

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA  
HOLDEN AT KAMPALA**

**CORAM: HON. L.E.M. MUKASAKIKONYOGO, DCJ  
HON. G.M. OKELLO, JA.  
HON. A. TWINOMUJUNI, JA.**

**CRIMINAL APPEAL NO. 70 OF 1999  
BETWEEN**

**1. CPL KASIRYE HAMUZA  
2. MUSINGO PETER  
3. NULU KONDE WAISWA ..... APPELLANTS  
4. NDOLERIRE FRED  
5. SGT. DENIS KULE**

**AND  
UGANDA ..... RESPONDENT**

*(Appeal from the decision of the High court (Onega, J)  
at Jinja dated 11th day of June 1999 in Criminal Session  
case No. 455 of 1997,)*

**JUDGMENT OF THE COURT**

This appeal arose from the convictions by High Court (Onega, J) of the appellants for murder and aggravated robbery contrary to sections 183 and 272 and 273 (2) of the Penal Code Act respectively.

The background facts, which gave rise to the appeal, as found by the trial court, are as follows: a plan was hatched out by the appellants to carry out a robbery at the Coffee Factory of one Salongo Sentongo in Jinja Industrial area. To execute that plan, Ndolerire Fred (A4) was to provide transport with fuel. He hired a self-drive vehicle from Equator Tours and Travel and Kasirye Hamuza (A1) was enlisted to drive. The two drove to Jinja to the home of Nulu Konde Waiswa (A3) where they were joined by Denis Kule Mugenyi (A6) and constable Musingo (A2). Christopher Mulongo who was (A5) and was subsequently acquitted was to survey the

planned robbery site and to supply the necessary information regarding the viability of the mission.

The group set out for the robbery mission leaving behind Nulu Konde w Waiswa and Ndolerire Fred. On reaching the place, some workers recognised Kasirye Hamuza and they even greeted him. He then advised his group that it was not safe to carry out the robbery because he was already recognised. The robbers called off that mission but decided not to return empty handed. So they embarked on a series of random robberies which culminated in the death of Mudooba Paul. The appellants and others were subsequently arrested and indicted on one count of murder and five counts of aggravated robbery. Appellants Nos. 1, 2 and 4 made charge and caution statements to the police. They also made extra judicial statements before a Magistrate (PW7). During the trial, the charge and caution statements were rejected because they were found not to be voluntary. The extra-judicial statements were however, received in evidence.

At the trial, all the appellants denied the charges and gave varied defences. Appellant No. 1 pleaded compulsion. Appellants Nos. 2, 3, and 5 pleaded alibi while appellant No. 4 pleaded that he hired the motor vehicle to collect his debt from Jinja. The trial Judge rejected their defences and convicted appellant No. 5 of the murder of Mudooba Paul in count No. 1 Appellant No. 1 to 4 were acquitted of that offence. All the appellants were however, convicted of aggravated robbery in all the counts and were sentenced to death. It is these convictions which prompted this appeal.

The memorandum of appeal for appellants No. 2, 3 and 4 contained 4 grounds as follows, ground 4 and 6 having been dropped.

1.

the Learned trial Judge erred both in law and fact to admit and rely on extra-judicial statements of Kasirye Hamuza Al, Peter Masingo, and Fred Ndolerire and used them in evidence against the said persons and their co-accused.

2. the learned trial Judge erred in law and fact to hold that Fred Ndolerire's extra-judicial statement was obtained voluntarily,

3. the learned trial Judge misapplied the principles of the doctrine of common intention in this case,

6.

the learned trial Judge erred both in law and fact to hold that the second appellant was properly identified at the scene of the robberies and thus wrongly rejected the second appellant's alibi.

For the first appellant, the following grounds were argued:

(a) that the learned trial Judge failed in fact and in law to uphold a defence of duress/compulsion put forward by the appellant and thus came to a wrong conclusion,

(b) the learned trial Judge failed both in fact and in law to hold that the prosecution had not proved beyond reasonable doubt the ingredients for each and every robbery or for each and every count/charge, and

(c) the learned trial judge failed in fact and in law to properly evaluate evidence (in general) for each count/charge.

For the 5th appellant, the memorandum contains four grounds which were couched as follows:

**1. the learned trial Judge erred in law and fact in admitting and relying on the accomplice evidence of Al (Kasirye Hamuza) to convict the appellant,**

**2. the learned trial Judge erred in Law and fact by finding that the appellant had been correctly identified at the scenes of crimes,**

**3. the learned trial Judge erred in law and fact in rejecting the appellant's defence of alibi,**

**4. the trial Judge erred in law and in fact when he failed to properly evaluate the evidence adduced at the trial hence reached erroneous decisions.**

On ground 1, for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants, the complaint was firstly about the admission in evidence of the extra-judicial statements made by Kasirye, Musingo and Ndolerire and using them against the makers and their co-accused.

Mr. Tayebwa, learned counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants, contended that statement made by an accused is not evidence against a co-accused unless he adopts it and thereby makes it his own. He cited *Archbold Criminal Pleading, Evidence & Practice 39th Edition Paragraph 1395* as authority for that proposition. He argued that on the above principle, since the co-accused did not adopt the extra-judicial statements made by the named appellants, the statements should not have been used against their co-accused.

Secondly, that these extra-judicial statements having been rightly referred to by the trial Judge as accomplice evidence, they needed corroboration. He contended that there was no such corroboration. Counsel Tayebwa pointed out that the evidence on which the trial Judge relied for corroboration were statements made by co-accused in the absence of others, to the police officers during their interrogations. He submitted that such statements themselves required corroboration and therefore cannot corroborate others.

On the other hand, Ms. D. Lwanga, Principal State Attorney who appeared for the state, contended that the extra-judicial statements could be used against the co-accused on the strength of section 28 of the Evidence Act. She also cited *Festo Androa Asenua and Anor Vs Uganda Criminal Appeal No. 1 of 1998 Supreme court (unreported)* as another authority for her proposition. She submitted that the trial Judge was; therefore, right to have taken these statements into consideration against the co-accused.

The question whether a statement made by an accused may be used *in* against a co-accused was considered by the Supreme Court in the case of *Mohamed Mukasa and Anor Vs Uganda, Criminal Appeal No. 27 of 1995 (SC) unreported* and stated thus:

**“... if the accused makes a full confession and tarts himself with the same brush and the statement is sufficient by itself to justify the conviction of the maker of the offence for which he is being tried jointly with the other accused, the statement may be taken into consideration or as evidence against the co-accused.”**

It would seem clear from the above quotation, that for a statement of an accused to be used against a co-accused, it must amount to a full confession upon which alone, the maker could be convicted of the offence he/she is being jointly tried with the others. This reflects the Interpretation given to section 28 of the Evidence Act which reads:-

**“When more persons than one are being tried jointly for the same offence, and a confession made by one Of such persons affecting himself and some other of such persons is proved, the court may take ‘into consideration such confession as against such other person as well as against the person who makes such confession.**

**Explanation:- ‘Offence’ as used in this section, includes the abatement of or attempt to commit the crime.”**

The view held by the Supreme Court in *Festo Androa Asenua and Anor (supra)* is the same with its earlier view in *Mohamed Mukasa and Anor (Supra)*. That states the position of the law in this country regarding use of a statement of an accused against a co-accused.

In the instant case, the extra-judicial statements made by Kasirye and Masingo do not amount to full confessions. They, therefore, cannot be used against their co-accused. The extra-judicial statement of Ndolerire Fred, however, amounts to a full confession which could alone justify his

conviction of the offence he was jointly tried with others. The trial Judge, therefore, rightly used that statement against the co-accused.

On the submission that the extra-judicial statements needed corroboration but lacked it, Ms Lwanga responded that these statements could supplement other substantial evidence in terms of the principle enunciated in *Ezera Kyabanamaizi and other vs R (1962) EA 309 at 311.*

In that case, the former court of Appeal for East Africa stated that a comment made by an accused not on oath is not accomplice evidence because it was not made on oath. It can be used against a co-accused in terms of section 28 of the Evidence Ordinance to supplement an otherwise substantial case against him. It could never be the basis for a conviction

As stated earlier in this judgment, the extra-judicial statement of Ndolerire which amounts to a full confession was rightly used against his co-accused to supplement other substantial evidence.

We thus find no merit in this ground and it fails.

Ground 2 complains about the admission in evidence of the extra-judicial statement of Ndolerire. Mr. Tayebwa criticised the trial Judge for admitting the statement in evidence because it was not voluntary. His reason was firstly that Ndolerire was escorted to the recording Magistrate by the police officer who had earlier tortured him and that on the way to the Magistrate, the police officer warned the appellant that if he ever changed his statement from the earlier one, he would be taken to the police station and would be dealt with. Secondly that while the Magistrate was recording the appellant's statement, a police man stood from outside pointing a threatening gun at the appellant. He submitted that these factors had the effect of keeping the fear operating in the mind of the appellant during the recording of his extra-judicial statement despite the caution administered to him by the Magistrate.

Ms. Lwanga did not agree with those submissions. She stated that Ndolerire was not escorted to the recording Magistrate by the policeman who had earlier tortured him. Even if it were so, the Magistrate had cautioned the appellant before recording his statement which should clear out any fear that the appellant could have had. She rejected the claim that a policeman stood from outside the Magistrate's chamber and kept pointing a threatening gun at the appellant when his statement was being recorded as false. She reasoned that the evidence of the recording Magistrate (PW7) ruled out the possibility of a person standing from outside his chamber seeing anyone seated in his chamber due to the position of the windows.

The trial Judge held a trial within a trial to determine the voluntariness of this extra-judicial statement. The same reasons for stating that the statement was not voluntary were advanced before him. He considered and rejected them. On whether a policeman stood outside the Magistrate's chamber and pointed a threatening gun at the appellant while he was recording the appellant's statement, the trial Judge believed the evidence of the Magistrate. He also held that any threat which might have been issued to the appellant before was cleared out by the caution administered to him by the Magistrate before recording the appellant's statement. We agree. The Magistrate's evidence on an alleged policeman standing outside his chambers and pointing a gun at the appellant while he was recording his statement went as follows

**"I can't tell whether security outside was stepped up on that day the suspects were brought. There is no possibility of any person sitting or standing outside any chambers and looking at the suspects with threatening eyes. (sic) The angle could be very small and the window is on a side where people do not pass."**

Clearly, there was no way the appellant could have seen a policeman standing outside the Magistrate's chambers pointing a gun at the appellant while his statement was being recorded. That claim cannot be true. As for the alleged earlier threats, we think that, the caution

administered to the appellant by the Magistrate before recording the appellant's statement effectively removed them. We are, therefore, satisfied that the extra-judicial statement was voluntary and was rightly admitted in evidence. This ground too has no merit and it fails.

**Ground 3** complains about the application by the trial Judge of the principles of common intention. Mr. Tayebwa submitted that according to D/AIP James Lopita (PW3), the plan was critically to rob at Salongo Sentongo's Coffee Factory at Jinja Industrial area. When this mission aborted, the robbers at the site decided that they could not return empty handed. They then decided to embark on random robberies that are the subject of this appeal. The 3rd and 4th appellants were not present at the site of the planned robbery when the decision on the random robberies was taken. Counsel submitted that, had the trial Judge properly applied the principles of common intention, he would not have convicted appellant's No. 3 and No. 4 for the robberies on Kamuli Buttongo Road which were the brain child of Appellant Nos. 1, 2, and 5.

On the other hand Ms. Lwanga submitted that the trial Judge correctly applied the principles of common intention. Appellant No. 3 and 4 were equally guilty of the robberies on Kamuli-Buttongo road on the principle of transferred malice. She argued that the mission was to rob. It was immaterial that the robbery did not take place at the Coffee Factory but elsewhere.

There is no dispute that appellant Nos. 3 and 4 were part of the planned robbery which aborted. The question now is whether they could be liable for the subsequent robberies which resulted into the murder of Mudooba Paul when they were not part of the decision to carry out those robberies.

It is well established that if a man by mistake causes injuries to a person or property other than the person or property which he intended to attack, he is guilty of a crime of the same degree as if he had achieved his object provided that the harm done is of the same kind as the one intended. See **Archbold Pleadings, Evidence & Practice 40th Edition Paragraph 1439 (iv). Black Law Dictionary Sixth Edition pane 1498** also expresses the same view.

In the instant case, the appellants agreed to rob at the Coffee Factory of Haji Salongo Sentongo at Jinja Industrial area. Appellant No.4 hired a vehicle and supplied fuel in it to transport the robbers for the execution of the plan. Appellant 3 housed the robbers and issued to them the guns which were kept at his place for the operation. We think that these two appellants were equally guilty of the subsequent robberies after the 5 planned one was aborted because the objective was to rob and robberies were effected. It is immaterial that it did not take place at the Coffee Factory of Haji Salongo Sentongo but elsewhere. The intended harm was robbery and it was merely transferred to other victims.

We are, therefore, satisfied that the trial Judge properly applied the principles of common intention. This ground also fails.

**Ground 6** is about identification of appellant No.2 at the scene of crime. Mr. Tayebwa criticised the trial Judge for finding that the appellant was properly identified by PW1 and PW2. Learned counsel submitted that the conditions favouring correct identification did not exist. He argued that these witnesses were victims of the robbery and that PW1 admitted that he was scared. He submitted that that fear impaired the witness's ability to properly observe and it was wrong for the trial Judge to rely on that evidence of identification.

For the respondent, Ms. Lwanga submitted that the conditions favouring correct identification existed. Firstly, the incident happened during a broad daytime and lasted for between 3 and 5 minutes. Secondly, PW2 knew the appellant No.2 before as he had trained with him as policemen and lived in the same police barracks. Though PW1 stated that he was scared, that did not necessarily greatly impair his vision.

The former Court of Appeal of Uganda (now Supreme Court) did spell out in the case of **Abdalla Nabulere and 2 others Vs Uganda, Criminal appeal No.9 of 1978 (CA) unreported** which is often quoted in this connection, what factors to be considered to test the quality of 5 identification.

These include:-.

- (1) length of time under which the accused had been under observation of the witness,
- (2) distance between the witness and the accused,
- (3) type of light available and,
- (4) familiarity of the witness with the accused.

All the above go to determine the quality of identification, as the better the quality, the lesser is the danger of mistaken identity.

In the instant case, PW1 and PW2 identified appellant No.2 at different scenes of crime on the same day during a broad daytime. PW1 described the appellant as the person who had a pistol and was the very person who ordered the driver to get out of the motor vehicle. He was the person who ordered the witness to remove his wristwatch. He was also the person who took from the witness's pocket cash of Shs. 65,000/= PW1 stated that the operation lasted for 3 minutes. PW2's testimony also corroborated that of PW1 that A2 was the person who had a pistol. PW2 stated that he identified this appellant better when the appellant was moving around some 5 to 6 meters from the vehicle, it was about 5 p.m. and the operation lasted 5 minutes. He had known the appellant before because he had trained with him as policemen at Masindi Police Training School. After the training, he lived with him at Naguru Police barracks for 1½ years before they again returned for further training together. From the above evidence, we are satisfied that the 5 identification of appellant No.2 by PW1 and PW2 could not have been mistaken. The conditions under which he was identified favoured correct identification. We also find no merit in this ground and it fails.

As for the appellant No.1, the gist of his main complaint in ground (a) was that the trial Judge erred in rejecting the appellant's defence of compulsion. Mr. Edward Muguluma Ddamulira, learned counsel for the first appellant, conceded that from the on set up to the site of the planned robbery which aborted, the appellant was part and parcel of the plan to rob. He argued that thereafter, the appellant was compelled to drive to the sites of the subsequent robberies. When his client was told to drive to Kamuli-Buttongo Road, he was not aware of what was going to be done there. Along Kamuli/ Buttongo Road, the appellant was ordered at gunpoint by appellant No. 2 to drive wherever he was told. Appellant No. 1 escaped at the earliest opportunity he got when their vehicle overturned.

Ms. Lwanga contended that the defence of compulsion was not available to appellant No.1 because the evidence available shows that he was a willing participant. It was conceded by counsel for appellant No.1, that up to the aborted robbery, the appellant was a willing participant. The evidence available shows that when the planned robbery aborted, the robbers decided at that time that they would not return empty handed. When this decision was taken appellant No. 1 was present. There is no evidence that he disassociated himself from it. On the contrary, it was after that decision that they drove to Kamuli-Buttongo Road. It is not true that this appellant did not know why they were driving to that place when they had resolved not to return empty handed. His failure to report to authorities immediately he escaped until the next morning when the mob was already at him is not compatible with the conduct of an innocent man.

We agree, therefore, that the defence of compulsion is not available to appellant No.1. This ground accordingly fails.

On **ground (b)** the complaint was that an essential ingredient of the offences charged in counts iii, iv, and v had not been proved and that it was wrong for the trial Judge to enter conviction for those offences. Mr. Muguluma submitted that no evidence was led to prove theft as an essential ingredient of the offence of robbery charged in those counts.

Ms. Lwanga conceded this complaint and stated that the convictions in those counts were improper.

We agree. For any offence to be established all its essential ingredients must be proved beyond reasonable doubt. Theft is an essential ingredient of the offence of robbery. These are the offences charged in counts iii, iv, and v but no evidence was led by the prosecution to establish the commission of theft in those counts. That meant that the commission of the offences had not been proved beyond reasonable doubt. The trial Judge, therefore, erred in entering convictions for the offences in those counts. This complaint was thus well taken and the ground succeeds.

**Ground (c)** complains that the trial Judge did not properly evaluate the evidence on record and therefore, came to a wrong conclusion that appellant No.1 was at the scene of crime voluntarily.

This ground is re5 stating in a roundabout way that the trial Judge erred in rejecting the appellant's defence of compulsion. We have sufficiently dealt with that defence in ground (a).

We shall not repeat it here. We only repeat our finding in ground (a).

The complaint of the 5th appellant on ground I was that the trial Judge erred in admitting and relying on the accomplice evidence of A1 to convict the appellant when there was no other corroborative evidence. Mr. Kunya, learned counsel for the 5th appellant, pointed out that A1's testimony that Bwambale fired shots in the air could not fit the description of the 5th appellant. He contended that even the evidence of identification of the 5th appellant by PW1 and PW2 was doubtful since the witnesses conceded that they had no prior knowledge of the appellant. He argued that in that circumstance, it was necessary to conduct an identification parade for the witnesses to confirm their identification of the appellant but that this was not done. He submitted that the evidence of identification was even weakened as the conditions under which the identification was allegedly made were poor. He criticised the trial Judge for finding that those witnesses were truthful without analysing the question of fear admitted by PW2 and lack of prior knowledge of the appellant by the witnesses. He cited *Cpl Wasswa and Ninsiima Dan Vs Uganda, Criminal Appeal No. 49 of 1999 (SC) unreported* to support his proposition for the need of identification parade.

In response, Ms. Lwanga submitted that the evidence of PW1 and PW2 shows that appellant No. 5 was properly identified. The identification was made during daytime in an incident which lasted between 3 and 5 minutes. In the course of the incident, the appellant came very close to PW2 as he blocked the witness from getting out of the vehicle. Ms Lwanga submitted that identification parade was not necessary in this case because this case differs from *Wasswa & Ninsiima (supra)* on their facts.

We scrutinised the evidence of identification of the 5th appellant by PW1 and PW2 as it is our duty as a first appellate court so to do. The witnesses identified the appellant at different scenes but both described him as the person who had a rifle and the most atrocious. Although PW1 claimed that he had known the appellant before, he did not specify how, when and where he had known the appellant. Nevertheless, in the course of the incident which lasted for between 3 and 5 minutes in a broad daytime, the appellant came close to PW2 when he leaned against the door of the vehicle as the witness tried to get out of it. He demanded for money from the witness and took from him Shs. 62,000/= . He was also the person who peeped into the vehicle and exclaimed that "the man is dead" referring to the witness's brother.

We think that despite PW2 'S admitted fear and PW 1's unexplained claim of prior knowledge of the appellant, these conditions under which the 5th appellant was identified favoured correct identification. The incident happened during daytime and lasted a reasonable length of time in the course of which the appellant came very close to PW2. The appellant's activeness in the operation made him more Conspicuous and easily noticeable. We are satisfied that the identification was accurate and needed no Corroboration *Wasswa & Ninsiima (supra)* is distinguishable from the instant case on their facts. There is no question of close resemblance between the 5th appellant and another person to be resolved by identification parade as it was in *Wasswa & Ninsiima* above. The trial Judge was, therefore justified to believe these witnesses. The main complaint in grounds 3 and 4 was that the trial Judge accepted wholesale the prosecution case and rejected the appellant's alibi without giving it judicious Consideration. We find no merit in this complaint. The accomplice evidence of A1 put the appellant at the scenes of crime. That evidence was amply corroborated by the clear evidence of identification by PW1 and PW2. As seen above, the evidence of identification was thorough. The witnesses described clearly the parts played by the appellant in the commission of the offence. That ruled out the alibi put by the appellant.

When we pointed out to Ms. Lwanga the lack of clear evidence as to how the deceased met his death, she conceded that there was not clear evidence as to who shot the deceased. She submitted that the conviction of the 5th appellant on that count I was not proper.

In the result, we allow the appeal in part. The conviction of the 5th appellant for murder in count I and the convictions of the appellants for robbery in counts ii, iv and v are quashed and sentences in respect thereof are set aside. The Convictions of all the appellants for robbery in counts ii and vi are upheld so is their sentence of death on each of those counts. However, the sentence in count vi is suspended. .

Dated at Kampala this 28<sup>th</sup> day of August 2001.

L.E.M. MUKASA-KIKONYOGO.  
**DEPUTY CHIEF JUSTICE**

G.M. OKELLO,  
**JUSTICE OF APPEAL**

A. TWINOMUJUNI  
**JUSTICE OF APPEAL**