased had lived for 2 months. PW3 joined the deceased on 3/12/1998. The deceased declared that she felt insecure and feared that her co-wife (A1) could easily kill her as the residence was in a sparsely populated area. The deceased was by then pregnant. The deceased got a house in Ntinda where both the witness and the deceased moved on 31/12/1998. One day during (March), 1999, the deceased returned home soon after going to her place of work. She was **"scared and shivering"** and reported that she had just received a threat from A1 on phone. In April, the deceased reported that A1 had phoned and quarrelled with the deceased on phone for 30 minutes. This last report is corroborated by the evidence of Kyomukunda Rosemary, PW.8, who replaced the deceased, in February 1999, as a receptionist. The deceased was transferred to an inner office. According to PW8, in April, 1999 a woman telephoned and inquired if she was talking to the deceased. The woman caller was eventually connected to the deceased. The conversation was so long and drawn-out that some other officers in the offices complained about it presumably because they could not access the telephone line. Later the deceased informed PW8 that the caller **"was her co wife Janet who was threatening her."** PW8 noticed that the deceased "was not happy." PW8 was not cross-examined on this damning evidence.

So the two courts justifiably held that it was evidence admissible under S.30 (a) of the E. Act.

Ms. Naome Kibaju, (PW4) acted as Ag. Director of Uganda Population Secretariat in 1998. One afternoon in 1998, the deceased went to her office panicking and reported that "some body" was threatening to shoot her (deceased). She therefore needed transport to take her away. Transport was provided. Later the deceased telephoned PW4 to say it

was her co-wife who had threatened her. PW4 advised the deceased t report the matter to the police. The deceased was relocated to an inne office, obviously for safety. Even after that reorganisation, the deceasec continued to report to PW4 more threats on her life from the firs appellant.

The learned trial judge considered these reports as dying declarations or statements admissible in evidence under S.30 (a) of the Evidence Act. In the Court of Appeal, counsel for the first appellant criticised the trial judge contending that the evidence of PW1,3, 4 and 8 regarding the threats was hearsay and therefore inadmissible since there was no sufficient proximity between the threats and the occurrence of death in order to form a transaction. The Court of Appeal referred to several authorities and to the manner in which the learned trial judge evaluated the evidence of the four witnesses on this subject and upheld his conclusions.

The learned judge had concluded that:

> ***"In the premises, I am of the view that the statements made to each of these four witnesses constitute circumstances of the transaction leading to the deaths of the deceased and as such are admissible."***

The Court of Appeal agreed with the interpretation of the law [S.30(a)] by the trial judge and his application of that law to the facts of this case. We have no basis upon which to fault these conclusions.

We think that the conclusions of the learned trial judge and the upholding thereof by the Court of Appeal are justified. In our opinion

the reports made by the deceased to PWs 1,3,4 and 8 are those envisaged by section 30(a) of the Evidence Act.

S.30 (a) of the Evidence Act states: -

> ***"Statements, written or verbal of relevant facts made by a person who is dead.....are themselves relevant facts in the following cases.***
>
> ***(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question and such statements are relevant whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."***

The conduct of A1 soon after the murder as testified to by PW6 and the reports of the four witnesses summarised earlier in this judgment, irresistibly point to the guilt of the first appellant. A study of the evidence of PW6 shows that though she appeared to be of little education, she had a remarkable memory. She witnessed what transpired on 6/6/99 and 9/6/99. In Court she remembered everything that went on immediately after Janet returned. PW6 testified in part as follows-

> **"Beginning with the month of June 1999. A1 friendship between Gorretti, Janet and Bessi became closer. They used to talk secretly in the sitting room for long periods.**

Whenever there were visitors they talked for shorter periods. They met secretly for about one week and Janet and her husband went to the village on a Friday and came back on a Sunday. I was left in the house with Bessi and the children. The Sunday they returned at 7.30 p.m. I was in the house with Bessi. Some one rang to Bessi. She answered it having picked the phone. I was I metre away from Bessi when she was talking on phone.....

I only heard Bessi's answer. She said "Have you finished."

PW6 noticed that Bessi was very pleased with the telephone message. Bessi went away. About an hour latter A1 and Charles returned from their weekend journey to the village. Bessi also returned about that time. Without entering the house, Charles drove away, as Gorreti arrived. Gorreti, Bessi and Janet entered the house. They were exceedingly happy. They started dancing with great joy. Bessi then told Janet that what had been troubling her was over because the malaya had been killed and the properties will all be hers. Janet replied in English while smiling saying - "leave me, my daughter." Thereafter A1, Bessi and Gorreti entered and stayed in A1's bedroom.

On 9/6/1999 at 2.00 p.m, Gorreti, brought a Moslem witchdoctor to A1's home. A1 ordered the witness to catch a chicken which she did. A1 ordered the witness to enter the house. A1, Gorreti, Bessi and the witch doctor remained outside. From the sitting room the witness watched what the quartet was doing.

The witchdoctor slaughtered the chicken by severing off its head. He did that while Janet, Gorreti and Bessi were standing together with the witch doctor. The chicken was boiled which the three ladies ate but the witchdoctor did not. Some days later PW6 heard Bessi talking to Gorreti on telephone. Bessi expressed fears that her witchdoctor would not protect her because she was about to be arrested. By then A1 had been arrested. Because of all this, PW6 left A1's home on 3/7/1999. Before these events she had never seen a witchdoctor in that home.

The witness was not shaken in cross-examination. The time when Bessi received the telephone call, i.e, about 7.30 p.m, tallies with that given by Jolly Kapere (PW2) who, at about 7.30 p.m, saw a gun man enter the pick up in Ntinda.

We have no doubt that the evidence of PW6 shows that the first appellant was fully involved in planning and securing the murder of the deceased. The regular meetings of AI, Bessi and Gorreti a week prior to the murder were most probably about the deceased. The rejoicing by the trio immediately after the murder confirms this. Bessi and Gorreti are lucky to have been acquitted by the trial judge.

Mr. Tusubira who represented the first appellant in the Court of Appeal addressed that court on what he called wrong evaluation of evidence by the learned trial judge about the source of threats and also on the credibility of PW5 and PW6. With regard to the reliability of the source of threats, the Court of Appeal stated this:

" Like the learned trial judge, we agree with learned Senior Principal State Attorney that from the evidence

on record, first appellant was the only co-wife the deceased was worried about and scared of which led her into shifting residences.

The evidence of Kato, PW1, who was a close friend and neighbour of the deceased was that the deceased one day told him that she was going to shift from Kamwokya because she had received threats from the first wife of Charles Mureeba and that she had also spotted her in Kamwokya where the deceased lived. The first appellant in her testimony confirmed that of PW1, shows that the first wife of Mureeba feared by the deceased is none other than the first appellant"

The Court of Appeal re-evaluated relevant evidence on the source of the threats. It re-evaluated the evidence of PW5 and his credibility before the court supported the finding by the trial judge that the circumstantial evidence established the guilt of the first appellant. All her grounds of appeal have no substance and they must fail.

On the evidence available we find it convenient to consider the cases of A2 and A3 together. The grounds of appeal for A2 have been reproduced already. The three grounds of appeal for the third appellant are framed in the following words:

1. *That the learned Justices of Appeal erred in fact in finding that there was sufficient circumstantial evidence linking the appellant to the commission of the offences.*

2. *That the learned Justices of Appeal erred in fact and law in finding that the doctrine of common intention had been sufficiently proved linking the appellant to the commission of the said offences.*

3. *That the learned Justices of Appeal erred in fact and law in confirming the conviction of the appellant without a thorough re-evaluation of the evidence on record.*

Arguments presented in the Court of Appeal on behalf of the two appellants by their respective advocates have been repeated before us. The Court of Appeal, as a first appellate Court, re-evaluated the evidence, as it was bound to do, and came to the same conclusions as the learned trial judge that PW5 and PW2 were reliable witnesses and that the two appellants were not. So the Court of Appeal dismissed their appeals.

Before us, as we have mentioned, Mr. Ddamulira Muguluma argued the appeal of A1 and A2 together. We have referred to the gist of the arguments already in relation to A2. Learned counsel contended that because PW5 had allegedly seen a gun in a bag in the pick-up driven by A2 and latter he learnt that a woman in Ntinda had been shot dead, PW5 therefore connected A2 to the murder of the deceased. Learned counsel also argued that the evidence of PW5 as to the gun he sighted in the pickup is inconsistent with the evidence of the Ballistics expert as to the technical name of the gun.

In respect of A3 his counsel, Mr. Kunya, argued grounds 1 and 3 together followed by ground 2 separately.

Ground 1 is about sufficiency of circumstantial evidence to link the 3rd appellant to the commission of the offences. Ground 3 is a criticism of the Court of Appeal on lack of adequate re-evaluation of the evidence In connection with these two grounds, Mr. Kunya, for A3, began by adopting the submissions of Mr. Ddamulira Muguluma on similar grounds made earlier in respect of A1 and A2. Learned counsel then contended that the circumstantial evidence on record was insufficient and could not incriminate A3.

Counsel contended that the evidence does not establish that the vehicle seen by PW5 in the garage was the same vehicle which PW2 saw in Ntinda the same day so as to connect it with A3. Learned counsel further contended that PW5 did not give the registration number of the vehicle until the end of his examination -in-Chief in court. He submitted that there could be a mistake in the identification of the double cabin vehicle. He criticised the prosecution for its failure to call one Julius, an apparent registered owner of the vehicle to testify. Mr. Kunya appeared to argue that the circumstantial evidence given by PW.5 should not have been accepted as it **"left a lot to be desired."**

He contended that there was no evidence incriminating A3 and further that there was no nexus connecting the vehicle produced in evidence to that sighted at Ntinda.

While arguing ground 2, Mr. Kunya contended that there was no evidence establishing common intention between A2 and A3 contending that PW5 only suspected A3 because he saw A3 and A2 moving together.

Mr. Wagona, PSA, supported the decisions of the two courts below. Earlier in this judgment we referred to the submissions of Mr. Wagona while considering the appeal of the first appellant. The learned Principal State Attorney submitted that circumstantial evidence is about the cumulative effect of the totality of the evidence and therefore different pieces of evidence should not be looked at in isolation from each other. He relied on **Criminal Evidence by Richard May** (Supra). He referred to the utterance made by A2 to A3 about missing money by failing to **"beat a woman"** and A2's conversation with PW5 when the former wanted the latter to get a self drive vehicle for hire. This was evidence of two people working for a common purpose. This showed common intention. The Principal State Attorney argued that PW5 and the Ballistics expert (PW13) referred to the same weapon, a gun, contending that the two courts below correctly relied on the evidence of the expert as to the technical name of the gun.

The Principal State Attorney submitted that the vehicle which was seen twice by PW5 in the garage was the same vehicle seen by PW2 in Ntinda and it was the same vehicle which was produced in evidence at the trial.

Mr. Tumusasira for A1 had argued in the Court of Appeal that the evidence of PW5 was incredible and unreliable because, according to counsel, PW5 told lies and was inconsistent in his testimony. That was because PW5 had stated first that he traded in potatoes and later that he was a spy and lastly that he was a mechanic; that although he claimed he had met A2 and A3 three times, it turned out that he had met them 6 times.

The evidence against these two is purely circumstantial and consists essentially of the evidence of Mugabi Bright (PW5) and of Jolly Kapere

(PW2). We have already summarised the evidence of these two witnesses and that of the two appellants. The evidence of PW5 and the appellants shows they knew each other. According to PW5, A2 and A3 visited a garage in Kisenyi a few days before the murder of the deceased seeking to hire a vehicle on self-drive basis. A2 asked PW5 to look for such a vehicle. A2 confided in PW5 the purpose for which the vehicle was needed which was that a rich woman in Ntinda wanted them to murder somebody and A2 needed a vehicle for transport to do the job. Two days later the two appellants checked on PW5 who said he had not succeeded in getting a vehicle. The two appellants went away. Another two days later (on 6/6/1999) the two appellants turned up at the garage in late afternoon driving a white double cabin pick-up for repair. PW5 saw a bag inside the vehicle containing a gun and an overcoat. Before leaving the garage the two appellants borrowed a rivet gun designed to remove from or fix number plates on a vehicle. The two men drove out of the garage at 5.30 p.m. Kisenyi, where the garage was, is almost in the central part of Kampala. The vehicle was a white double cabin pick-up. At about 6.30 p.m in Ntinda, a suburb of Kampala, on its Eastern side, a white double cabin pick-up drove past PW2 as she was returning home.

There were three people in the vehicle: a driver in the driver's seat and two other passengers seated in the rear cabin. PW2 reached home, dressed up and proceeded to a party. On her way she saw the same white pick-up parked on a road which is not normally busy, about 100 metres away from the residence of the deceased. One door of the vehicle was open. This was about 7.30 p.m. There was light provided by electric security lights. As she moved a distance, she heard gun shots.

This frightened her and so she turned to return home. As she neared the same pick-up, a dark skinned man (like A2) approached the vehicle while wearing an overall and carrying an object which, to PW2, appeared like a stick or a gun. The man was one metre from her. He entered the pick-up which had no number plates. (The rivet must have been used to remove the numbers). The pickup sped away. She then learnt that the deceased had been shot dead. She visited the scene. The following day, PW5 attended to the two appellants and their pick-up at the same garage. The evidence of the two appellants is to the effect that both were not at the scene of the crime. A2 claimed that since 5/6/1999 he was in Kayunga Hospital attending to a sick child. A3 was else where. Of course PW5 did not testify that he saw the two appellants shoot the deceased. But A2 mentioned that their mission was to murder a woman.

In its judgment the Court of Appeal considered the activities, the status and background of PW5 in some detail before it accepted the conclusions of the trial judge that PW5 was a reliable witness. This is how the Court of Appeal dealt with the evidence of this witness:

> **"Like the learned trial judge, we find that the inconsistencies mentioned above were minor and the trial judge was right to reject them as they did not go to the root of the case. We find from the evidence on record that Mugabi did not report the murder immediately to his superiors because he feared for his life. The late recording of a police statement should not be visited on the witness as investigation of crime is the work of the police. With regard to Mugabi's police**

statements *[(Exh.P2 and P3. These should really be exh.D2 and D3 because they were introduced by defence)]* **the learned trial judge was justified in rejecting them because they were exhibited as part of evidence but were put in for identification only and the police officer who recorded them was not called to be cross-examined on the matter. Mr. Mugabi's testimony in court was more preferable and carried more weight as it was given on oath and he was rigorously cross-examined on it. We find that the learned trial judge was justified in relying upon his evidence: See Ojede S/o. Odyek Vs.R.(1964) E.A.499.**

We find that Ayebale Miriam's evidence in Court carried more weight. Police statement by Mugabi and Ayebale should not have been considered at all as they not properly put before court."

The learned Justices of Appeal had earlier set out those aspects of Mugabi's evidence which Mr. Tusubira contended rendered the witness unreliable and incredible before the justices found that the witness was in fact reliable. That demonstrates that the learned justices re-evaluated the evidence on record before upholding the findings of the trial judge. We have not been persuaded that the learned justices erred in their conclusions.

In connection with exh.P2 and P3 we would like to correct the apparent confusion arising from the passage quoted above. It is apparent that the two statements were not properly proved and admitted in evidence.

So it is inaccurate to say that "**Mugabi testimony in Court was more preferable and carried weight.**" It is trite that for a police statement to be treated as evidence, it must be properly proved and admitted in evidence unless the authenticity of that statement is not challenged.

If it is not proved it cannot be acted upon by any court. So it cannot be a basis for saying that a witness's evidence in court is more preferable and carried more weight than the statement which was not properly admitted in evidence at the trial.

As regards PW2, Jolly Kapere, we think that this witness testified about what she saw and experienced. She saw the pick-up thrice within a period of about one hour. She was helped by electric security lights to see the vehicle and the man who entered it after the shooting. The person whom she described as answering to the appearance of A2 was as close as one metre away from her. There was electric light to help her observe the man.

In the circumstances of this case her evidence corroborates that of PW5 as to the double cabin pick-up which was white and the overcoat and the probability of a gun. In these circumstances, we think that there was ample circumstantial evidence to support the convictions of A2 and A3. Their grounds of appeal have no merit and therefore their appeal must fail.

In conclusion this appeal has no merit and it is accordingly dismissed.

Delivered at Mengo this 21st day of July 2006.

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

J.W.N.TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N.KAROKORA
JUSTICE OF THE SUPREME COURT

J.N.MULENGA
JUSTICE OF THE SUPREME COURT

G.W.KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

Mulenga for A1 & A2.
Tsekooko for A3 & A4.