

**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA  
AT MENGO**

**(CORAM: MANYINDO D.CJ. ODER J.S.C. & TSEKOOKO, J.S.C.)**

**CRIMINAL APPEAL NO. 19/1993**

**BETWEEN**

**GABULA BRIGHT AFRICA===== APPELLANT**

**AND**

**UGANDA===== RESPONDENT**

***(Appeal against conviction in High Court decision at  
Jinja (Kato, .J.) dated 19<sup>th</sup> November 1993 in Criminal  
Case No. 170 of 1991).***

**JUDGMENT OF THE COURT:**

The Appellant, Gabula Bright Africa and eight others were jointly charged and tried by the High Court at Jinja on an indictment of treason contrary to section 25 (l)(c) of the Penal Code, and alternatively, misprision, contrary to section 27(b) of the Penal Code.

At the trial, the appellant was referred to as A.3. His eight co-accused (who are not concerned with this appeal) were: Sheik Amis Ndifuna Kinyiri, Willy Mukama Lugoko, Ngobi Willy, Adinadi Buwedeyo, Willy Mukama, Wadidi Simon, George Ntende, and Awazi Bwana. They were referred to at the trial as A1, A2, A4, A5, A6, A7, A8 and A9 respectively.

The charge of treason constituted count one of the indictment, and that of misprision of treason in the alternative, count two. The particulars of count one were that the Appellant, his co-accused and others still at large between March 1987 and October 1999, in diverse places in Busoga and Nairobi, Kenya, contrived a plot and expressed the plot, by overt acts in order by force of arms to overturn the Government of Uganda by law established.

Altogether, nineteen (19) overt acts were alleged in the indictment but only four of which implicated the Appellant in the offence of treason. We shall revert to those overt acts shortly.

The particulars of the alternative count were that the appellant and his co-accused knowing that an organisation known as “Nineth October Movement” had been formed by Obote in Nairobi to overthrow the NRM government by force of arms, did not give information thereof to a Minister, administrative officer, Magistrate or a Police office in charge of a Police Station in Uganda.

The overt acts which implicated the appellant in treason were stated in the indictment as follows:

16. Gabula Bright Africa and Willy Mukama during the month of June 1987, at the Post Office Building, Jinja met and discussed plans of how the “Nineth October Movement” would overthrow the NRM government.
17. Gabula Bright Africa during the month of October in Jinja made reports of the activities of the “Nineth October Movement” and achievements and also drew a document showing military strength of the NRA.
18. Gabula Bright Africa, Willy Mukama Lugoko, George Ntende and others still at large during the month of August, 1989 at the home of Willy Mukama in Busowa held a meeting whereat apart from introducing the leaders of the Nineth October Movement in Uganda they discussed plans of overthrowing the NRM Government.
19. During the month of July to October, 1989 in Jinja town, in the Jinja district, Sheik Amis Kinyiri, Gabula Bright Africa, Willy Mukama Lugoko and Willy Mukama held meetings of the Nineth October Movement, where discussions were held on how to overthrow the National Resistance Movement Government and return Obote to power. Discussions were held and decisions taken on how to facilitate Nineth October Movement fighters in Kagoma, Budonia, Buyala, Busiki and Bugobi sub-counties.

After the close of the prosecution case at the trial, the learned trial Judge acquitted George Ntende (A8) and Awazi Bwana (A9) of both counts on the grounds that the prosecution had not made out a prima face case against them. However, he found that a prima face case had been made out against the Appellant and other six accused persons, and he put them on their defence.

In his judgment dated 19<sup>th</sup> October 1993 the learned trial Judge acquitted Willy Ngobi (A4), Adinadi Buwedeyo (A5) and Simon Wadida (A7) on both counts. He also acquitted Sheik Amis Ndifuna Kinyiri (A1), Willy Mukama Lugoko (A2) and Willy Mukama (A6) of treason on count one; but he convicted them on the alternative count of mis-prison of treason, and sentenced them of two years' imprisonment each. They did not appeal against their conviction and sentence.

Only the appellant was convicted of treason and sentenced to death, this was because the learned trial Judge found that the prosecution had proved to the required standard the allegations against the appellant in overt acts 17 and 19. However, he found that the allegations in overt acts 16 and 18 had not been so proved. The task of the learned trial Judge in this regard had been made easier by the prosecution Counsel having conceded that no sufficient evidence had been adduced to prove the two overt acts in question.

This appeal is against the appellant's conviction. Ten grounds were set out in the memorandum of appeal. They were that:-

1. The trial Judge erred in law and fact in finding that Tindiweyi (PW8) was a genuine government spy or agent provocateur rather than an accomplice where by her evidence would require no corroboration before being relied upon to sustain the conviction of the Appellant.
2. The trial Judge erred in law and fact when he accepted PW8's evidence whom he had called a liar thereby, rendering all her evidence as lies or tainted with.

3. The trial Judge erred in law and fact when he contradicted himself by accepting part of PW8's evidence to convict the Appellant while rejecting the part of the evidence of PW7 to acquit the other accused in the trial.
4. The trial Judge misdirected himself on the law and fact in holding a "trial within a trial" to determine the admissibility of Exh. P.25, which misdirection resulted in a biased evaluation of the prosecution evidence against the appellant.
5. The trial Judge erred in law and on the facts in relying on Exh. P.24 and Exh. P.25 as constituting overt act 17 thereby holding that the said overt act had been proved beyond reasonable doubt against the appellant.
6. The trial Judge erred in law and on the facts when he reached a decision that overt 19 had been proved beyond reasonable doubt against the Appellant.
7. The trial Judge erred in law and on the facts when he came to findings not supported or contrary to the evidence before him or when he based his decision on mere conjecture and assumptions.
8. The trial Judge erred in law and fact when he considered irrelevant evidence against the appellant in respect of overt acts 17 and 19.
9. The trial Judge erred in law and fact when he reached a decision that the NRM Government stated in overt act 19 was the Government of Uganda as by law established capable of being overthrown under section 25(1)(c) of the Penal Code Act.
10. The trial Judge erred in law and fact when he ignored the inconsistencies, discrepancies and contradictions in the prosecution evidence thereby failing to

properly evaluate the evidence before him and resolve the doubt in favour of the appellant.

Ground nine of the appeal was abandoned.

The appellant's complaint in ground one arose from learned trial Judge's finding on the issue of whether Christine Tindiwegi (PW8) was an accomplice in the crimes charged against the appellant and his co-accused or whether she acted merely as a government spy or agent provocateur when she participated together with the appellant and the others in the treasonable activities. The issue was raised by the defence and the prosecution at the trial. On the basis of the evidence adduced both by the prosecution and the defence, the learned trial Judge's finding on it was made in the following terms:

*“the issue which arose during the submission of the learned Counsel from both sides concerns the question as to whether or not both Kyanika (Pw1) and Tindiwegi (PW8) are accomplices. It was argued by Mr. Wamasebu that while Kyanika was an accomplice Tindiwegi was a mere police spy but not an accomplice. The distinction between a police spy and an accomplice is quite relevant in our legal system. While both these witnesses do participates in the commission of an offence and later on turn out to be witnesses, their reasons are not usually the same. An accomplice participates as a criminal like the rest hoping to be a beneficiary of the crime while a police spy or agent provocateur participate in the crime for the purpose of exposing the criminals and he does not expect to take any share in the consequences or proceeds of the crime. A gent provocateur are generally employees of government especially in treason cases like the present one. (See Longman Dictionary of Contemporary English and Habibu Kawa vesta and others v. R (1934) 1. E.A.C.A 191.....)*

*On the authority of Hashmain's case (supra) Kyanika was an accomplice so his evidence requires corroboration as a matter of practice. As for Tindiwegi it is clear from what she told the court that she was a government agent from the day she became suspicious of Onyo 's movements and she reported the matter to one James, who later took her to Moses front the NRM Secretariat. She was referred to*

***Kamukama (PW10) who gave her a go ahead in her infiltration of the exercise.***

***According to Kamukama the government was giving her some money so as to facilitate her work. All these facts put together do show that Tindiwegi was a government spy or agent provocateur whose evidence does not require corroboration as she is not an accomplice, her evidence is accordingly capable of corroborating that of Kyanika.”***

In this submission on ground one of the appeal, Mr. Mohamad Mbabazi, learned Counsel for the appellant, criticised this finding for several reasons. The first one was that whereas Tindiwegi (PW8) said in her evidence that her first contact with a representative of NOM, one of Silver Oonyo, was on 6/2/1989 when the latter took to her a letter addressed to “Mama Kelele” and that she reported the matter the following morning to one James of the office one of the District Administrator (D.A.) of Jinja and one Moses from the NRM Secretariat, Lt. Godfrey Kamukama (PW10) the District Security Officer (D.S.O.) of Jinja on the other hand testified that he first came to know about the appellant after he, Kamukama (PW10) had started operating with Tindiwegi (PW8) about June, 1989. The learned Counsel contended that this meant that Tindiwegi (PW8) operated with NOM for a period of four months before she reported its activities to the authorities.

Second, Tindiwegi’s evidence (PW8) indicated that she made two trips to Nairobi in connection with NOM. The first journey was in June 1989, which was funded entirely by Lugoko (A2). Thereafter, she made a second trip, which was funded by the NRM Secretariat. According to the learned Counsel this evidence meant that Tindiwegi (PW8) made the first trip without Kamukama’s (PW10) knowledge, the government security Officer she was allegedly dealing with regarding this matter.

Third, the two exhibits tendered in evidence by the prosecution and implicating the appellant, exhibits p.24 and p.25 bore Tindiwegi (PW8)’s name and signature as a mobiliser of NOM or a witness to some of its activities. Exhibit p.24 dated 6/8/1989, was titled ‘NINE OCTOBER ARMY MOVEMENT BUSOGA DIVISION HEADQUARTERS, JINJA. EXPENSES REPAYMENT CONTRACT.’ The document stated that the amount of money required was

lent to the movement in the “names of Mama Christine Tindiwegi and Chairman Sheik Kinyiri”, Tindiwegi (PW8) also signed the document as a “principal witness”. With regard to exhibit p.25, bearing the address and date “Kipindi kya NRM/NOM Busowa Zone, Jinja. 01 09089 “and titled” Confidential Note Re: General commentary to the High Command/NOM, Tindiwegi (PW8) signed it as “witness - mobiliser.” These two documents, it was contended, indicated and meant that Tindiwegi (PW8) was a participant in the activities of NOM not as spy but as an accomplice.

Fourth, Ali Kivumbi Kyanika (PW1) who, with Christine, was one of the key prosecution witnesses, said in his testimony that he wondered why she later was not charged as one of the accused persons since she had tried to recruit him into NOM.

We think that the learned trial Judge properly directed himself on the law regarding accomplices on the one hand and Government spies or agent provocateur on the other in criminal cases of this nature. We need not, therefore, belabour the point. We think, however, that the criticisms made under this ground called for a fresh evaluation of the relevant evidence and the making of its own conclusions thereon by this Court regarding the points raised by the learned Counsel.

The prosecution evidence in this regard came mainly from Tindiwegi (PW8), and Kamukama (PW10) and to a lesser extent from Ali Kivumbi Kyanika (PW1). The appellant’s evidence must also be taken into account.

The gist of Tindiwegi’s evidence as PW8 in this connection was that she first heard of NOM on 6/2/1989, when Silver Oonyo took to her a letter addressed to “Mama Kelele”. She was not “Mama Kelele”, but she had previously been known as “Mama UPC,” which she no longer was at the time the letter was delivered to her. She accepted the letter although she was not “Mama Kelele”, because she suspected Oonyo to be a “Mbega.” Oonyo introduced himself to Tindiwegi as a person working at Kirinya Prison and as having just come from Bugiri attending a meeting NOM. Oonyo also said that those at the meeting had asked him to tell her, Tindiwegi, to go to Bugiri to attend another meeting the following day. After Oonyo had left, she became scared, because she thought that she was being investigated for her previous

support for the UPC. Consequently she left to report the matter to the Jinja Special District Administrator called Fred Mukisa, whom she found to be in a meeting; she instead talked to a man called James, who took her to a man called Moses from the NRM Secretariat. She informed Moses what Oonyo had told her, Tindiwegi (PW8), about NOM. Moses encouraged her to gather more information about NOM. It has to be observed that neither James nor Moses was called as witnesses. Nevertheless, Tindiwegi said that she proceeded to act as advised. When Oonyo returned the next day, they agreed to go to Bugiri on a Saturday to attend a NOM meeting. The two of them went as arranged, reaching Bugiri at 11.00 a.m. where they were received well by a woman called Apio, who informed them that they were late for the meeting which had just ended. The next meeting was to be held on 7/5/1989 at the home of Willy Lugoko (A2) at Busowa. On that day, Tindiwegi (PW8) went there, but Lugoko (A2) was absent. The next day, however, Lugoko (A2) met Tindiwegi at her house and gave her a number of typed documents concerning NOM. The documents in question were admitted in evidence as exhibits p.20 and p.21. The former was a five-page document dated 24.2.1989 and contained what appeared to be a message conveying directives and guidelines to members or supporters of NOM. Exhibit p21 was a three- page document, dated 3.3.1989. It was also written on a headed paper of the movement, Titled “The Rwandese Tutsi Refugee Domination has to be Impeded”, its contents were critical of the Uganda Government.

Subsequently Lugoko (A2) went with the appellant to Tindiwegi’s house, where the appellant was introduced to her, a trip to Nairobi discussed and Tindiwegi was given two Nairobi telephone numbers by Lugoko (A2). Tindiwegi (PW8) and the appellant were to make the trip through Busia. On 11<sup>th</sup> June 1989 Tindiwegi and the Appellant left Jinja for Nairobi. The journey was financed by Lugoko (A2). But only Tindiwegi reached Nairobi, the appellant having stopped at Busia because he had no passport. In Nairobi Tindiwegi was accommodated at the Serena hotel, where a man called Chope gave her a lot of information and briefing about the movement (NOM). Tindiwegi (PW8) was then driven at mid-night to a meeting attended by twenty other people and chaired by one Engena, whom she came to know as the Chairman of the movement. Tindiwegi had previously known Engena in Uganda as a child and the son of former President Obote. The meeting advised Tindiwegi to inform Lukogo (A2) and Willy Mukama (A6) to stop squabbling for power: She was also asked to tell Lugoko (A2) and the appellant to report about the movement’s operations. Such reports



should be conveyed to Nairobi by Tindiwegi (PW8). She stayed in Nairobi for four days. On returning to Uganda, Tindiwegi reported to the appellant and Lugoko (A2) what had transpired during the visit to Nairobi.

The next significant activities in which Tindiwegi (PW8) was involved were visits to camps of the movement, led thereto by the appellant. Tindiwegi testified that she accompanied the appellant on visits to many camps in Iganga District. The appellant circulated documents, took photographs of camp inmates and addressed them about NOM at the camps. The camera used by the appellant had been given to Tindiwegi (PW8) by Kamukama (PW10) and Tindiwegi had in turn given it to the appellant. Tindiwegi (PW8) also claimed that she subsequently handed over some of the documents and 30 photographs to Kamukama (PW10). Indeed the 30 photographs were produced in evidence as exhibits p.22. 34 documents were also produced as exhibit p.23. Tindiwegi (PW8) said that the photographs and the documents were given to her by the appellant to take to Nairobi, but she instead handed them over to Kamukama (PW10).

Regarding the hand-writing document dated 6/8/1989, (exhibit p24) listing the names of persons who had paid money to support the movement, Tindiwegi said that the appellant also gave it to her to take it to Nairobi. She signed it when she received it from him and later handed it over to Kamukama (PW10). She did not, however, explain why she signed it. Another hand-written document was exhibit p25 to which we have already referred. Tindiwegi (PW8) denied that she had signed that document. She said that it was written by the appellant and that her name was already written on it when he gave it to her.

In cross-examination Tindiwegi (PW8) said that she started spying regarding this matter when persons involved in NOM first went to her house. Everything which was being done was being communicated to Kamukama (PW10) by her. She gave Mama Kelele's letter to him. When she went to Nairobi, she was already spying on the appellant and the others. It was Kamukama (PW10) and one Kalisa who allowed her to go to Nairobi. She said that she made two trips to Nairobi, the first one was funded by one Moses of the NRM Secretariat, who gave her dollars, the equivalent of shs.70,000/=. On this trip, she was accompanied by Oonyo, but they stopped on the way at a place called Mwara in Kenya. The witness did not

explain why they stopped on the way. On the second and successful journey to Nairobi, funded by Lugoko (A2) at a cost of shs. 100,000/-, Tindiwegi (PW8) said that she was accompanied by the appellant, who stopped at Busia.

In cross-examination Tindiwegi (PW8) denied ever having been a member of NOM.

In his testimony, Kamukama (PW10) said that he was DSO Jinja in 1989, when he came to know Tindiwegi (PW8). She was referred to him by one Lt. Katsigazi from the NRM secretariat as somebody who had information about an organisation involved in destabilisation of the country's security. The organisation was NOM. Tindiwegi (PW8) reported to him about NOM in June, 1989, but he could not remember the exact date. He encouraged her to participate in the activities of the group and she heartedly accepted to cooperate, without dictating any terms of doing so. From then on, she started to participate in the activities of the movement, and to report to him what was going on in the movement. Between June and October 1989, she went to Nairobi on invitation of NOM, and he (Kamukama) gave her Tindiwegi a blessing of the journey. On her return she reported to him that the NOM meeting there had been successful. Thereafter she continued to attend NOM meetings which were usually attended by Willy Mukama (A6), Lugoko (A2), Kinyiri (A1), the appellant and others. Tindiwegi (PW8) also collected documents and passed them on to Kamukama (PW10). He also provided her with a camera for photographing members of NOM. He kept the documents and photographs which he later handed over to the Police. The witness identified the documents - exhibits p.20, p.21, p.23, p.24., p.25 and photographs, p.22 - as the materials he received from Tindiwegi in the course of their co-operation in this matter.

In cross-examination Kamukama (PW10) said that he first came to know of the Appellant after he had started operating with Tindiwegi(PW8), which was about June 1989. He blessed Tindiwegi's trip to Nairobi and gave her Kenyan shs. 500/- not dollars as she had claimed. She made only one trip to Nairobi and made a verbal report to him of what had happened in Nairobi. Thereafter she continued to inform him about meetings of NOM which she attended,

but she did not give him written minutes thereof.

Ali Kivumbi Kanyika (PW1) was a self-confessed member of NOM, having been recruited to join it by one Asubo with whom PW1 had been a prisoner in Luzira. On returning home to Jinja from Luzira Asubo gave him a note to take to Sheik Kinyiri (A1), described then as a coordinator of the Movement in Jinja. He met Kinyiri (A1) when he returned to Jinja. On the following day Kinyiri (A1) took Kanyika (PW1) to Tindiwegi's (PW8) home, who was described to Kanyika as a coordinator. Kinyiri introduced Kanyika (PW1) as a former UNLA soldier and that he (Kanyika) had decided to join them.

Further according to Kanyika (PW1), Tindiwegi received him well, talking to him in Luganda. Twenty minutes later, the appellant arrived, and Tindiwegi described the appellant to Kanyika as her boss, which he later understood to mean boss in NOM. The two men knew each other before, having previously met at Jinja Police station in 1986. Kanyika (PW1) further said that he subsequently made other visits to Tindiwegi's home and stopped being a member of NOM on the fourth visit, and he later reported the matter to DISO, Lt. Kamukama (PW1 0). In cross-examination, he said that he was surprised that Tindiwegi (PW8) was not among the accused persons in the case. He was apparently surprised because of the report he had made to the authorities.

In his sworn testimony given in his defence the appellant denied any knowledge of NOM. He stated how he was arrested on 23.9.1989 at the source of the Nile where he was found reading. Later he was detained at Gadaffi military barracks for one month. During the detention, Kamukama (PW10) had him flogged for a long time and denied food. From the barracks he was taken to Tindiwegi's home (PW8) where he was photographed. Appellant further said that although he knew Tindiwegi before, because he had met her in a church, he was never introduced to her by Lugoko (A2), whom he did not know before he (the appellant) was arrested. He denied that he ever met Kanyika (PW1) at Tindiwegi's home of that Tindiwegi ever introduced him to Kanyika as the commander of NOM. He also denied that he ever travelled with Tindiwegi to Busia, or distributed any documents, or traveled with her, to any camps.

Regarding exhibits p.24 and p.25 which Tindiwegi claimed to have been given by him, the

appellant denied doing so, or writing them. He said that he was forced by torture to sign the documents, already written, during his detention at the military barracks.

The evidence we have referred to would appear to suggest that there was inconsistency in the prosecution evidence regarding when Tindiwegi (PW8) first reported to the authorities about the activities of the appellant and the others in NOM and she was encouraged to act as a government spy. While Tindiwegi claimed that she reported the matter on 6.3.1989 or immediately on receipt of the letter addressed to “Mama Kelele” and was encouraged to act as a spy by Moses of the NRM secretariat, to whom she was referred by James of Jinja SDA’s office, Lt. Kamukama (PW10) the Jinja DISO said that he first knew about Tindiwegi and NOM in June 1989, when Tindiwegi (PW8) was referred to him by Lt. Katsigazi of the NRM secretariat. In our view, this inconsistency is more apparent than real. First because Tindiwegi (PW8), when cross-examined by Mr. Waibale, learned counsel for Sheik Kinyiri (AI) at the trial, said that she gave the letter addressed to “Mama Kelele” to Kamukama (PW10). This was apparently not challenged by the defence. If it is true that she did so, it would mean that Kamukama (PW10) knew about Tindiwegi and her report to the authorities from the beginning, and not in June, 1989. Secondly, it seems to be clear that not Kamukama (PW10) alone was dealing with security matters in Jinja at the relevant time. James of the Jinja SDA’s office, Moses and Lt. Katsigazi of the NRM Secretariat apparently also handled security matters in the area. It is to James and Moses Tindiwegi (PW8) whom first made her report and got encouragement to spy on the plotters. Such a situation would not be inconsistent with Kamukama (PW10) having come later into the picture, if that is what happened. Apparently, neither Tindiwegi (PWS) nor Kamukama were cross-examined on this apparent inconsistency and on the role (if any) played by James, Moses and Lt. Katsigazi regarding the report made, and the role played, by Tindiwegi(PW8) in the matter. In the circumstances, we are unable to accept the learned counsel’s contention that Tindiwegi (PW8) first participated in its activities as a genuine member or supporter of NOM for four months before turning a spy in June 1989. We think that her evidence that she was a spy from the beginning was a credible one.

Regarding the trip or trips to Nairobi, we think that Tindiwegi (PW8) made only one successful trip, not two. That would be consistent with what Kamukama (PW10) said in his testimony. Tindiwegi’s evidence in examination-in-chief also implied that she made only one trip, namely the one of 11.6.1989, and on which she was accompanied by the appellant up to

Busia, and which was financed by Lugoko (A2), though Lugoko (A2) denied doing so. But it was in her cross-examination that the matter became clearer. According to that clarification, it seems that the first attempt to travel to Nairobi by Tindiwegi (PW8) and Oonyo aborted when they stopped at Mwara in Kenya. It is not known why they stopped at Mwara. Tindiwegi (PW8) was not asked to explain. That abortive trip was financed either by Moses of the NRM Secretariat, as Tindiwegi said, or by Kamukama as he himself said. If, indeed, Oonyo accompanied Tindiwegi on the abortive trip as she said, her evidence should be believed because Oonyo had just recently introduced her into NOM and had gone with her to Bugiri to attend the movement's meetings. The date of that abortive trip was not revealed by Tindiwegi (PW8), but the relevant evidence would seem to suggest that it was fairly soon after Tindiwegi had begun interacting with the plotters. Further if the abortive trip was financed by the NRM secretariat or Kamukama, it would lend support to Tindiwegi's evidence that she became a spy from the beginning.

The evidence thus appears to show that it was the second trip of 11/6/1989 funded by Lugoko (A2), which was successful. During that trip the appellant gave Tindiwegi verbal messages and documents to take to Nairobi, but she did not take the documents for fear of being arrested.

In the circumstances, we find no merit in the learned counsel's contention to the effect that Tindiwegi (PW8) went on a journey to Nairobi as an emissary of the plotters and not as a spy.

In view of the evidence regarding exhibits p.24 and p.25 already referred to and our conclusions above, to the effect that Tindiwegi (PW8) became a spy at the beginning of this incident, we do not think the witness signed, and her name appeared on, the documents as a genuine participant in the activities of NOM. In her testimony she said that she signed exhibit p.24 with the appellant Kinyiri (A1) and others, and that the appellant gave her the documents to take to Nairobi, but she did not do so, and instead she handed it over to Kamukama (PW10). With regard to exhibit p.25, written by the appellant, she said that she did not sign it. Her name was already written on the document when it was given to her by the appellant. Similarly as in the case of exhibit p.24., she did not take the document to

Nairobi as she was asked to do.

As to Kyanyika (PW1)'s surprise that Tindiwegi (PW8) was not also charged with the offence, he appears to have said so because he allegedly made a report on Tindiwegi's participation in NOM activities to Kamukama (PW10). We think that Kanyika (PW1)'s surprise would be justified unless he had known that Tindiwegi was acting as a spy which, apparently, neither he nor any of the persons involved in NOM knew she was.

In these circumstances, we are satisfied that Tindiwegi (PW8) was a government spy or agent provocateur. As such, her evidence did not require corroboration, as she was not an accomplice. We think, therefore that ground one of the appeal must fail.

Next, ground two, Mr. Mbabazi's criticism of the learned trial Judge in this regard was based on the following passage of his judgment:-

***“While I do accept Tindiwegi’s story that she went to Nairobi to attend NOM meeting and that A.2 knew about that meeting as truthful, I have by strong doubt as to who financed that trip. According to her the trip was fully financed by Lugoko who gave her money for all the expenses, but Willy Mukama Lugoko denied even her having financed such a journey. Lugoko’s denial is backed by the evidence of Kamukama PW10 who says it was he who financed the journey. Since Tindiwegi made only one trip to Nairobi and since Kamukama insists that he paid for the trip and Tindiwegi does not say that the trip was jointly financed by Kamukama and Lugoko, I find Lugoko’s story that he did not finance the trip to be truthful on this particular point. The only reason I can think of as to why Tindiwegi might have told lies on the issue was to make the Court believe that Lugoko was behind the trip go Nairobi, thus strengthening her story that Lugoko was a staunch supporter of NOM. If find it as a fact that the money which Tindiwegi used to travel to Nairobi was provided by Kamukama but only Will Mukama Lugoko.”***

Regarding this ground, the learned counsel for the appellant submitted to the effect that Tindiwegi (PW8) having been found to have lied that Lugoko (A2) had financed her trip to Nairobi when that was not the case, the learned trial Judge should have rejected the witness's

evidence implicating the appellant and not believed it as he did, the same way that her evidence was rejected in respect of the appellant's co-accused, leading to their acquittal. But instead, the learned trial Judge relied on Tindiwegi's evidence to convict the appellant. In view of the finding we have made that the abortive trip made by Tindiwegi (PW8) appears to have been financed by Moses of the NRM Secretariat or Kamukama (PW10), and that the successful trip of 11.6.1989, was financed by Lugoko (A2) it would follow that Tindiwegi (PW8) should not have been found to have lied about Lugoko(A2) having financed the trip to Nairobi. In any case, we think that even if she had lied on the matter, the learned trial Judge was entitled to save and accept from her evidence what he believed to be true from what he considered to be untrue. See Mattaka and others v Republic(1971) E.A. 495. That was a Tanzania case of treason, in which four of the six appellants were convicted of misprison and the remaining two were convicted of misprison of treason. The main witness against all the appellant was a South African, B.K. Leballo. He was a government spy, and one whom the trial Judge found to be unreliable and at times untruthful witness, on whose evidence the Judge stated he would rely where it was shown by other evidence to be true. On appeal to the Court of Appeal for East Africa, the appeals for three of the appellants were allowed and of the three dismissed.

Regarding the quality of Labello's evidence, the Court of Appeal said this on page 504.

***“We are of the view that this assessment of Labello's evidence by the Chief Justice must be accepted. Broadly speaking the Chief Justice was satisfied that the main portion of Leballo 's evidence was true and this is borne out of the admitted or proved facts, but the Chief Justice found that he would not accept any portion of his evidence as involving any of the appellants except that evidence was shown by other evidence where or by sequence of events to be true. In considering the case against each of these appellants the Chief Justice's assessment of Leballo 's evidence must always be borne in mind, together with the fact that he is undoubtedly an unreliable witness and one who was always endeavouring to obtain proof of the appellant's guilt and has shown that he is not above lying or grossly exaggerating his evidence, which is only a polite way of describing a lie, in order to***

***ensure the conviction of the Appellants.”***

On this basis of the decision in **Mattaka’s** case (supra) we think that the learned trial Judge in the instant case would have properly relied on the portion of the evidence of Tindiwegi(PW8) which he believed to be true even if he disbelieved other aspects of her evidence as untrue if that was the case. Further regarding the trip to Nairobi already referred to, we are unable, with respect to accept the learned counsel’s submission on ground two.

Regarding ground three, we understood the learned counsel for the appellant to have made two points in his submissions. First, that whereas the learned trial Judge accepted Tindiwegi’s evidence against the appellant concerning the alleged visits to NOM camps, he rejected the part affecting the other co-accused. As the others were acquitted of these allegations it meant that the learned trial Judge applied double standard to have convicted the appellant. We think that this line of argument is similar to the one we have already dealt with when considering ground two. In the circumstances we consider it unnecessary to say anything more about it.

The learned counsel’s second point related to what the learned Judge said about exhibits P.20 and P.21, dated 24/2/1989 and 3/3/1989 respectively. The learned trial Judge referred to these documents when considering the case against Lugoko (A2). He said that they were not signed by Lugoko (A2), and that in so far as they related to the meetings alleged in overt act No. 19, alleged to have taken place during the months of July to October, 1989, the documents did not fall within that period and were, therefore, as far Lugoko (A2) was concerned irrelevant. In these circumstances, the learned counsel contended, the Appellant should also have been acquitted of those allegations together with the other three accused persons with whom he was alleged in overt act 19 to have held meetings and discussions during July to October, 1989.

With respect, we are also unable to accept this contention for the same reasons which we have given in respect of ground two. As to whether the appellant was properly convicted of the overt act alleged in No.19, we shall consider the matter when dealing with ground six of the appeal.

Next, ground four. It was contended that the learned trial Judge should not have held a trial within a trial to decide on the admissibility of exhibit P.25 under section 80 of the Trial on



Indictment Decree as he did, because the document was not a confession.

Section 80 provides as follows:-

***“80(1) Notwithstanding any rule of practice to the contrary in a trial before the High Court the assessors shall not be required to leave the court while the issue of the admissibility of a confession is being tried and the Judge may seek their opinions on any facts relevant to such issues.***

***Provided that the decision of any fact of law upon which the admissibility of a confession depends shall be for the Judge alone.***

***(2) In this section, “Confession” includes any statement the admissibility of which is challenged by the accused person.”***

As has already been mentioned in this judgment, exhibit P.25 was a document bearing an address of NOM. Dated 1.9.1989, it stated that it was written on behalf and with the approval of eight persons, including the Appellant, who signed it was “Muzei Field Commander.” It was also witnessed by Tindiwegi (PW8) as a mobiliser. It was a six - page document the contents of which was a report of the activities of NOM, sums of money spent on various items, including visiting of Namalere Camp. It also pledged loyalty to the NOM High Command. It was the prosecution case that the document had been written by the Appellant and given by him to Tindiwegi (PW8) to take to NOM High Command in Nairobi and that as a spy she instead handed it over to Kamukamu (PW10). When the prosecution sought to tender it in evidence, it was objected to by the Appellant on the grounds that he had been forced to copy the contents of the document from an already existing document. He was forced to do so and to sign the document during his detention at the Military barracks. Following the objection, the learned trial Judge held a trial within a trial to determine the document’s admissibility. After the trial within the trial the learned Judge over-ruled the defence objection and held that the document had been written and given to Tindiwegi (PW8) by the Appellant long before he was arrested and detained at he Military Barracks. The Appellant had not been forced to write it in the manner claimed by him.

Admittedly the document was not a confession in the ordinary sense of a confession admitting an offence with which an accused has charged and made to a police officer, a magistrate, after charge and caution or to a person in authority; but since its admissibility was “challenged by the accused person,” our view is that the learned trial Judge acted properly to have held a trial within a trial to determine the issue of admissibility under section 80(2) of the T.I.D. In the circumstances we do not think that it was a misdirection by the learned trial Judge to have done so. Ground four of the appeal must, therefore fail.

Next, ground five, In this connection, the learned counsel for the appellant submitted first that the contents of exhibit p.25 did not show treasonable acts; second, that overt act No.17 charged the Appellants with making reports of the activities of NOM during the month of October, 1989 and yet exhibit p.25 was dated 1.9.1989, thus falling outside the period relevant to overt act 17.

The learned counsel did not refer to exhibit p.24 although it was mentioned in the ground of appeal and, like exhibit p.25, was relevant to overt act 17.

In his judgment, the learned trial Judge considered in some detail the contents of the two documents (exhibits p.24 and p.25) in relation to overt act No.17. We think that the points taken by the learned counsel for the Appellant are adequately answered by what the learned trial Judge said, with which we wholly agree. He said this:

***“The contents of the two documents are so detailed that it cannot be said with any degree of justification that these documents were fabricated in order to falsely implicate A.3 in this case. Exhibit P.24 which A3 signed by his code name of ‘Commander Muzeyi’ gives full details of dates and camps visited by A.3 and other people.***

***Some of the details contained in that documents are 7/8/89 toured Budondo camps and photographs of officer taken in each camp, 1 0/8/89 a tour of area within the vicinity of Bugiri/Iganga and Idudi, Busowa, the purpose of this particular visit was***

*to confirm to the sympathizers the arrest of key leaders of the movement such as Lugoko and inform the supporters that programmes should continue and that the boys should not be told to leave the camps as it was being done in some camps, 13.8.89 toured Bugiri area to meet elders but due to poor transport system, the camp could not be reached, 1 5/8/8 9 toured Nakivumbi camp/Iganga and photographs of officers taken, 1 6/8/89 toured Bugolobi/Iganga camp, and finally 1/9/89 toured Namalere camps where photographs were taken. The cost of all these items was amounting to 68,700/= which was to be repaid by the movement. The above details corroborate Kyanika's evidence which was to the effect that he was introduced to A.3, he (A3) told him that he was the Commander and that he has some 9 camps under him.*

*The document (exp.24) clearly confirms the existence of those camps. The contents of Exp.24 also tally well with the evidence of Tindiwegi (PW8) to the effect that she visited some of the camps with A3 and that A3 used to take some photographs while at the camp- Exp.22. A3's evidence that he has never handled a camera in his life cannot be true. I find Ex P.4 to be a true report made freely by A3 out-lining his role in respect of NOM/NOA.*

*Exp. 25, entitled "Confidential Note," is more concerned with squabbles among the ranks of NOM/NOA. It was signed by A3 himself as "field commander Muzeyi" on what he "eight man-self-set counsel" In the first two paragraphs of this document A3 and his colleagues seriously castigate the present government of Uganda and pledge their loyalty to the former President Dr. Apollo Milton Obote, they also express their "relentless mercination to match to Kampala by hook or nook" These are very hard words and they must have been intended to express A3 'S intention and determination to over throw the present government of Uganda by all means. As said earlier, this document was addressed to NOM/NOA High Command in Nairobi, so A3 and his colleagues cannot be taken lightly in what they stated in that document, they must have meant what they said.*

*In my considered opinion, the contents of the two documents (Exp.24 and Exp.25) are treasonable matters and the evidence shows that they are attributable to A.3*

***who is the author of the two documents. In these circumstances I find that the prosecution has proved beyond reasonable doubt overt act 17 against A.3.”***

We think that considering all the evidence that was before him, the learned trial Judge was entitled to come to the conclusions he did. We agree with him that the evidence adduced by the prosecution a proved overt act 17 against the appellant to the required standard. In the circumstances, ground five of the appeal must fail.

We shall next consider together grounds six, seven and eight, which the appellant’s learned counsel also argued together. The learned counsel’s submissions on these grounds related mainly to overt act 19. He contended that the meetings alleged in this overt act were neither specified nor proved by evidence against the appellant.

In the circumstances the learned trial Judge erred; first, to have drawn inferences that eh appellant attended such meetings merely from the contents of exhibits p.24 and p.25 notwithstanding that neither of the two documents mentioned the meetings in question; second, to have relied on the evidence of Tindiwegi (PW8) about touring of camps as evidence of such meetings; and thirdly, to have held that although what the Appellant said (if anything) at the meetings alleged by Tindiwegi (PW8) to have been attended by him was not proved by evidence, an inference could be drawn that the Appellant was not a mere attendant at such meetings but an active participant.

We think that these criticisms were well founded, in view of this Court’s decisions in a couple of treason cases to the effect that it is not enough to merely prove that an alleged treason plotter attended a meeting at which such a plot was discussed. It is necessary to go further and prove what the alleged plotter actually said at the meeting and that what he said is treasonable. See Cpl. ***Mike Muwonge and others v. Uganda***, Criminal Appeal No.6 of 1990; and ***Hofin Topacho Ongiertho and others v. Uganda***, Criminal Appeal No.1 of 1993. (Unreported) (S.C).

In the instant case, the prosecution did not adduce evidence to prove what the Appellant allegedly said at the meetings alleged in overt act 19. In convicting the Appellant of this overt act, the learned trial Judge relied on the contents of exhibits P.24 and 25, and on Tindiwegi's evidence concerning visits by her and the Appellant to NOM camps.

As we have already found in this judgment, such evidence was relevant to, and was accepted to have proved against the Appellant overt act 17. The learned trial Judge, rightly so in our view, relied on it to convict the appellant of that overt act.

The learned trial Judge's error complained of by the appellant's counsel under ground six, seven and eight of the appeal is illustrated by the following passage of his judgment, which indicates that he tended to make assumptions of what the appellant said at the meetings stated in overt act 19. This is what the learned trial Judge said;

***“Tindiwegi in her evidence spoke of a number of meetings which she attend with A3 at her home and Kinyiri's home but denies ever having attended any meeting with this witness. This piece of evidence was bitterly attacked by Mr. Kania on the ground that no minutes of the meetings were ever recorded. It is common knowledge that at meetings of that nature minutes are generally not kept. PW8 testified that at the meetings the agenda was how to fight and overthrow the government of Uganda. I accept the evidence of PW8 as truthful and find that those meetings took place and A3 was one of those who attended them. The evidence of PW8 is not however clear as to what contribution if any, A3 made at these meetings. Considering the fact that the meetings were concerned with plans to overthrow the Government and in view of the fact that A3 was busy visiting training camps which were established to implement meetings and in view of the contents of the two reports (Exhs. 24 and 25) made by As, it is only reasonable to draw an inference that A3 was not a mere attendant but an active participant. His position must be distinguished from that of the accused person in Muwonge and Ongodia's cases where the appellants just sat at the meetings and did nothing more later on. In the present case A3 did not stop at attending meetings but after the meetings he went out to visit the camps in a bid to implement the decisions which had been taken at the meetings. It is true to say that there is no direct evidence stating***

**specifically what A3 said at these meetings but his subsequent conduct cannot be totally divorced from what happened at these meetings.**

(the underlining is ours).

With respect, we think that this was a serious misdirection by the learned trial Judge in view of decisions of this Court already referred to in **Muwonge** (supra) and **Topacho** (supra).

In the circumstances our view is that overt act 19 was not proved against the Appellant to the required standard. Grounds six and seven of the appeal must, therefore, succeed. So must ground eight in so far as it concerns overt act 19. We have already dealt with overt act 17, which is also mentioned in ground eight of the appeal.

We now come to ground ten, the last one. In his submissions in this regard, the learned counsel for the Appellant enumerated what he considered to be inconsistencies, contradictions, or discrepancies in the prosecution evidence ignored by the learned trial Judge. First Tindiwegi (PW8) was contradictory about the trip to Nairobi. One trip was apparently made before she had reported to Kamukama (PW10). That trip was allegedly financed by Lugoko (A.2). Yet, Kamukama (PW10) said that he was the one who financed the only trip to Nairobi.

With respect, the learned trial Judge did not ignore this apparent contradiction. He did, in fact, consider it. In any case, we have already said what we think happened regarding the Nairobi trip; in the circumstances, there is no need to repeat it here.

The next inconsistency was in the evidence of Tindiwegi (PW8) and Kamukama (PW10) concerning the documents and photographs which the former handed over to the latter. Tindiwegi (PW8) said on the one hand that after her return from Nairobi she and the Appellant toured camps and took photographs, but on the other hand, she said that the Appellant gave her photographs and documents, to take to Nairobi on the second trip, she did not take them. Kamukama on the other hand, was not certain when Tindiwegi gave him the documents. It was contended this meant that Tindiwegi (PW8) gave him the documents in

piece-meal. What we have said before about the trip to Nairobi equally applies here. We need not, therefore, say more in this regard.

Another contradiction concerned the currency given to Tindiwegi (PW8) for the Nairobi trip. Whereas Kamukama said that he gave her Kenya Shs.500/=, she said that the money was in dollars, and that the trip was financed by Lugoko (A.2). This has also been dealt with when we were considering ground one of the appeal.

Next, the learned counsel contended that whereas the signature of Lugoko (A2) does not appear on exhibit P.25, Tindiwegi (PW8) said that he signed this document; and the learned trial Judge said that Tindiwegi must have been mistaken to have said so. With respect, it is evident that the learned counsel was mistaken, because it was Kinyiri (A1), not Lugoko (A2) to whom the learned trial Judge referred in this connection.

Another contradiction was that whereas Tindiwegi (PW8) said in her evidence that she visited Buyala camp, she could not locate where the camp was situated when asked to do so. With respect we do not think that this was contradiction. Failure by the witness to say where Buyala was did not necessarily mean that she had not visited it.

The next and final contradiction was said to be between the evidence of Tindiwegi (PW8) and that of Kamukama (PW 10) regarding when the former reported about activities of NOM to the latter. We have already dealt with this matter. In our view the two positions were not necessarily contradictory. They were reconcilable.

The learned counsel contended that the failure by the learned trial Judge to resolve the contradictions inconsistencies or discrepancies in question was fatal to the appellants conviction.

With respect, we are unable to accept that contention, because some of the things referred to as contradictions, inconsistency or discrepancies did not amount to such and some have been resolved. In any case, we think that they were minor and did not indicate that the prosecution

witnesses concerned told deliberate lies in their testimony.

In the circumstances we think that even where the learned trial Judge did not specification dealt with them, such failure would not be fatal to the Appellant's conviction.

For the reasons we have given, we think that the learned trial Judge was wrong in his finding that the allegation contained in overt act No. 19 had been established.

However, we are satisfied that there was ample evidence to support the allegation in over act No.17. The appellant was therefore, properly convicted of the charge of treason on the basis of that overt act. Accordingly the appeal is dismissed.

Dated at Mengo this 5<sup>th</sup> day of May, 1995.

**S.T. MANYINDO**

**DEPUTY CHIEF JUSTICE**

**A.H.O ODER**

**JUSTICE OF THE SUPREME COURT**

**J.W. N. TSEKOOKO**

**JUSTICE OF THE SUPREME COURT.**