THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: **HON. MR. JUSTICE G.M. OKELLO, J.A.;**

HON. LADY JUSTICE A.E MPAGI-BAHIGEINE, J.A

HON. LADY JUSTICE C.N.B KITUMBA, J.A.

CRIMINAL APPEAL NO.54 OF 1999

BETWEEN

BWENGE PATRICK :::APPELLANT

AND

UGANDA:::RESPONDENT

(Appeal from conviction and sentence by High Court (Onega J.) dated 21/5/99 in Criminal Session Case No. 190/96).

JUDGMENT OF THE COURT

The appellant, Bwenge Patrick, was on 21/5/99 convicted by High Court (P.P.K. Onega J.) sitting at Jinja of murder contrary to section 183 of the Penal Code Act and was sentenced to death. He now appeals to this Court.

Nabirye Joyce, the deceased, was the girl friend of the appellant. She lived in a rented grass thatched hut and sold local brew at Kasumbira village, Buzaya in Kamuli District. On 6/5/95, she had a quarrel with the appellant over a curtain which apparently got lost and she had seen it at the home of the appellant's brother. In the evening, the appellant returned to the deceased's residence and went behind her hut where he started throwing stones at the deceased's customers still drinking. The customers dispersed. At about 9.00 p.m when the deceased and her children who included Ben Mpala (PW1) and George Babirye (PW2) had retired to bed, Mpala woke up

and noticed that their house was on fire. He woke up his brother George Babirye and the deceased. As they all got out, Mpala saw the appellant with the help of the light from the burning house. The appellant was standing in the veranda. He grabbed the deceased and pushed her into the burning house and struck her on the head with an axe. Thereafter he ran away. The deceased was burned to death. Mpala Ben and his brother George Babirye raised alarm. Neighbours answered the alarm and found the deceased burnt in the house. The matter was reported to the authorities.

The following morning, a doctor came and carried out post mortem examination on the body of the deceased. He found depressed fracture of the occipital part of the skull and strangulation with burns. He opined that the cause of death could have been any of the two injuries.

The appellant was arrested that following day and charged with the murder of the deceased. He denied the charge. At the trial, he set up a defence of alibi. He testified that at the material time he was away on duty loading a certain lorry. He returned only to find that the deceased was dead. The trial judge rejected his defence and convicted him as stated earlier.

There are two grounds of appeal namely:

(1) That the trial judge erred to hold that the prosecution case had been proved beyond reasonable doubt.

(2) That the learned trial judge erred in rejecting the appellant's alibi which ought to have raised a reasonable doubt.

At the hearing of this appeal, Mr. Akampuriria, learned counsel for the appellant on state brief, pointed out an irregularity in the proceedings before the trial court which we think must be tackled first. He pointed out that the trial judge permitted an Assessor, one Sunday Aluzero, who absented herself from part of the trial and did not hear the evidence of one of the four witnesses for the prosecution to resume participation in the trial and give opinion at the close of the trial. According to Mr. Akampuriria, that irregularity was fatal to the whole trial.

Mr. Simon Byabakama Senior Principal State Attorney who appeared for the state conceded that that was an irregularity. He cited ***Abdu Komakech Vs Uganda [1992 — 93] HCB 21,and Mukiibi Emmanuel v Uganda, Cr. Appeal No 43 of 1996, Court of Appeal, (unreported,).***

The law governing absence of an assessor in a trial before the High Court is provided by section 67 of the Trial on Indictment Decree No. 26 of 1971 which reads:

"(1) If, in the course of a trial before the High Court at any time before the verdict, any Assessor is from sufficient cause prevented from attending throughout the trial, or absents himself and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other Assessors.

(2) If more than one of the Assessors are prevented from attending or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of different Assessors."

In ***Abdu Komakech's case (supra,*** the trial started with two Assessors. The prosecution examined its witnesses and closed its case. Then there was a further adjournment. It was then that it was discovered that one of the original Assessors had not been participating in the trial as he had been sitting with a different judge in a different case. At the absent Assessor's insistence, another Assessor had taken his place. Neither the judge nor the counsel was aware of this unfortunate arrangement. On discovering this state of affairs, the trial judge dismissed substitute Assessor and the trial proceeded with the remaining Assessor throughout. He acted under section 67 (1) of the Trial on Indictment Decree. It was however not clear exactly when the rightful Assessor was replaced by the substitute Assessor. The appellant was convicted.

On appeal, the Supreme Court held that "the second Assessor acted as an Assessor fraudulently. This irregularity was fundamental as it went to the jurisdiction of the court. It occasioned a miscarriage of justice and was therefore not curable under section 137 of the T.I.D. That the court had discretion to order a retrial where the original trial was defective or illegal and the interest of justice requires it."

In the instant case, hearing started on 23/4/99 with two Assessors: Sunday Aluzero and Grace Masiko. They were both sworn. Evidence of PW1, PW2 and PW3 were taken and all were cross-examined. Then hearing was adjourned to 29/4/99. On this adjourned date, Assessor Sunday Aluzero was absent. Only Assessor Grace Masiko was present. The court rightly ordered that hearing would proceed with only one assessor, presumably the one present. Thereafter, the

evidence of PW4 was taken. After his cross-examination, the prosecution case was closed and the court adjourned the hearing for defence's case on 6/5199.

On this date, the record is not exactly clear as to the presence or absence of both Assessors but the appellant gave his evidence and his case was closed. This was followed by submissions of counsel and the summing up by the trial judge to the Assessors. The Assessors gave their opinion at 12.15 p.m. The record went as follows:

"Mrs. Sunday Aluzero: I am here to give a joint opinion for two of us."

It would seem from the above that when the case reopened on 6/5/99 for the defence, both Assessors were present though the record does not show that. They heard the evidence of the appellant, submissions of counsel and finally the summing up by the trial judge to them. The absent Assessor therefore only missed the evidence of PW4.

We still think that Assessor Sunday Aluzero, having absented herself from part of the trial and did not hear the evidence even of only one witness should not have been permitted to resume participation and give opinion in the case. Like in **Abdul Komakech (supra),** allowing her to resume participation in the trial was a fundamental irregularity which is fatal to the trial. It is a question of jurisdiction. It occasioned a miscarriage of justice as that Assessor's opinion which was based not on the full evidence could have influenced the decision of the judge. We think that this was a mistrial as the error cannot be cured under section 137 of the T.I.D. Mukiibi Emmanuel (supra) is distinguishable from Abdul Komakech above and the instant case. In that case, the trial started with the two Assessors who sat with the trial judge throughout the trial though the Judge did not get them sworn as required by section 65 of TID. The court held that in view of section 6 of the Oath Act (Cap 52) that failure to swear the Assessors did not invalidate the proceedings. That was an error which was curable under section 137 of the TID. On the evidence adduced, we think that the interest of justice demands a retrial. As it is, we find no point in considering the grounds of appeal.

In the result, we allow the appeal, quash the conviction and set aside sentence of death. We order a retrial before a different judge. Appellant therefore must be kept in custody pending the retrial.

Dated at Kampala this 26th day of November 1999

G.M. OKELLO

JUSTICE OF APPEAL

A.E.N MPAGI-BAHIGEINE

JUSTICE OF APPEAL

C.N.B. KITUMBA

JUSTICE OF APPEAL