THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

***CORAM:* HON. MR. JUSTICE G.M. OKEI1LO, JA.**

HON. MR. JUSTICE S. G. ENGWAU, JA.

HON. MR. JUSTICE A. TWINOMUJ1JNI, JA.

CRIMINAL APPEAL NO.70/98

KITWALA RONALD & 3 OTHERS :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

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

(Appeal from the judgment of the High Court of Uganda at Kampala (S.B. Bossa, J.) dated 2/12/98 in Criminal Case No.98/97)

JUDGMENT OF THE COURT

This is an appeal against the judgment of the High Court of Uganda at Kampala whereby four appellants were convicted of murder c/s 183 and 184 of the Penal Code Act andwere sentenced to suffer death. At the time of hearing of the appeal, we were informed that the third appellant, Rwamigo Richard died in prison on 17th January 1997. The appeal was therefore prosecuted on behalf of the remaining three appellants.

The prosecution case which was accepted by the learned trial judge is that the 10th July 1995 was a market day at Kankwale village, Muwanga sub-county in Kiboga District. On that day at about 1 p.m. the three appellants together with the now recently deceased Rwamigo Richard arrested the deceased called Paulo Kijwa for allegedly riding his bicycle through the market. The first appellant was a police Corporal with Kiboga District Administration then stationed at Muwanga Sub-county Headquarters. The other three were members of the Local Defence Unit (LDU) employed within Muwanga Sub-county. The appellants roughed the deceased up and removed his bicycle from him. They demanded for money from him which he was very reluctant

to pay. After a lot of threats that he would face very serious consequences if he did not pay up, he paid shs.4000/= which they took but demanded for more. The deceased paid a further shs.1000/= which apparently did not satisfy them either. When he tried to remove his bicycle, the appellants grew wild, re-arrested him and shortly jointly assaulted him seriously. He fell down whereby they tied his hands at the back but he managed to release himself and stood up. At that time, the three LDU members were armed with a gun each but the first appellant was not armed. The first appellant asked Rwamigo Richard to give him the gun which Rwamigo surrendered. The 1st appellant fired one shot in the air after which he fired one bullet in the face of the deceased. The deceased fell down and the 1st appellant fired another two bullets at the legs of the deceased. The deceased died instantly. The 1st appellant then fired many shorts in the air causing a stampede in the market whereby virtually everyone dispersed and ran away. Only close relatives of the deceased remained around and took the corpse to their home.

Meanwhile the four men left the scene with the deceased's bicycle. At around 6 p.m. on the same day, the 1st and 2nd appellants reported themselves at Nabwendo Police Post about three miles from the scene of the crime. They reported that they had killed someone at the market and they surrendered a gun as the murder weapon and the bicycle belonging to the deceased. They were arrested and detained. The prosecution case did not indicate how Rwamigo Richard and the fourth appellant were arrested.

At the trial the four men totally denied the offence and set up an alibi whereby they all claimed that on the material day and time they were not at Kankwale market. The learned trial judge rejected their defence and convicted them of murder. Hence this appeal.

There is only one ground of appeal, namely:-

> "The learned trial judge erred in law and fact when she held that the accused persons/appellants were properly identified and put on the scene of the crime by the

prosecution witnesses."

Mr. Leonard Musika of m/s Babigurnira and Company Advocates represented the three appellants before this court. His arguments as we understood them were two pronged:-

(a) That the evidence of identification was not sufficient because the prosecution only chose to call evidence of relatives of the deceased whereas the crime was committed in broad day light in presence of hundreds of pepple who were in the market and in his view, more independent witnesses should have been called to support the evidence of identification given by the relatives of the deceased.

(b) That the only witness who implicated the 4th appellant (Kyalimpa Kaloli) was the wife of the deceased who had not known the appellant before the incident. Learned counsel further pointed out that this witness had confessed to having told lies to the court when she first denied that she had come to the market to sell a local alcoholic beer locally known as TONTO. In his view the evidence of that witness was worthless which leaves no evidence against the 4th appellant at all, and it was unsafe to convict him on her evidence alone.

In reply, Ms Damali Lwanga, Principal State Attorney who represented the respondent argued:-

(a) That there is no law which pràhibits relatives of a victim of crime from testifying against those accused of the crime as long as they are competent witnesses and have admissible evidence. She submitted further that there is no law laying down the number of witnesses and in her view, except in cases requiring corroboration the evidence of one witness was sufficient to prove any fact. She submitted that once the learned trial judge found the prosecution evidence credible, as she did in this case, she was entitled to rely on it. She pointed out that in this case after a lot

of gun fire at the scene of crime, most of the people ran away leaving behind only those relatives of the deceased who were interested in recovering his body and to her this explained why they were eventually the only ones available to give evidence in court.

(b) Regarding the submission that the only witness implicating the 4th appellant was a self confessed liar, Ms Lwanga submitted that the wife of the deceased was not a liar and in fact the learned trial judge found her to be a very credible witness despite her admission that she had told a lie. The trial judge dealt with that matter at length and concluded that despite that isolated lie, the rest of her testimony was accurate and credible. That as a person who witnessed the whole incident that led to the death of her husband, she described all the events very well describing in detail the role played by each of the appellants accurately and without contradictions or discrepancies. In her view the learned trial judge was entitled to rely on her testimony as she did.

We shall now deal with the merits of this appeal. The main issue is whether the appellants were correctly identified at the scene of the crime on the day and time the deceased was shot dead. This crime was committed in broad day light at 1 p.m. to be exact, in a market place. The first two appellants who were local security officers were very well known in the area. Furthermore the learned trial judge accepted, as he was entitled to, the evidence that the first two appellants reported themselves on the same day at about 6 p.m. that they had killed the deceased at the market, and surrendered the gun they had used to kill the deceased and the deceased's own bicycle which was the cause of the scuffle that led to his death.

The learned trial judge considered the defence of the appellants that they were not at the scene of the crime and that they were all airested separately and charged with this crime. In light of the prosecution evidence she had accepted, she was convinced that the appellants were squarely put at the scene of the crime and that their alibi was false. She directed herself properly on the law

and on the evidence. The assessors had advised her to accept the evidence of the prosecution and to convict all the appellants. She did so and we agree. We do not accept the argument that the evidence of prosecution witnesses should not have been accepted because they were all relatives of the deceased or that any other witnesses were required to prove the case against the appellants. As long as a witness is competent and credible, his or her evidence can' be relied upon even if it is of a single witness. We hold that the first two appellants were properly identified at the scene and this leg of the first ground of appeal is rejected.

The second leg of this ground was that the wife of the deceased who gave the only evidence implicating the 4th appellant was a self confessed liar and that it is extremely unsafe to base a conviction on the evidence of this single witness. In her judgment the learned trial judge dealt at length with the evidence of this witness. She accepted most of her evidence. On the question of her lying to court, the trial judge observed:

> "I am aware that this witness lied about the reason she went to the market and stated that she had gone there to buy goods, yet she admitted later that she had gone to sell tonto beer. However this slip does not make her an unreliable witness. She stood firm in the face of vigorous cross-examination and I have no doubt that she told the truth on what - transpired at the scene of the crime."

The learned trial judge had a lot of opportunity to observe this witness as she gave her evidence in court. Her evidence was very detailed. It is amazing that she survived a lengthy grilling cross-examination intact and did not contradict or depart from her testimony. Its no wonder then that despite her admission that she had told a lie on oath, the learned trial judge found that her evidence was substantially truthful. The learned trial judge was entitled to do this on the authority of Alfred Taiar –vs- Uganda East African Court of Aeal Criminal appeal No.167 of 1969 where it was held that it was open to the trial judge to find that a witness has been substantially truthful even though he had lied in some particular respect. In the circumstances we agree with the trial judge and the assessors that the wife of the deceased was a truthful witness and her testimony duly implicated the 4th appellant in the commission of this crime. This leg of

the only ground of appeal also fails. This means that the whole appeal fails.

The above disposes of the appeal. However during the hearing of the appeal we were concerned that the issue of common intention was not given adequate consideration and we asked counsel to address us on the issue though it was not a ground of appeal. However, they were not prepared and their brief submissions on the matter were not helpful. We feel that as a first appellate court, we should not leave this case without considering whether the appellants had a common intention to commit this crime.

In her judgment the learned trial judge made brief references to the issue of common intention as follows:-

> "All the accused are liable because they got out together to prosecute an unlawful purpose namely, to extort money from an innocent man for a crime that did not exist."

Then in conclusion she stated:-

> "Although Al shot the deceased, the common intention of the remaining 3 accused to participate in the crime can be inferred from their presence at the scene of the crime, their actions to wit A2, strangling the deceased before he was shot, A3 in releasing his gun to Al and A4 in assisting to detain the bicycle of the deceased. (See R -vs- Tabulayenka & Another (1943) 10 EACA 131 and D. Magayi -vs- Uganda [19651 EA 667). They were therefore all guilty."

The two cases cited in the above extract discussed the meaning and application of section 22 of the Penal Code Act which pro'4des as follows:-

> "Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in prosecution of such a purpose an offence is committed of such a nature that . its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence." (Emphasis ours)

Both cases cited above concerned thief beating. The appellants gathered spontaneously and beat and tortured suspected thieves until they died. The court held in both cases that the death of the victims was a probable consequence of the beating and torturing inflicted by the appellants.

In the instant case the facts are rather different. It is true the appellants unlawfully arrested the deceased in order to extort money from him. They roughed him up and assaulted him in an attempt to extort the bribe from him. They confiscated his bicycle for the same purpose. The issue is whether the death of the deceased through gun shot wounds can be said to be a probable consequence of the appellants actions.

There is of course no difficulty in answering this question in the affirmative in respect of the 1st appellant and Rwamigo Richard (now dead). It was the 1st appellant who shot the deceased and it was Rwamigo who handed over the gun that was used to kill him. The 1st appellant who was not armed would not have committed this crime the way he did if someone had not given him a gun. The only difficulty is when considering the case of the 2nd and 4th appellants. According to evidence, both assaulted the deceased. They all took part in demanding the bribe. Both had guns but did not use them against the deceased. Could they have reasonably foreseen that the first appellant who was a more senior security officer, a corporal and a policeman, who was not armed would suddenly get a gun and shoot the dceased?

In our judgment, we would have been inclined to answer the above question in the negative if the 2nd and the 4th appellants were not members of LDU. Members of LDU, like police officers have

a duty to protect life and property of the people. They should not in the first place have engaged in the unlawful act of extorting a bribe from the deceased. They had a duty to protect the deceased. They also had the capacity and the opportunity to prevent the 1st appellant from shooting the deceased. Though he acted rather suddenly, it should be remembered that he was not armed in the first place. He asked for a gun from an LDU when they were seeing and hearing. If they had no common intention with the 1st appellant, this should have alerted them that he was about to do what they had the duty to prevent. They did nothing. Then a gun was handed to him and they did nothing. He must have cocked the gun before shooting but they looked on and did nothing. He first shot in the air. This is how the first prosecution witness describes moments before and during the shooting of the deceased:-

> "He got a gun and fired in the air. He shot passed the head of the deceased. When he finished that Al told me to go out of his sight because I was still asking him to have mercy on the deceased. At that time the deceased was standing in front of Al. As I was moving away he shot the deceased. He shot him in the nose and the bullet went out from the back of the head. Because of the shot he had made in the air people had got scared and ran out of the market. The deceased died. I also ran for about 3 metres. I heard very many shots….
> The accused persons pointed the guns at us before the deceased was killed in the scuffle when Al was tying him up with fibres. After the firing Al, A2, A3 and A4 left the scene. As they moved away they were firing their guns."

Surely if they did not approve or acquiesce in what he was doing they had enough time to disarm him at any of these stages when it had become clear that he was already so worked up that he could shoot the deceased. Instead, they stood there with their guns aimed at the crowd until the 1st appellant shot the deceased three times. Even their final act of shooting in the air together as they left the scene clearly was meant to scare the people who would have ar'rested the four of them as they all had participated in the killing. In these circumstances we have no doubt that all the appellants not only acquiesced and encouraged the commission of the crime but also fully

participated in its commission.

In the result we find no merit in this appeal. We uphold the conviction and sentence and dismiss the appeal.

Dated at Kampala this 12th day of May 1999.

G.M. OKELLO

JUSTICE OF APPEAL

S. G. ENGWAU.

JUSTICE OF APPEAL

A.TWINOMUJUNI

JUSTICE OF APPEAL