IN TILE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO - D.C.J., ODER, J.S.C.,

CRIMINAL APPEAL NO.15

BETWEEN

SAM EKOLU alias OBOTE==========APPELLANT

AND

UGANDA ==========RESPONDENT

(Appeal against conviction of the high Court of

Uganda at Soroti (Engwau, .J.) dated 19th May, 1994

IN

CRIMINAL SESSION CASE NO. 237/93)

JUDGMENT OF THE COURT:

The appellant, Sam Ekolu alias Obote, was charged with, tried and convicted of murder contrary to Section 183 of the Penal Code, in an indictment of five counts, all of them murder. He was sentenced to death on all five counts, but the sentence in respect of the last four were suspended.

The particulars of the charge were that on 24th October, 1990, at Ochamai village, Abango Parish, Asuret sub-County, Soroti county in Soroti District the appellant and others still at large, murdered Levi Emalu, David Opano, Robert Eoru, one Ogwang and Micheal Otalai. The five deceased persons were the subject matter of the first, second, third, fourth and fifth counts respectively.

The prosecution case was that at the material time, the appellant was a soldier in the NRA, a detachment of which was stationed in the locality. The appellant was a member of that detachment. On the night of 23/10/1990 .the appellant and a group of NRA soldiers went on an operation in the area, in search of rebels or their supporters. The five deceased persons were rounded up as suspected rebels, led away and killed by NRA soldiers on the appellant's

orders. The appellant had been a rebel in the area but had changed sides.

The prosecution adduced evidence from three witnesses to prove its case.

The appellant denied the charges against him and gave sworn evidence in his defence to the effect that although he was a member of the NRA group of soldiers who participated in the operation in question, he did not give the alleged orders, because he was a mere private and was not in a position to give orders.

The learned trial Judge rejected the appellant's defence, accepted the prosecution evidence and convicted the appellant accordingly. Hence this appeal.

Originally only one ground of appeal was set out in the memorandum, but Mr. Kihika, learned Counsel for the appellant, applied and we granted his application, to amend the memorandum of appeal by adding a second ground, which he did. The two grounds of appeal were that:

1. The learned Judge erred in fact and in law when he held that the appellant was properly identified as the person who ordered the deceased persons to be killed.

2. The learned Judge erred when he shifted the burden of proof on the appellant.

Mr. Kihika argued the grounds of appeal and prayed the Court to allow the appeal, quash the convictions and set aside the sentences.

In view of what later became apparent as a defect in the trial, we shall not consider the merit of these grounds and the learned counsel's argument in their support.

The state respondent was represented by Mr. Charles Ogwal Olwa. When he had made his submission in reply to the effect that he was supporting the convictions, we drew his attention to the absence from the whole record of any indication that the learned trial Judge had summed up the case to the assessors, a point which the appellant could perhaps, have taken as a ground of appeal, but had not done so. In the event, Mr. Ogwal Olwa conceded that in view of the provisions of Section 81(1) of the Trial on Indictment Decree, which appear to be mandatory, the omission by the learned trial Judge to sum up the law and evidence in the case to the assessors meant that the trial .was a nullity.

In the circumstances the learned Counsel for the appellant in reply prayed for the appeal to be allowed and a retrial ordered.
Section 8 1(1) of the T.LD. provides that:

> ***"81(1) when the case on both sides is closed, the Judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his opinion orally and shall record each such opinions. A Judge shall take a note of his sum-up to the assessors*** ".

We think that these provisions impose a statutory obligation on a trial Judge to sum up the law and the evidence in a case to the assessors. The provision are different from those of section 283(1) of the Tanzanian Criminal Procedure Code, in which the word "may" was used instead of the word "shall", used in Section 81(1) of our T.LD. The Tanzanian Statute was considered in Miligwa s/o ***Mwinje and Another V. R.*** (1953), 20, E.A.C.A., 255; ***Washington s/o Odinga V. R.*** (1954) 21. E.A.C.A. 392, and ***Andrea s/o Kuhinga and Another KR.*** (1958) E.A. 684.

In these cases it was decided that the Tanzanian Statute imposed no such obligation.

In the instant case there is no evidence on the record that the learned trial Judge summed up the case to the assessors after the close of the case of both sides. This in our view amounted

to a failure to comply with the obligatory requirement of Section 81(1) by the learned trial Judge. It was a procedural error, which was fatal to the appellant's conviction.

Another error connected with the assessors in this case was that the combined opinion of the assessors was recorded in a reported form. The learned trial Judge reported on behalf of the assessors what they had said in giving their opinion, instead of recording what they actually said which, had he done so, would have been no problem. For this court has accepted a joint opinion of assessors but it is upon the trial Judge to ascertain and make a note that each assessor is of that opinion.

For these reasons we think that the appeal should be allowed. It is accordingly allowed, and the convictions quashed, the sentences set aside and an order made that the appellant should be retried by another Judge. The appellant should not be released, but he should be detained in remand until completion of the retrial.

Since the offences were alleged to have been committed more than four years ago we hope that the retrial will be expeditious. The Registrar is therefore, instructed to draw the attention of the Director of Public Prosecution to this judgment.

Dated at Mengo this 5th day of May 1995.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE
A.H.O. ODER
JUSTICE OF THE SUPREME COURT
H.G. PLATT
JUSTICE OF THE SUPREME COURT