

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.30 OF 2015

Between

OBWALATUM FRANCIS APPELLANT

AND

UGANDA RESPONDENT

**CORAM: KATUREEBE,C.J; KISAAYE; ARACH AMOKO; OPIO AWERI;
TIBATEMWA; JJ.SC**

(Appeal against the judgment of the Court of Appeal before Mwangusya, Buteera and Egonda.Ntende JJA)

JUDGMENT OF THE COURT.

This is a second appeal against the judgment of the Court of Appeal that was delivered on the 6th day of March 2015 arising from the judgment of the High Court at Kumi.

The appellant was indicted for murder contrary to Sections 183 and 184 of the Penal Code Act now Sections 188 and 189 of the same.

Back ground to the Appeal.

The appellant is a former Rapid Response Unit (RRU) military operative and a former L.C.5 Chairperson, representing Bukedea. He used to help the Police in its operations with his vehicle and security expertise.

The two deceased persons (Ojekedde and Emokol) were suspected to be in possession of FireArms. Ojekedde was arrested on 5th March 2007 with some rounds of ammunition and taken to Bukedea Police Station. As a result of the information he gave while in custody, a joint operation which comprised of Police, Army personnel and Ojekedde on board of a truck belonging to the appellant was sent to Kamon village to arrest Emokol who was suspected to be having the firearms.

Emokol was not found home. Information was obtained that he was at a brick making site laying bricks. He was found and taken to his parents' home where he was interrogated about the whereabouts of the fire arms. He denied any

knowledge of the firearms. The deceased persons were then tortured to reveal the whereabouts of the fire arms and in the process, the appellant picked a hoe, removed its wooden handle and hit Emokol at the back of his head. Emokol collapsed and later on when he regained consciousness, still denied having any firearms. The deceased were later taken to Bukedea Police Station where the appellant in possession of pliers proceeded to squeeze their testicles. The deceased were then led to a location where they had allegedly claimed the firearms were hidden and in the course of the torture while there, a mob joined in assaulting the deceased.

On being brought back to the Police station, Emokol became unconscious and died. Ojekedde was rushed to hospital and also died later in the day.

The appellant was arrested and charged with murder.

At the trial, the prosecution led 5 witnesses to prove the ingredients of murder. The body of Ojekedde was examined by Dr. Okiria and the post mortem report revealed his cause of death to be closed head injury with brain concussion and dislocation of the cervical vertebrae following severe assault. Emokol's body was examined by Dr. Mugereri and the post mortem report revealed that the cause of death was excessive bleeding following the severe assault. The accused was examined and the report stated that he was of a normal demeanor.

In his defence, the accused denied commanding the operation of searching for firearms and torturing the deceased persons. He claimed that he advised the police against torturing the suspects. He also stated that he only learnt about the death of the suspects from his driver, a one Okoche.

On the 15th December 2011, the appellant was convicted for murder contrary to sections 188 & 189 of the Penal Code Act and sentenced to 50 years imprisonment, on each count to run concurrently.

The appellant, being dissatisfied with the High Court decision, appealed to the Court of Appeal vide Criminal Appeal No. 48 of 2011 against both conviction and sentence.

The Court of Appeal upheld the decision of the High Court as regards conviction. The Court however quashed the sentence imposed by the High Court after finding that it was an illegality since the judge did not consider the period spent on remand by the appellant, his age and whether he was a first offender or not. Consequently, the appellant was sentenced to 20years imprisonment on each count to be served concurrently.

The appellant still dissatisfied lodged an appeal in this court against both conviction and sentence on the following grounds:

- 1. The learned Justices of Appeal erred in law and fact when they believed the evidence of PW4, Tom Osuret and PW5 Charles Odukule to uphold the conviction of the appellant, thereby occasioning a miscarriage of justice.**
- 2. The learned Justices of Appeal erred in law and fact when they relied on extraneous evidence of PW1, PW2, PW3 and PW4 & PW5 to impute the Appellant's malice aforethought, thereby occasioning a miscarriage of justice.**
- 3. The learned Justices of Appeal erred in law and fact when they down played the grave inconsistencies/contradictions in the prosecution evidence, thereby occasioning a miscarriage of justice.**

The appellant prayed court to allow the appeal, set aside the judgment and sentencing orders, and set the appellant free.

He further prayed in the alternative that should the conviction be upheld the sentence be reduced commensurate to the mitigation factors addressed by the appellate court.

Representation

The appellant was represented by **Robert Bantu** on private brief while the respondent was represented by **Okello Richard, Principal State Attorney**. Both counsel filed written submissions.

The Duty of the Second Appellate Court.

This being a second appeal, we shall start by stating the scope of duty of the 2nd appellate court as discussed in the case of **Milly Masembe Vs Sugar Corporation and Anor, Civil Appeal No. 01 of 2000**, where **Mulenga (JSC)** stated that;

“in a line of decided cases, this court has settled two guiding principles at its exercise of this power. The first is that failure of the appellate court to re evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. The second is that the Supreme Court, as the second appellate court, is not required to, and will not re evaluate the evidence as the first appellate court is under duty to, except where it is clearly necessary” (emphasis added). Further, this court's duty was

expounded on in the case of **Kakooza Godfrey Versus Uganda SCCA No 3 of 2008** where it was observed that;

“ As a second appellate court, we are aware that the two lower courts reached concurrent findings of fact.....we can only interfere in those concurrent findings if we are satisfied that the courts were wrong or applied the wrong principles of law”(emphasis added)

Bearing the scope of this court’s duty in mind, we shall proceed to consider the submissions by counsel and resolve the grounds giving rise to this appeal.

Ground one

The Learned Justices of the Court of Appeal erred in law and fact when they believed the evidence of Tom Osuret PW4 and Charles Odukule PW5 to uphold the conviction of the appellant.

Appellant

Counsel for the appellant submitted that the gist of the evidence of PW4 and PW5 does not disclose any evidence to prove that the appellant’s acts caused the death of the deceased. He argued that PW4 testified that the police and the deceased persons left for Kamacha leaving both him (PW4) and the appellant at the police station. Counsel argued that at that time, the deceased was alive and that they died when the appellant was not with them.

Counsel further submitted that the evidence on record is to the effect that the cause of death of the deceased persons was mob justice and not the appellants. He relied on the Police statement of PW5 Charles Odukule and the Postmortem report. Counsel further relied on the case of **Kamanzi Fred V Uganda Crim appl No. 14 of 1997** where the Supreme Court held that it is not enough to establish that the accused inflicted an injury on the deceased, it must be proved beyond reasonable doubt that the injury caused the death. The onus is on the prosecution to rule out the possibility of the deceased’s death having come about by some other circumstances wholly unconnected with the injury inflicted by the appellant.

Counsel concluded that there was no proof that it was the appellant’s acts that caused the death of the deceased persons. He further stated that the evidence cannot sustain a conviction for murder thereby inviting Court to find so.

Respondent

In response, the Principal State Attorney submitted that the Learned Justices of Appeal rightly believed the evidence of PW4 and PW5 because the two witnesses were at all material time present with the appellant in the places where major incidents regarding torture took place.

Counsel urged court to read the evidence adduced by the prosecution as a whole and not in isolation in order to appreciate the prosecution case against the appellant. He relied on the case of **Justine Nankya V Ug SCCA No. 24 of 1995** where it was held that **“whether a court believes one witness and disbelieves another is a question of credibility after court has considered all the evidence and demeanor of the witness. In this case, the learned trial judge believed the prosecution witnesses and disbelieved the appellant’s side. She made deliberate findings of fact on the issue of credibility of the key prosecution witnesses. The trial judge was entitled to make those findings as she had the opportunity of seeing the witness testify.”**

Counsel contended that much as it is true that the cause of death of the deceased was a mob beating and they died in instances where the appellant was not present, that did not excuse his involvement because he encouraged the mob to beat them.

Further, counsel argued that it was the prosecution case that the appellant with instigation of others assaulted the two suspects who remained extremely weak while they continued being moved from place to place. That it was therefore immaterial that at the time of the suspect’s death, the appellant was not travelling with the team. Counsel for the respondent concluded by inviting court to find that this ground has no merit.

Resolution.

The argument by the appellant is that both evidence of PW4 and PW5 did not disclose any proof that the appellant’s acts caused death.

The Court of Appeal dealt with the evidence of the two witnesses as follows:

“we have examined all evidence adduced in this case. This includes the evidence for the prosecution and defence. It is in fact admitted by the appellant that he voluntarily went to see what was happening in Kamon. The person who

transported him during that day was sought out by the appellant himself. That person is PW4. PW4 testified as to what he saw the appellant doing on the day in question. It is clear that the appellant participated in the operation to arrest Emokol on 6th March 2007 and the attempts to recover a firearm. He assumed control of the operation at least at Kamon where considerable injuries were inflicted on both deceased persons by the appellant and the mob gathered. The appellant encouraged the mob to beat the deceased persons instead of protecting them. In his own testimony, the appellant told the mother he could not protect Emokol since he had failed to reveal where the firearm was. This is not very different from the mother's testimony in which she stated that the appellant told her 'if the boy is taken, he will not come back alive' the mother could only respond that 'you bring back the body'

PW4 was an independent witness. His testimony is sufficient to show the participation of the appellant in the causing of the death of Ojekedde and Emokol. We believe his testimony. We also believe the testimony of PW5 who was part of the then police team. Both witnesses testified that the appellant was wearing an army uniform. It is clear that the appellant assumed a command position with regard to the operation. The appellant's attempt to downplay his role is not credible in light of the evidence to the contrary...."

The issue of the evidence of PW4 and PW5 as regards the participation of the appellant in the causing of the death of Ojekedde and Emokol was well dealt with in the above observations and we find no reason why this court should interfere in those findings.

Further, it is immaterial whether the deceased persons died in the presence or absence of the appellant. The question rather should be whether the appellant caused or contributed to the death of the deceased. It is on record that the appellant assumed the role of team leader given his apparently senior standing in the military and it is also not disputed that he tortured the deceased persons and further invited the mob to beat up the suspects.

The evidence of PW4 in his police statement (D5) also emphasizes that the appellant tortured the suspects and was later joined by a mob. There is no evidence however pertaining to the fact that the appellant stopped the angry mob from torturing the deceased persons. It is true that the suspects died in the absence of the appellant. However prior to the death of the deceased, the appellant and other persons under his command severely assaulted the deceased who remained extremely weak and later succumbed to death on their last trip back to Bukedea Police Station. Ojekedde died shortly after.

We agree with the case relied on by the appellant (**Kamanzi Fred V Ug Crim Appeal No. 14 of 1997**) which is to the effect that it is not enough to establish that the accused inflicted an injury that caused the death. The onus is on the prosecution to rule out the possibility of the deceased's death having come about by some circumstances unconnected with the injury inflicted by the appellant. In the instant case, the appellant tortured the deceased persons and also invited the mob to beat them up well knowing that such assault was capable of causing death. He had common intention with the mob to beat and kill the deceased persons.

Common intention is provided for in **Section 20 of the Penal code Act** and it reads that;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence”.

The doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter, it is now settled law that an unlawful common intention does not imply a pre- arranged plan. In the case of **P Vs Okute [1941]8 E.A.C.A at P.80**, it was observed that common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to dissociate from the assault. Further in the case of **Wanjiro Wamiro Vs R [1955]22 E.A.C.A. 521 at p.52**, court observed that it is immaterial whether the original common intention was lawful so long as the unlawful purpose develops in the course of events. See also **Ismail Kisegerwa & Another V Uganda crim Appl No. 6 of 1978**

In the instant case, the appellant led the operation to discover guns allegedly in the possession of the deceased persons. During the operation, he employed deadly methods of obtaining information on the whereabouts of the fire arms. It is on record that the appellant hit Emokol on the head, squeezed the genitals of both Emokol and Ojekedde with pliers and invited an angry mob to beat up the deceased. The intention of the appellant in the beginning was lawful but in the course of events, the unlawful acts he adopted contributed to the eventual death of the deceased persons. Unlawful common intention was formed the moment the appellant and the mob pursued deadly acts which culminated in the killing of the deceased persons. It is our considered view that the facts of this case fall squarely within the ambits of S. 20 of the Penal Code Act and the

case law discussed above, especially the case of **Wanjiro & Wamiro Vs R (supra)**.

In the premises, we find no merit in this ground.

Ground two

The Learned Justices of Appeal erred in law and fact when they downplayed the grave inconsistencies/ contradictions in the prosecution evidence, thereby occasioning a miscarriage of justice.

Appellant

Counsel for the appellant argued that the prosecution evidence was marred with grave inconsistencies. He submitted that there was a contradiction when PW4 testified that he denied the appellant his motorcycle and offered to ride him around and then the same witness had a change of mind and voluntarily surrendered the motorcycle key to the appellant to fetch pliers.

Counsel further submitted that there was exaggerated contradictory evidence about finding Emokol. PW4 stated that the appellant got one of the boys from Kokutu Trading Centre to direct him where Emokol was and on refusal, he ordered for their beating until they disclosed where he was. PW5 on the other hand testified that they left the police station with Ojekedde and went to the swamp and that it was after failing to find the gun that Ojekedde was pinched with pliers until he disclosed that the gun was with Emokol. That Emokol was found mixing clay and was pushed to the hut.

Counsel added that PW1 on the other hand collected Emokol when he was making bricks and brought him home whereas PW2 stated that the appellant came looking for her son, the deceased and that together with the appellant, they proceeded to the place where he was making bricks. That in her cross examination, she stated that he was found in her garden yet PW4 stated that the parents (PW1&2) were found in their home pounding groundnuts.

Counsel contended that contradictions still prevailed in the evidence regarding the use of pliers. Counsel argued that PW 4 stated that on arrival at Bukedea Police Station, the appellant went and brought a pair of pliers, stripped the suspects naked and squeezed them where as PW5, Charles Odukule stated that the appellant used the pliers to pinch Ojekedde at Kokuto swamp.

Counsel further submitted that there were contradictions in the evidence relating to the use of the hoe by the appellant. He argued that PW4 in his testimony stated that the appellant used a hoe and hit Emokol at the back of his head yet no other witness present at the scene of crime testified to that effect.

Counsel argued that a proper scrutiny of the post mortem reports leaves no doubt that the deceased died at the hands of different persons (mob). He relied on the case of **Kamanzi Fred V Uganda (supra)** where court noted that the post mortem should establish beyond reasonable doubt that the deceased died as a result of injury inflicted by the appellant. Counsel argued that whereas it was the prosecution evidence that the deceased died as a result of squeezing of the testicles with a pair of pliers, the post mortem reports provided no such evidence of swollen testicles of the deceased persons.

Counsel relied on the cases of **Alfred Tajor V Uganda EACA, Criminal Appeal No. 167 of 69 and Sarapio Tinkamalirwe V Uganda, SCCA No. 27 of 1989** which were to the effect that grave inconsistencies or contradictions are those that go to the root of the case. He submitted that the prosecution throughout the trial offered no reasonable explanation for the said inconsistencies.

Counsel invited court to reject the prosecution evidence on the basis of it being marred with such inconsistencies.

Respondent

Counsel for the respondent submitted that some aspects of this ground was dealt with in their submissions on ground one and that they would submit on only those areas that may not have been directly covered by ground one.

Counsel contended that there was ample evidence on record from the prosecution witnesses who were present at the scene and the postmortem reports that reveal the cause of death to be random beatings that the two were subjected to.

He further argued that the evidence of the movements of PW4 and the appellant on the motorcycle was never disputed.

Counsel contended that it was from the evidence of PW4 and PW5 that the use of pliers was established. Both pieces of evidence suggest that the pliers were used in two different places which were at the police station and at Kamacha. He stated that it was just a phase of all the many torturous activities they went through.

Counsel further disagreed with the appellant's insinuations that it was during the trips (2nd 3rd & 4th) where the mob seemed to beat the victims to death when the appellant was not with them as confirmed by PW5. Counsel argued that it was never in any evidence adduced by the prosecution witnesses or the defence and therefore that counsel for the appellant testified from the bar. Counsel concluded by inviting court not to find merit in this ground.

Resolution

The appellant submitted that the prosecution evidence was marred with grave inconsistencies in various parts of their evidence. We shall first of all restate the law on inconsistencies in prosecution evidence:

The Law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained. **See Alfred Tajor V Uganda (Supra)**

The appellants submitted that the prosecution evidence was contradictory in the following areas;

Finding Emokol

Appellant's case was that different prosecution witnesses (PW1, PW2, PW3, PW4 and PW5) made contradicting and exaggerated accounts of what indeed happened to the late Emokol.

It is true that all these witness differ on their account of how Emokol was found which indeed amounts to an inconsistency. However, it is our considered view that the way Emokol was found is not a matter that holds substance in the instant case but rather what happened to him after being found. All the witnesses testified to the cruel torture he was subjected to which eventually led to his demise.

Fetching of pliers.

Appellant's query was that since PW4 (Tom Osuret) testified to having denied his motor cycle and offered to give him a ride instead, how then did he surrender his motor cycle keys to the appellant to fetch the pair of pliers.

We however do not see the connection between the two scenarios. It is apparent that PW4 denied the appellant his motorcycle keys because of the fear of the unknown military operation that the appellant was involved in thereby offering to ride him on the bike instead. Later as the operation went on, PW4 was certain of the kind of operation the appellant was engaged into and could then confidently release his motor bike. It is our opinion that PW4's denial of the bike in the first place had nothing to do with him offering the same to the appellant. We find no inconsistency in this piece of evidence.

Using of the pliers

The appellant's case was that PW4 testified that the deceased persons were stripped naked and squeezed at the police and put back on the truck which is contrary to PW5's testimony that there was no torture done or allowed at the police station.

It was a fact that the two pieces of evidence contradict each other however we feel that the place where the pliers were used is immaterial but rather the fact that both witnesses admit that the pliers were used by the appellant. The case before court was to prove the appellant's participation and contribution towards the death of the deceased persons and we are satisfied that the evidence on record regarding the appellant torturing the suspect tallies.

Further, it is noteworthy that PW5 was a police man which explains why he could not testify that the suspects were tortured at the police station as such testimony would paint the police in bad light.

Use of a hoe

The appellant's claim was that PW4 testified that the appellant hit Emokol's head with a hoe stick which fact was not corroborated by any other witness present at the scene.

In criminal law and the law of evidence, there is no specific number of witnesses required to testify on a fact and for court to believe the fact. **Section 133 of the Evidence Act reads that;**

“ subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.”

This was the position in the case of **Livingstone Sewanyana V Uganda, SCCA No. 19 of 2006** where it was held that it is the quality and not quantity of the evidence that matters.

We are of the considered view that it is immaterial that only PW4 testified on the use of the hoe by the appellant despite other persons being present at the scene of crime. What mattered was the credibility of his testimony. In the instant case, he was a key witness who knew all the facts and the extent of the appellant's participation in the death of the deceased persons. We still find no inconsistency regarding the use of the hoe.

Post mortem report

Appellant claimed that the cause of death of the deceased persons in the post mortem report was torture by a mob and not the appellant.

The post mortem report indeed showed the cause of death as closed head injuries with brain concussion, dislocation of cervical vertebrae and excessive bleeding following severe assault by mob justice. We agree with court's position in the case of **Kamanzi Fred V Uganda** (supra) as relied upon by the appellant's counsel that the post mortem report should establish beyond reasonable doubt that the deceased died as a result of injury inflicted by the appellant.

After a thorough perusal of the record, we are inclined to agree with the respondent's submission that the appellant was part of the mob. There was undisputed evidence on record that the appellant tortured the deceased persons and also invited an angry mob to assault the suspects. As earlier asserted in our considerations, the appellant with common intent with the mob caused the death of the deceased persons

Common intention can be inferred from the presence of the appellant, his actions, and omissions to disassociate himself from the attack. See **P Vs Okute (supra)**.

It is immaterial whether the original common intention was lawful so long as the unlawful purpose develops in the course of events; **See Wanjiir & Anor Vs R (Supra)**

In the instant case, the evidence of PW1, PW2, PW3, PW4 and PW5's was to the effect that the appellant led the team of policemen that searched for the guns suspected to be in the custody of the deceased persons. However the lawful purpose became unlawful when the appellant tortured the suspects using different means and ordered the suspects to be beaten by the mob.

In view of the above conclusion, we find that the inconsistencies in the areas of evidence raised by the appellant were minor and in some instances nonexistent and as such ought to be ignorable.

Accordingly, this ground fails.

Ground three

The learned Justices of appeal erred in law and fact when they relied on extraneous evidence of PW1, PW2, PW3, PW4 & PW5 to impute the Appellants malice aforethought there by occasioning a miscarriage of justice.

Appellant

Counsel contended that the lower courts did not take into consideration the evidence of the Police Statements of PW1 as Exhibit D1, PW2 as exhibit D2, PW5 and PW4 yet it was those statements that exculpate the appellant from any wrong doing.

Counsel cited the case of **Tekerali S/O Korongozi V Reg {1952}EACA 259**, where the defunct **East African Court of Appeal** held that;

“The first information at police stations provides a good test for the truth or accuracy to which later statements can be judged.... Truth will often come out in the first statement taken from the witnesses at the time when the recollection is very fresh.”

Counsel argued that court chose to believe the evidence of PW5 that he was told not to incriminate the appellant by AIP Omwony since he helped police with his vehicle. Counsel also stated that the court erred when they asserted that the earlier statements did not incriminate the appellant until an order of investigation came from Kibuli yet there was no evidence of such an order on record.

Counsel contended that the circumstances under which the additional statement of PW5 was recorded were questionable. Counsel stated that there was a possibility that PW5 acted on orders of the DPP to frame the appellant to find favor or pardon from the suspension as caused by the appellant because no evidence on record proved that PW5 interacted with AIP Omwonyi, (PW3).

Counsel concluded that court was wrong to selectively evaluate the evidence on record in favor of the prosecution and disbelieving the contents in exhibits D1,2,3 and 6.

Counsel prayed court to answer this ground in the affirmative.

Respondent

Counsel submitted that the justices of appeal considered the first statements in the station diary book together with the testimonies in court

Counsel submitted that additional statements were a usual practice of the police during investigations aimed at ensuring that concrete evidence is gathered before a trial can commence.

Counsel objected to the appellant's arguments that PW5 acted on orders of the DPP to frame the appellant to find favor from the suspension or avenge his suspension as caused by the appellant. He submitted that the first statement of PW5 already had loads of information involving the participation of the appellant in the torture of the deceased persons.

Counsel concluded that the appellate court properly evaluated the evidence on record in favor of the prosecution and that the justices considered the defence testimonies.

Counsel prayed court to dismiss the appeal on all grounds and uphold the findings of the first appellate court.

Resolution

The appellant's case was that court downplayed the importance of the statements made by the witnesses at the police and made their decision in consideration of only the witness statements in court. Appellant claimed that the police statements contradict the testimonies in court. He also questions the circumstances surrounding the recording of an additional statement by PW5.

The Court of Appeal observed as follows on this issue:

"...it is also true that the statement of PW5 that was initially recorded, no mention was made of the participation of the appellant in the commission of this crime. During cross examination, PW5 explained this omission, "I was advised to make a statement by AIP Omwony not to highlight Obwalatum since he normally offers us his vehicle."

We wish to observe that where there are inconsistencies in respect of witnesses and their earlier statements, or contradictions and discrepancies between the prosecution witnesses which are minor and of a trivial nature. These may be ignored unless they lead to deliberate untruthfulness. Where the inconsistencies, contradictions and discrepancies are too grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained. See Alfred Tajor V Uganda, Criminal case No. 167 of 1969 (unreported); Emmanuel Nsubuga V Uganda, Supreme Court Criminal Appeal No. 16 of 1988(unreported); and Suleiman Katusabe V Uganda, Supreme Court Criminal Appeal No. 7 of 1991(unreported).

The inconsistencies and contradictions in this case will be examined in light of the fore going principles.

But before we do so, it is important to recall the value of first information received at the police stations or made to authorities in relation to crimes committed. The former Court of Appeal for Uganda [at the time the court of last resort] in Clement Namulambo & anor V Uganda Criminal Appeal No. 1 of 1978(unreported) discussed the question of first reports. It quoted with approval the following passage from Terekali S/o Korongozi & ors V R (1952) 19 EACA 259 at page 260,

‘their importance can scarcely be exaggerated for they often provides a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against alter embellishments or the deliberately made up case. Truth will often come out in the first statement taken at the time when recollection is very fresh and there has been no opportunity for consultation with others.’

The appellant does raise a valid point with regard to the first information report made by PW5 and unless satisfactorily explained; it could weaken the prosecution case considerably. In this case, the explanation is that there was an attempted cover up of the participation of the appellant because of his close relationship with the Bukedea Police Station. He normally lent them his motor vehicle. And much as it was not mentioned as a direct motivation, it is clear from the evidence of both sides that the appellant figured prominently in the fight against crime in Bukedea. The explanation of a cover up in our view is credible given his strong inside links with both the police and the army in the area.....”

The observations made by the learned Justices above suggest that the Justices were mindful of the importance of the statements recorded at the police. The observations further exhaustively explain the circumstances surrounding

PW5's making of an additional statement. We dismiss the argument by the appellant that there was a possibility that PW3 acted on orders of the DPP to force the appellant to find favor for pardon from the suspension as caused by the appellant. There was no proof of this allegation and this court shall not act on possibilities.

The appellant contended that none of the earlier witness statements pinned the appellant to committing the crime. We however disagree with that submission because the evidence in exhibit D1 and D2 (statements of Amos Tukei and Debora Tukei) put the appellant at the scene of crime. Exhibit D5 (statement of Tom Osuret) reveals the torture that the appellant subjected to the deceased persons. The witness also states that upon the appellant torturing the deceased, the rest of the people joined him and beat them. There was no evidence regarding the fact that the appellant stopped the mob in protection of the deceased persons apart from his testimony. We agree with the trial judge that it is not true that the appellant attempted to protect the suspects from being assaulted because being that Emokol was a nephew to the appellant, he would have reported the police's barbaric actions immediately after the death of the two persons but no report of torture against any one was done by him.

We find no merit in this ground and accordingly, it fails.

SENTENCING

The appellant in the alternative prayed Court that should the conviction be upheld, the sentence be reduced commensurate to the mitigation factors addressed by the first appellate court. He further invited court to take into consideration the certificate of recommendation dated 20th January, 2017.

The sentencing jurisdiction of the Supreme Court has now been put beyond doubt in the case of **Kiwalabye Bernard Versus Uganda, Supreme Court Criminal Appeal No. 143 of 2001(unreported)** where the court observed as follows;

“The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to construct an

important matter or circumstances to be considered while passing the sentence or where the sentence imposed is wrong in principle.”

It should be emphasized that the Supreme Court as the court of last resort should endeavor to ensure that the sentences meted in this country are lawful, commensurate with the offences committed and encompass the rights of the victims of the crime as well as public interest; See **Busiku Thomas Versus Uganda, Criminal Appeal No. 33 of 2011**, where Her Lordship Kisaakye JSC made the following remarks;

“..... In my view, the right to a fair hearing should not only encompass the rights of the accused person or convicted person during the sentencing stage. It should also encompass the rights of the victim of the crime as well as public interest. As it was rightly observed by the Constitutional Court of South Africa in S V Jaipal 2005(4) SA 581 (cc), Para 29 that;

‘The right of an accused to a fair trial requires fairness to the public as represented by the state. It has to instill confidence in the criminal justice system with the public, including those to the accused, as well as those distressed by the audacity and horror of the crime’

In our view, the above passage is echoing the letter and spirit of **Article 126(1) of the 1995 Constitution** that the powers of the court as derived from the people should be exercised (in sentencing) in conformity with the law and with the values, norms and aspirations of the people. The Supreme Court as the last custodian of justice should accordingly make sure that the sentencing regime obtaining in this country is followed with the letter and spirit of Article 126(1) of the Constitution. It should not merely rubber stamp sentences of the lower courts. It should probe propriety of sentences.

In the instant case, the Court of Appeal while dealing with sentence observed as follows;

“ the appellant instructed his counsel not to say anything in mitigation and he said a few words himself, protesting his innocence. This was his right. The prosecution did not produce any record of previous convictions if any for the appellant. He must be treated therefore as a first offender. Prior to his trial and conviction, he spent one year and seven months on remand. He is 57 years of age, given at the time he was charged he was 54 years of age. The appellant was convicted of 2 very serious offences involving the loss of two lives. The

maximum penalty for the offence of murder is the death penalty. However as the appellant is a first offender, he will be spared the death penalty.

Taking into account all the foregoing, we are satisfied that a sentence of 20 years on each count served concurrently will meet the ends of justice in this case. We so order”

The observations made by the Court of Appeal above are exhaustive and clear of ambiguities. All legal factors to consider while sentencing were put into consideration by court; the appellant was treated as a first offender, the period spent on remand was considered, the court took consideration of the age of the appellant. The court further considered the fact that this was a grave offence involving loss of two lives and the fact that the maximum penalty of murder was death.

We agree with the Court of Appeal that the sentence imposed was not manifestly excessive or so low as to amount to a miscarriage of justice.

The certificate dated 20th January 2017 attached to the record reveals that he has been of good conduct in prison however this court can only interfere if wrong principles of the law were applied while sentencing. We find no need to interfere with the decision of the Court of Appeal. We also find 20 years imprisonment a fair sentence considering that the offence is murder moreover involving two lives.

In the result, we dismiss the appeal. The decisions and orders of the Court of Appeal are upheld.

Dated at Kampala this**20th** day of**December**..... 2017.

.....

Hon. Chief Justice Bart .M. Katureebe

.....

Hon. Justice Esther. Kisaakye-Kitimbo

.....

Hon. Justice Stella Arach-Amoko

.....

Hon. Justice Ruby Opio-Aweri

.....

Hon. Justice Lillian Tibatemwa-Ekirikubinza

