THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ORDER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C. AND MUKASA-KIKONYOGO., J.S.C.)

CRIMINAL APPEAL NO. 1 OF 19 98

B E T W E E N

1. FESTO ANDROA ASENUA)

2. KAKOOZA JOSEPH DENIS) ... ... APPELLANTS

AND

UGANDA ... ... RESPONDENT

(Appeal from judgment of the Court of Appeal at Kampala (Manyindo,DCJ., Berko, J.A. and Engwau, J.A.) dated 23rd February 1998 in Court of Appeal Criminal Appeal No. 34/1996)

JUDGMENT OF THE COURT:

This is an appeal from the decision of the Court of Appeal which dismissed the appellants' appeal against convictions for two murders and sentence of death passed on 5th April 1996 by the High Court. They were convicted and sentenced to death for the murder of Professor Mudhola and Dr. Kidubuka.

We shall hereinafter refer to the appellant Festo Androa Asenua as the first appellant (A1) and to the appellant Kakooza Joseph Denis as the second appellant (A2).

The facts accepted by the High Court and the Court of Appeal are as follows. During 1988, the Government established a Constitutional Commission to collect views from the people of Uganda for purposes of making a new Constitution. The late Professor Mudhola was appointed its Vice-Chairman. By early 1993 the Constitutional Commission was in the final stages of completing its task.

It would seem that adherents of a group calling itself 9th October

movement believed it could frustrate the Commission's efforts by murdering the late Prof. Mudhola. Some people were enlisted to eliminate him. Such people appear to have included the two appellants.

On or about 15th February 1993, the first appellant sought protection from a medicine man called Ali of Geregere village, Lugazi, where he (Ali) had a wife called Jane Nakate (P.W.16), a matoke dealer. Ali rented a room there which served as his clinic or shrine. The first appellant informed Ali in the presence of Jane Nakate that he wanted to kill Mudhola. He, therefore, wanted medicine to protect himself. After hearing that declaration, Jane Nakate moved away from Ali's shrine and so she did not hear the rest of the conversation. On the 20th February 1993 at about 7:30 p.m, the late Mudhola and Kidubuka and other persons had a drink at a drinking place known as Container Bar, Paris Hotel, in Wandegeya, within Kampala. On the instructions of a Captain Kaaya and a Lt. Annet, the second appellant drove the first appellant who carried a grenade in a bag to the place where the deceased were drinking. At about 8:00 p.m. the first appellant released the grenade at the place where the deceased were drinking. The grenade exploded, very seriously injuring the two deceased and other people who were rushed to Mulago Hospital where they died the following day, 21st February 1993.

A few days thereafter Jane Nakate (P.W.16) again saw the first appellant at her husband's (Ali's) home. There, Jane Nakate heard the first appellant tell her husband that "he had killed Mudhola but wanted medicine to protect him against arrest". It would seem, that that, same day or later the first appellant organized feasting, i.e., drinking and eating. Ali, who never testified during the trial, reported the first appellant to Military authorities in Entebbe who together with the police eventually arrested the first appellant at Lugazi at the grave of a

relative while in the process of cleansing himself, in the manner prescribed by Ali, to appease the ghosts of Mudhola and Kidubuka. The first appellant was eventually taken to Court where he was charged with the murders of the two deceased persons and the attempted murder of Professor Katorobo.

It seems the second appellant was arrested in 1992 in connection with theft. During December 1992 the second appellant escaped from prison where he had been detained on a charge of theft of a bicycle. He was re-arrested about 13th April 1993. The murder of the deceased persons appear to have haunted him while he was in custody. As a result he talked to D/A. I. P. Bernard, (P.W.6) on certain matters, as a result of which the second appellant was taken to Andrew Bashaija, (P.W.7), Magistrate Grade 1 on 5th May 1993 who recorded a confession statement from the second appellant. The admissibility of that statement was contested during the trial, as it has been before us.

The appellants were tried by Mpagi-Bahigaine, J. (as she then was). Each gave evidence on oath denying the offence and each raised an alibi in his defence. The learned judge did not address the assessors on the count of Attempted Murder. The assessors in their brief opinions advised convictions on murder charges. The learned trial Judge disbelieved the defence evidence. She accepted the prosecution case and convicted the two appellants of the two murder charges and sentenced each to death. The learned trial Judge never made a finding in respect of the third count which was that of attempted murder of Prof. Katorobo.

The two appellants appealed to the Court of Appeal against the decision of the trial Court. The Court of Appeal dismissed that appeal. This appeal is against the dismissal.

Nine grounds of appeal were put in the memorandum of appeal and two grounds in a supplementary memorandum.

The complaint in the first ground of appeal is to the effect that the second appellant was tried without an indictment, and that therefore, there was a grave miscarriage of justice when the Court of Appeal confirmed his convictions and sentence.

On 16th September 1994, Mr. Mugenyi a Principal State Attorney, withdrew charges against the second appellant and proceeded to have the first appellant committed alone to High Court for trial. Upon realising his mistake, the same Principal State Attorney later on the same day had the charges against the second appellant (A2) reinstated. A2 was on 21st September 1994 separately committed to the High Court for trial. The typed record of proceedings at the commencement of the trial reads - "Charge read and explained to both accused.

A1: I deny all charges.

A2: I deny all charges.

Court:-

"Prosecution for both accused are (sic) all three counts". There must have been a typing error. We have perused (or rather we deciphered) the original record. The statement reads -

"Court: Proceed on both accused on all three counts".

Mrs. Owor Akorimo, Counsel for both appellants, contended that the withdrawal of the charges at the committal stage was fishy. We understood her to suggest that another suspect should have been charged and not the second appellant. According to learned Counsel, this confusion created doubt which should have been resolved in favour of A2. Mr. Ogwal-Olwa, Principal State Attorney submitted, correctly in our view, that this point should have been raised at the trial and that the two appellants were properly arraigned.

With all due respect to Mrs. Owor Akorimo, we think that this ground has no merit. There was confusion during committal proceedings. An amended indictment in which the two appellants are mentioned was shown to us at the hearing of this appeal. We are not sure of the time when the amendment was effected. But the record of the trial shows quite clearly that three charges upon which the appellants were tried were read and explained to the second appellant Kakooza. Quite clearly he was tried on an indictment and for the murder of Mudhola and Kidubuka. Moreover, if there had been an irregularity now suggested by Mrs. Owor- Akorimo, we think that objection to such an irregularity should be taken care of by the provisions of Sections 137 of the Trial

on Indictments Decree 1971 (TID) and Section 331(1) of the Criminal Procedure Act. These provisions read as follows:-

"137. Subject to the provisions of any written law, no

finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless such error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice:

Provided that in determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".

And Section 331(1) of Criminal Procedure Code reads –

"331. (1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice, or any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred".

See R. vs. Thakar Singh s/o Kahir Singh (1934) 1 E.A.C.A. 110 which is authority for the view that objection to a defect

in an indictment should be taken during trial and that where no failure of justice having occurred and accused not having been embarrassed or prejudiced the conviction should stand. The Court in that case considered Section 367 of the Criminal Procedure Code which provisions are similar to those of Section 137(1) of T.I.D., 1971. Ground one must fail.

In ground two the complaint is that the learned Justices of Appeal erred in law and fact in disregarding the appellant's alibi. The drafting of the ground refers to the alibi of one appellant. However, in her arguments, Mrs. Owor-Akorimo- submitted that grave injustice was caused to both appellants because their alibis were not evaluated or analysed in the context of the prosecution case. She complained that the Court of Appeal shifted the burden of proof in the process of evaluating Al's alibi. She cited L. Aniseth v. Republic (1963) E.A. 206:
R v_Johnson Vol. 46 Criminal Appeal Reports 55 and Mugisha v. Uganda (1976) H.C.B. 246 in support of her contentions. Mr. Ogwal-Olwa, Principal State Attorney, contended that there was no alibi raised and, if any was raised, the same was useless. He further contended that in any case the alibis were only raised at the trial and in the Court of Appeal and both Courts rejected the alibis. He contended that there was no shifting of burden of proof; that the Court of Appeal considered the evidence in the context of the whole case.

With respect, we think that the Court of Appeal misdirected itself on the burden of proof of alibi in the following passage (page 6 of the judgment).

> "In our opinion the alibi did not raise a doubt in the prosecution evidence".

It is trite that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. See Ntale vs. Uganda (l968)E.A. 365; Sekitoleko vs. Uganda (1967) E.A. 531 and L. Aniseth vs. Republic (1963) E.A. 206.

In the case of R_____vs. Chemulon Wero Olancro (1937) 4 E.A.C.A. 46, it was stated:

"The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act".

See also Ezekia vs. Republic (1972) E.A. 42 at page 48 on proof of alibi.

Learned Counsel for the appellants cited Mugisha vs Uganda (1976 HCB246 for her contention that the Court of Appeal evaluated and accepted the case for the prosecution in isolation and then considered the case for the appellants. We do not agree.

In his defence on oath, the first appellant testified that on 20th February i.e., on the night the deceased persons were fatally injured at Wandegeya by the blast of the grenade, he, the first appellant, was at the funeral rites ceremony at the home of James Machyo (D.W.l) who also testified in his support. This alibi had not been raised before trial.

A2 raised his alibi belatedly during re-examination with the statement that "at the time of Mudhola's death I was at Kyerima performing some traditional rites concerning my sister's twins". The prosecution did cross-examine A2 on this. Jane Nabakoza, D.W 4,a sister of the second appellant and who was dismissed by the Principal State Attorney as a useless witness, in effect supports the claim by the second appellant that on 20th February 1993 he attended the rites of D.W.4's twins at Kyerima with her family.

The learned trial Judge in her judgment summarised the evidence for both sides, and alluded to certain passages in exh. P 2, which is the statement of A2 before a Magistrate who recorded it-(Bashaija P.W.7.). We would agree that the learned Judge did not in her judgment refer to the alibi of A2. But at page 13 of her judgment she referred to the alibi of A1 in the following passage:-

> "As to his alibi that he was at James Machyo's home (D.W.l). I have already pointed out some unsatisfactory aspects of his evidence. It is inconceivable that anybody (let alone an L.C.l Chairman) would fail to remember the date of a spouse's death nor burial.
>
> I think then it is not difficult to see the discrepancies in Al's whole defence evidence.
>
> He said A1 had gone to his house at 11:00 a.m. on Saturday 20th February and had left at 11:0 0 p.m. whereas A1 himself claimed to have spent the night of 19th and part of the Saturday 20th there. In the absence of clear indication as to Al's whereabouts (sic) on the fateful day it is necessary to go to A2' s confession ..... . "

Clearly the learned Judge rejected the alibi of Al, as she was entitled to do, in view of the evidence on record. The learned Justices of Appeal took the same approach in regard to Al's alibi.

True the learned Judge did not allude to the alibi of the second appellant. This is understandable since the Judge held that his (A2's) confession was truthful. Moreover it has been held that the defence of alibi should be disclosed at the earliest possible opportunity. In **R. vs.Sukha Singh s/o Wazir Singh And others (1939) 6 E.A.C.A. 145**. it was observed by the Court of Appeal for East Africa that –

> "If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

See also **R. vs. Ahmed bin Abdul Hafid (1934) I E.A.C.A.** 76. In the instant case A2 raised his alibi belatedly at the trial, during re-examination, in 1996. It (alibi) is evidence alright, but in the circumstances of this case the alibi was of least value, if any. We have held that the Court of Appeal misdirected itself in the passage we earlier quoted in this judgment. Apart from that misdirection, we think that the Court of Appeal did evaluate the evidence relating to A1's alibi. We do not accept the contention that the learned Justices first accepted the prosecution's case in isolation and then considered the defence case. We however, accept the submission of Mrs. Owor-Akorimo that the Court of Appeal did not evaluate the alibi of the second appellant. In the instant case the trial Judge having accepted his (second appellant's confession as truthful, the alibi could not be accepted and therefore, failure by the Court to evaluate the alibi did not occasion such injustice to the second appellant as would warrant our interference.

For the reasons we have just given in reference to the judgment of the learned trial Judge on this aspect of the case, we do not, with respect, accept Mrs. Owor-Akorimo's submission that the two appellants or any of them suffered grave injustice as a consequence of the approach adopted by the two Courts below on this aspect of this case. Consequently ground two of the appeal must fail.

Before leaving the issue of alibi we would like to point out that in

England, evidence in proof of alibis has since 1967 been largely regulated by Statute. Thus Section 11 of the Criminal Justice Act, 1967 of the United Kingdom provides as follows "11 (1) On a trial on indictment the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.

(2) Without prejudice to the foregoing sub-section, on any such trial the defendant shall not without leave of the Court call any other person to give such evidence unless –

(a) the notice under that subsection includes the name and address of the witness, or if the name and address is not known to the defendant at the time he gives notice, any information in his possession which might be of material assistance in finding the witness".

It is unnecessary to reproduce here the rest of the provisions of Section 11 of that Act save to say that these provisions basically reflect the view stated by the Court of Appeal for Eastern Africa in the case of R_. vs. Sukha Singh (Supra) .

We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no Statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the U.K. Statute cited above, such belated disclosure must go to the credibility of the defence. We would therefore, strongly recommend that a Statutory Provision of similar effect to Section 11 of the United Kingdom Act ought to be made part of our Criminal Justice.

The complaint in ground 3 is that the learned Justices of Appeal erred in law and fact by not evaluating the evidence on record and instead relied on fanciful theories and speculation on witchcraft, as evidence against the first appellant. Although appellant's Counsel stated she had abandoned ground 6, she actually argued it when she addressed us on the third ground.

So we deal with both grounds together. That was the course adopted by Mr.

Ogwal-Olwa, the learned Principal State Attorney.

Mrs. Owor-Akorimo contended that the trial Judge relied on speculation and theory rather than concrete evidence to convict the first appellant. Learned Counsel strangely submitted that the statements made to one Ali, the husband of Jane Nakate, (P.W.16) both prior to and subsequently after the murder of the deceased persons cannot be conclusive evidence against the first appellant. Learned Counsel challenged the evidential value of exh. P 20, which is a paper containing messages in Luganda the object of which was to cleanse the first appellant of the ghosts of the deceased Mudhola and Kidubuka. Counsel also challenged the evidential value and the circumstances under which the first appellant was arrested. Mr. Ogwal-Olwa submitted that the two statements made by the first appellant to Ali and which P.W.16 heard are both confessions and evidence against the first appellant.

According to the evidence of Jane (P.W.16) she received the first appellant at the shrine of Ali and made Al and his companion shelter from rain- in the shrine as they waited for Ali. When Ali returned home and after customary exchange of greetings between Ali and the first appellant, the latter declared to Ali in the presence of P.W.16 that he intended to kill Mudhola and so he wanted medicine to protect himself. P.W.16 was made to move away after that declaration of intent because Al did not want P.W. 16 to hear more. He (Al) was scared of her presence. According to P.W.16, the first appellant again returned to Ali after three days. We think that the period must have been longer than three days, but in our opinion, this does not affect the value of the evidence of P.W.16 as to what transpired when the first appellant returned a second time. P.W.16 testified about Al's second visit in the following words:-

> "I saw the man a second time about three days later. He had come back to us again. He told my husband that he had already killed Mudhola but wanted medicine to protect him against arrest.
> I was present when this man was saying this to Ali. All this took place in the shrine. I then left for my home. Later my husband came to my room
> ..... He (Ali) told me that that man was a killer. He decided to send me and him'(the man) to stream to get flowing water in a bottle .....".

We agree with Mrs. Owor-Akorimo that Ali should have testified. But with respect, we do not accept her contention that the absence of Ali weakened the value of the evidence given by P.W.16. The declaration of

intent by Al to kill Mudhola and his (Al's) subsequent confession of the killing is admissible evidence whether it is Ali or P.W.16 or both gave that evidence at the trial. The fact that the declaration and subsequently the confession were made to Ali removed no value from the testimony of P.W.16 who heard the same matter.

With respect we do not think that both the trial Judge and

the learned Justices of Appeal speculated nor relied on theories rather than evidence when each accepted the statements as evidence against the first appellant. These two statements fully implicated the first appellant. First he announced his intention to kill Mudhola. Second he confirmed that he had killed Mudhola after Mudhola had been killed. These were said voluntarily. In that regard we think that the case of E. Nsubuga vs. Uganda (1992 - 1993) H.C.B.24 is not helpful to the case against the first appellant. In Nsubuga case (supra) evidence on identification was found by the trial Judge to be unsatisfactory. Nsubuga made a confession to a policeman who arrested him. Circumstantial evidence was inconclusive. Thus Nsubuga case is distinguishable from the case before us.

Equally we do not agree that the act of exorcising the spirits of the deceased by the first appellant when he prostrated on the grave of his relative and the discovery of exh. P 20 which shows that the first appellant was haunted by the spirits of Mudhola and Kidubuka was speculation. These were matters of hard and concrete evidence.

The English translation of exh. P 20 which is exh. P 21 reads as follows:-

> "FESTO ASENWA
>
> You two ghosts I am saying farewell to you. Leave me and my home and go to other place though I am the one who killed you excuse me and let your bodies rest in peace. I will say farewell with a cock but don't disturb my family again even if someone puts herbs on your graves go and disturb Mukasa. Dan Mudhola do not follow me. Even the Policemen who are looking for me should get lost and do not find this home. The elders from Tanzania should protect me so that I am not arrested. Bye.
>
> Children go and sleep like I threw a grenade on you and it exploded".

The Luganda document (exh. P 20) was retrieved by P.W.15, Lt. Col. Herbert Mbonye, at the home of A1 from an exercise book. Mr. Rwaganika, Counsel for A1 at the trial never cross-examined P.W-15 on this document. Haji Jjuko, P.W.2, Secretary for Defence, who participated in arresting Al testified about the document as did P.W.15. The cock is alluded to in exh. 20. It was present by the grave where Al was cleansing himself. Surely this hard circumstantial evidence points to no other reasonable inference except that the first appellant killed Mudhola. Clearly these

were damning pieces of evidence against Al.

Mrs. Owor-Akorimo was justified in criticising the learned trial Judge upon her conclusion, which was not based on any evidence, that one of the names of Al, i.e, Androa, is the vernacular version of the English name "Andrew". The Court of Appeal glossed over this aspect of the misdirection of the learned trial Judge. But the Court of Appeal held that –

> "We are satisfied that the man whom the second appellant collected from Kyetume town on the fateful night was the person who hurled the killer weapon which exploded killing the deceased persons. No doubt that assailant is the first appellant".

It is clear from the confession that it was the second appellant who drove the assailant to and fro the scene of crime. The misdirection by the learned Judge did not in any way cause injustice to the first appellant because we agree with the Court of Appeal and we are satisfied that there was overwhelming evidence against Al connecting him to the murder of the deceased persons. We think that the approach of the trial Judge in the case of Oketh Okale vs. Republic (1965) E.A. 555 justified the criticism of the trial judge by the Court of appeal for East Africa which quashed the conviction of the appellant in that case. Oketh Okale's case is distinguishable from the present case.

Mrs. Owor Akorimo suggested that the two statements made to Ali by the first appellant are not confessions. This is correct in regard to the first statement. But we cannot agree that the second statement which states that he (Al) had killed Mudhola is not a confession. It has been held, and we agree with the view, that a confession connotes an unequivocal admission of having committed an act which in law amounts to a crime: See R. .vs Kifungu s/o Nusurupia (1941) 8 E.A.C.A 89. A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence: See R. vs. Kituyan s/o Swandetti (1941) 8 E.A.C.A. 56. In this case the statement made by A1 to Ali after the murder of Mudhola is a full confession. But the statement made on or about 15th February 1993 is corroborative of the confession. That declaration is on the same footing like a prior threat to kill, as was the case in Waibi vs. Uganda (1968) E.A. 278.

In the result we think that grounds three and six must fail.

Ground four was abandoned.

The complaint in ground five is that the learned Justices of

Appeal erred in law by shifting the burden of proof to the appellants. This ground has in effect been dealt with when we considered arguments on the second ground. Mrs. Owor-Akorimo cited to us Woolmington vs. Director of Public Prosecutions (1935) A.C. 462 and Ssekitoleko vs. Uganda (1967) E.A. 531 in support of the well known principle that in a criminal trial, the burden of proof never shifts to an accused. With this statement, we are in agreement.

Learned Counsel complained, as she did complain when arguing ground two, that the Court of Appeal shifted the burden of proof to the appellants and that this occasioned a miscarriage of justice. Mr. Ogwal-Olwa conceded correctly and we agree that the learned trial Judge shifted the burden of proof in respect of proof of voluntariness in the making of exh. P 2, when she stated, at page 2 of her interlocutory ruling, after the trial within a trial, that -

> "It was then upon the accused to show it (confession) was improperly induced. It was incumbent upon him to raise a doubt that it was made voluntarily" underlining ours)". |

The Court of Appeal observed, correctly in our opinion that the onus is on the prosecution to prove that the statement was made voluntarily and not on the accused person to prove that a confession was not made voluntarily. We would, however, observe though that it is incorrect to hold, as did the Court of Appeal hold, when it stated (page 8 of its judgment) that the

> "misdirection was, however, cured by the
>
> trial Judge's earlier statement that the onus is upon the prosecution to prove affirmatively that such a statement has been made voluntarily ....."

With respect, we do not think that a subsequent misdirection can be cured by an earlier correct direction. We think that it is the reverse which is the correct position.

Be that as it may, we have not been persuaded that any injustice was occasioned to the appellants by that misdirection. Consequently ground five must fail.

In ground seven, the complaint is that the learned Justices of Appeal erred in law in relying on the repudiated

confession of the second appellant to confirm the conviction of both appellants. Mrs. Owor-Akarimo contended that A2's confession (exh. P.2) was inadmissible and should not have been relied on by the Courts below. She further argued that a confession in which a co-accused is implicated as in this case should not be taken as a basis of the prosecution case as was the case here. She contended in effect that in exh. P2, A2 did not admit the offence. Learned Counsel contended that exh. P2 shows that the second appellant was merely a driver; that A2 did not participate in throwing the grenade.

In summary, Counsel contended that the confession should not have been used as evidence against the first appellant: She referred us to Goba s/o Gindanenanya vs. R(1953) 20 E.A.C.A. 318 to support her arguments.

Counsel criticised the trial Judge regarding the misdirection about burden of proof of voluntariness in making confession (exh. P2) by A2. We have already considered this argument in this judgment under ground 2 and ground 5.

Learned Counsel made a bold submission that even though P.W.7 testified that the second appellant voluntarily gave the statement (exh.P2), the police could have concocted it. Unfortunately Counsel was not able to show any evidence to substantiate this unwarranted imputation of wrong doing to the police. Learned Counsel contended that, although the second appellant had repudiated exh. P2, both the trial Judge and the Court of Appeal did not caution themselves before relying on exh. P2 as evidence nor did they refer to the need for corroboration of that statement. Counsel further argued that the two courts did not indicate that there was evidence corroborating the confession statement. She cited Tuwamoi .vs Uganda (1967)E.A. 84 and Tuvuru vs Uganda (1992 - 1993) H.C.B. 7 in support of these contentions. On behalf of the respondent, Mr. Ogwal-Olwa submitted, and we agree, that it is within the discretion of a trial Judge to decide whether or not to admit a confession. The learned Principal State Attorney further submitted that P.W.7 recorded statement (exh. P2) in accordance with the Judge's rules and that evidence available shows that the second appellant voluntarily made the confession. That the trial Judge and the Court of Appeal rightly relied on the statement. We would point out that presently Magistrates record statements or confessions from accused or suspected persons by virtue of Section 24(1) (b) of Evidence Act and a Circular dated 2nd March 1973 which contains guidelines given by the Chief Justice to Magistrates to guide the Magistrates as to how to record such statements. The Chief Justice circular refers to S. 24(2) of the Evidence Act as amended by Decree 25 of 1971 which is now S. 24(1) (b).

At some point in her submissions, Mrs. Owor-Akorimo appeared to imply that exh. P2 was not a confession. For the explanation we have already given when we considered the confession of the first appellant to Ali, the medicine man, we are satisfied that exh. P2 is a confession by the second appellant that he participated in the murder of the deceased Mudhola. The Evidence Act does not define the term confession. We would state that subject to what we have already stated a confession is an admission of guilt made to another by a person charged with a crime. See: A Concise Law Dictionary. 5th Edition, by P.G. Osborn and see R. vs Ji-funga (supra) and R ... .vs. . . .Kituyan (supra) and Gopa s/o Gidamebanya & Others 1953) 20 E. A.C.A.318 at page 319 et seq.

In our view it does not matter that the second appellant never threw the grenade at the deceased persons. According to his statement, he had participated in discussions in Nairobi about the murder of Mudhola. He was detained to drive the first appellant to and from the scene of murder, knowing the mission of the first appellant. That is sufficient to show his admission of guilt of the offence charged and to render the statement a confession.

about the murder of Mud

As regards the first argument by learned Counsel for the appellant, we would refer to the provisions of 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 abetment of or attempt to commit the offence".

We think that by virtue of the provisions quoted above and as we consider that exh. P2 is a confession, the learned trial Judge and the Court of Appeal would have been justified in taking exh. P2 into account as evidence against the first appellant as well as against A2, the maker. Besides, as the Court of Appeal correctly held, even without taking exh. P2 into account, the trial Judge would have convicted the first appellant on the other available evidence such as exh. P 20 and the confession to Ali which was heard and proved by P.W.16 which is sufficient by itself. Thus the misdirection of the learned trial Judge that Andrew mentioned in exh. P2, is Androa, the first appellant, did not occasion injustice to the first appellant.

The learned Counsel for the appellants contended that neither the trial Judge nor the Court of Appeal cautioned themselves before they relied on the retracted confession (exh. P2). That there was no corroboration thereof. On the face of it, it would appear that the trial Judge did not warn herself before she acted on the confession of the second appellant to convict the second appellant. On reflection however, we think that the Judge was alive to the need for caution because of the following passage which appears at pages 11 and 12 of her judgment.

> "I warned the gentlemen assessors that it was their duty to decide on the probative value of the confession but that before deciding to base a conviction on it, they had to be fully satisfied that in all the circumstances of the case it was a true confession weighing all the circumstances under which it was made".

Clearly if she warned the assessors to act on the confession with care then she was alive to the need for care or caution.

Referring to the confession by A2, the learned Judge states this at page 13 of her judgment –

> "Regarding the circumstances under which he alleges it was made I assert with confidence no officer would have asked a prisoner to copy out a statement, over to him while he (officer) wrote out the same statement. It is absolute nonsense. I find the facts/circumstances proven complement the confession with perfect certainty".

It is not the use of the words "care", "caution" or "warn" which show that the Judge warned or cautioned herself. Care, caution or warning can be inferred from words used by, the Judge in her judgment. This is what the Court of Appeal refers to in Tuwamoi case (supra). At page 91^the Court of Appeal for East Africa stated –

> "We would summarise the position thus - a trial Court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution; and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true.
> The same standard of proof is required in all cases and usually a Court will only act on the confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the Court may act on a confession alone if it is fully- satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".

We think that the trial Judge was satisfied that the confession cannot but be true. The learned Justices took a similar view. Thus at page 10 of the judgment of the Court of Appeal it is there stated-

> "Given the wealth of the information contained in exh. P2, and the circumstances in which it was made, we are satisfied that the confession must be true".

Both the trial Judge and the Court of Appeal quoted at length portions of the statement showing details and steps taken by the group under whose instructions the appellants acted and the movements of A2

himself. The Court of Appeal did caution itself before accepting and confirming the convictions.

Ground seven fails. .

Ground eight of appeal complains that the learned Justices of Appeal erred in relying on compulsorily acquired, self-incriminating evidence against the two appellants contained in A2's (Kakooza's) Extra-Judicial statement contrary to paragraph (e) of Clause (3) and Clause (11) of Article 28 of the Constitution.

Mrs. Owor-Akorimo gave us written submissions and also amplified the same orally. The essence of her assertion is a repudiated or retracted confession can not be admitted in evidence against the maker at his trial at the instance of the prosecution. She relied on a number of cases decided by the Supreme Court of the United States of America. In particular she relied on the case of **Miranada vs. Arizona 384 U.S. 436 (1996)** There the Supreme Court of U.S.A. held

> "That the prosecution may not use statements whether exculpatory or inculpatory stemming from questioning initiated by law enforcement officers after a person has been taken into custody .....unless it demonstrates the use of procedural safeguards effective to secure the fifth Amendments privileged against self-incrimination.....
>
> Where an interrogation is conducted without the presence of an (Attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly, and intelligently waived his right to Counsel".

A perusal of the evidence of A2 does not suggest that P.W.7 forced A2 to make exh. P2. Indeed on his own evidence A2 was not tortured at the time he made the statement. He denies ever being before P.W.7 although he acknowledges writing exh. P2 or a similar document at Nagalama Post Office not in Kampala. Mr. Ogwal-Olwa argued that admission of a confession, as was done in the present case, did not amount to compelling A2 to give evidence.

The issue raised by Mrs. Owor-Akorimo is not without interest. However, as we pointed out to her during the hearing of this appeal, the provisions relied upon by learned Counsel were enacted in 1995 long after her client had made the confession in May 1993. In that regard no decision on this matter is really called for. Learned Counsel was unable to cite to us provisions in the 1967 Constitution which was in force in

1993 which provisions correspond to Article 28(3) (e) and 28(11) of the current Constitution. Besides, we think that the circular of the Chief Justice reproduced together with Section 24 of the Evidence Act contain necessary safeguards. Further in our view even if the 1995 Constitution were applicable, which is not the case, we think that since the confession was made before A2 was tried, the relevant provision would have been Article 23(3) of the 1995 Constitution which states that -

> "23 (3) A person arrested, restricted or detained shall be informed immediately, in the language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice".

The provisions of Article 28 relate to the right to a fair hearing. Thus Article 28(3)(e) reads -

> "28(3) Every person who is charged with a criminal offence shall -
>
> (e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State".

We would have to be persuaded with cogent reasons that the above provision require the State to provide free legal representation to any person suspected to have committed a criminal offence before that suspect is due for trial.

And clause 11 of article 28 states that-

> "11 - Where a person is being tried for a Criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person".

As we have already stated, the above provisions of Article 28(11) do not, in our considered opinion, apply to an accused or a suspect who is not yet due for trial. Further this ground was not raised at the trial nor in the Court of Appeal. Thus it contravened Rule 61(2) of the Rules of this Court. Sub-rule(2) reads -

> "(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a

2

> constitutional appeal, the points of fact or law or of mixed law and fact which are alleged to have been wrongly decided,
>
> and in the third appeals the matters of law of great public or general importance wrongly decided." (underlining supplied).

We understand the sub-rule to presuppose that an appeal to this Court springs from a matter convassed before and wrongly decided by the Courts below. We pointed this out to Mrs. Owor-Akorimo. She then attempted to seek leave of the Court for the point to be referred to the Constitutional Court belatedly. This application lacked merit. So we rejected it. Ground eight fails.

Ground nine of appeal as framed states:

> "that the learned Justices of Appeal erred in law and fact when they upheld the decision of the Trial Judge which was full of inconsistencies, discrepancies and contradictions thereby creating a reasonable doubt in favour of the appellants, thus occasioning a miscarriage of justice".

This ground was badly drafted. It is narrative and offends our Rule 61(2) (Supra). Be that as it may, we would observe that this ground formed the subject of Ground 4 in the memorandum of appeal lodged and argued in the Court of Appeal. Mr. Michael Akampurira, who respresented the appellants there abandoned that ground. At the hearing of this appeal we drew the attention of learned Counsel for the appellants to this anomaly. As we have already pointed out grounds of appeal are objections to the decision from which an appeal arises. It would clearly be unfair to criticise the Court of Appeal on the basis that that Court failed to consider inconsistencies, discrepancies and contradictions when such matters were abandoned and were not argued before nor drawn to the attention of the Court of Appeal. There was thus no sound reason for framing this ground.

Be that as it may, Mrs. Owor-Akorimo, contended that the trial judge and the Court of Appeal did not evaluate the contradictions, inconsistencies and discrepancies. She referred to the identification of Al whether he is Andrew or Androa and to the detention of A2 for three weeks before he appeared in Court. Counsel criticised the failure by the

prosecution to call Ali to testify against Al. She wondered why a Captain Kaaya was not called as a prosecution witness. Learned Counsel contended that if these matters had been evaluated by the two Courts the evaluation would have created doubt which should have been resolved in favour of the appellants. We have reluctantly agreed to consider these complaints. Mr. Ogwal-Olwa, quite correctly observed that these matters were not raised before the trial Judge and in the Court of Appeal. That even if they had been raised, the two courts would have rejected them because they were minor and did not affect the truthfulness of the prosecution witnesses.

Having perused the record before the trial Judge and the Court of Appeal we are persuaded by the arguments of the learned Principal State Attorney. We would point out that the two Courts in fact did consider the alleged inconsistencies regarding the person whom A2 conveyed in the car. Both Courts held that he was A1.

The delay of three weeks before A2 was charged in Court must be deplored and ought to be discouraged but we are satisfied that the delay for three weeks before A2 was charged in Court did not occasion a failure of justice in his case. A2 claimed he was cut on the ear while at Lugazi Police cell. The
doctor (P.W.5) who examined him never said he found a scar on the ear.

Ground 9 must fail.

The substance of ground one in the supplementary memorandum of appeal is that at the time when the second appellant committed the offence, he was under 18 years and therefore, not liable to the death sentence by virtue of Section 104(1) of the T.I.D., 1971. The second appellant and his sister Jane Nabakoza (D.W.4) tesitified that he was born in December 1975. Therefore, he was aged about 17 years when he committed the murders on 20th February 1993.

We would observe that there is unsatisfactory evidence in regard to proof or disproof of the age of A2. On 2nd Feb. 1996 a trial within a trial was held Dr. Barungi T. Kosi (P.W.4) tendered two Police Forms (24) bearing the signature of the late Dr. Samarere who had examined A2 on 7th May 1993 and wrote on the two forms, now exh. PI, and exh. P4, that A2 was aged 2 5 years. Dr. Barungi apparently orally and on oath mentioned that age to the trial Judge. The doctor was not cross-examined on it. When A2 gave evidence on Oath in the trial within a trial on 2nd February 19 9 6 he testified that he was aged 2 0 years on that day. He repeated this on 2nd April 1996 when he gave his defence on Oath. On both

occasions A2 was not cross-examined on his age. When his sister D.W.4 testified that A2 was aged 20 years, having been born during December 1975, she was also not challenged on this. Prosecution Counsel committed a blunder by not cross-examining A2 and D.W.4 on the age of A2.

The matter of age was not canvassed in the Courts below.

The learned trial Judge convicted the two appellants and proceeded to sentence the two to death without hearing allocutus. This contravened Section 93 of T.I.D.

Since there was conflict about the age of the 2nd appellant, Dr. Barungi or any other doctor could have been asked to examine the appellant and testify about the age. Or after the testimony of the appellant and his sister the trial Court should have ordered that the second appellant be medically examined to ascertain his age. In her judgment the trial did not determine A2's age. We have considered whether justice demands examination of the 2nd appellant. We hesitate to do so now. We think that in the circumstances ground one of the supplementary memorandum of Appeal should succeed.

Ground 2 in the same memorandum complains in effect that circumstantial evidence was insufficient to prove common intention.

Having considered the submissions of Counsel for the appellant and those of the Principal State Attorney, we are satisfied that the confessions of Al and A2 each show that they were engaged in the murder of the deceased Mudhola. Therefore, ground two must fail.

For the reasons which we have endeavoured to give the appeals against the convictions of both appellants must be and are hereby dismissed. The appeal against sentence of death passed against the first appellant is also dismissed. The appeal by A2 against the sentence of death succeeds. We order that A2 be detained in safe custody pending an order to be made under Section 104(1) of T.I.D. by the Minister. Before leaving this case we wish to correct a mistaken view. The Court of Appeal held and Mr. Ogwal-Olwa erroneously stated that the confession was recorded pursuant to the Evidence (Statements to Police Officers) Rules S.I 43-1) and the Judges Rules.

This error seems to be prevalent. We have recently pointed to this mistaken view in Supreme Court Criminal Appeal No. 16 of 1997 (Namulobi ...vs.. Uganda) (unreported) where we held that the Evidence (Statements to Police Officers) Rules were revoked when the old

Section 24 of the Evidence Act was repealed by Decree 25 of 1971. See also a similar view b y the East African Court of Appeal in Beronda vs. Uganda (1974)' E.A. 46. Moreover neither those revoked rules nor the Judges Rules apply in Uganda to statements recorded by Magistrates as was the case here. As we have pointed out Magistrates record these statements or confessions by virtue of the new Section 24(1) (b) of the Evidence Act introduced by the Evidence (Amendment) Act, 1985. Further on 2nd march 1973,S.W.W. Wambuzi, the Chief Justice issued to all Magistrates an administrative instruction reference C.J./c.b entitled "RECORDING OF EXTRA-JUDICIAL STATEMENTS" which circular was referred to approvingly by the East African Court of Appeal in the Beronda case (supra).

P.W.7 the magistrate who recorded A2's confession did not strictly follow all instructions contained in the circular. We have considered the circular and in agreement with the Judges of the East African Court of Appeal in Beronda case. We fully endorse the procedure set out by the learned Chief Justice. That procedure should be followed by Magistrates. We here set out the circular and trust that in future Magistrates will follow the same to avoid unnecessary objections and criticisms.

The circular reads –

"RECORDING OF EXTRA JUDICIAL STATEMENTS Section 24(2) of the Evidence Act provides:
"No confession made by any person whilst he is in the custody of a police officer shall be proved against any such person, unless it be made in the immediate presence of a Magistrate".

This section is designed to ensure that any statement made by a person in police custody is voluntary. If, therefore, such person is brought before a magistrate for the purpose of recording a statement from him the Magistrate must ensure that no force, threat, promise or any form of inducement is offered to or allowed to operate on the person to induce him to make a statement.

The following procedure shall be adopted:

(1) it must be remembered that the prisoner is not on trial. It follows that such statement must not be taken in any court as part of court proceedings.

(2) No police officer should be present in the chambers of Magistrate. The

police officer escorting the prisoner should leave after informing the Magistrate of the reason for taking the prisoner before him, that is, the offence with which he is charged or the offence he is suspected of having committed, as the case may be. The police officer should then wait outside the chambers out of sight.

(3) The Magistrate should inquire of the prisoner the language which he understands. If it is one which the Magistrate does not know he should send for an interpreter.

(4) The charge, if any, or the nature of the suspicion for which he has been arrested, shall then be explained to the prisoner.

(5) The prisoner should be asked if he wishes to say anything about the charge or the offence he is suspected to have committed, and should be told that HE IS FREE TO MAKE, OR NOT MAKE, ANY STATEMENT.

(6) The Magistrate must satisfy himself by all reasonably possible means that the statement about to be made to him is entirely voluntary. It must not be assumed that he is going to make a confession. The document containing the statement should be prefaced by a memorandum containing notes of the foregoing and the steps which the magistrate takes to satisfy himself that the statement is voluntary. This prefatory part will enable the magistrate to refresh his memory, in the event of his being called at the trial to prove the statement.

(7) It is advisable that a Magistrate who is about to take a statement should administer a caution the normal form:

"You need not say anything unless you wish but whatever you do say will be taken down and may be given in evidence at your trial".

(8) The person wishing to make a statement should not be asked whether he wishes to be sworn or affirmed; but if he requests the magistrate without suggestion from the Magistrate, to place him on oath or affirmation, this may be done but the prefatory memorandum must clearly state so.

(9) The statement should be recorded in the language which the prisoner chooses to speak. This may be done through an interpreter or the magistrate may himself, if he is fully conversant with the vernacular being used, record it in the same language. The prisoner is not to be cross-examined when he is making the statement. Any question put to the prisoner must be designed to keep the narrative clear, and the question so asked must be reflected in the statement. It must be understood that the role of the Magistrate simply is to record accurately the prisoner's story, if he chooses to make a statement.

(10) The vernacular statement should be read back to the prisoner incorporating any corrections he may wish to make.

(11) The prisoner should certify the correctness of the statement by signing or thumb-printing it. The Magistrate and the interpreter, if any, should counter-sign it. If the statement covers more than one sheet of paper all sheets should be so signed or thumb-printed by the prisoner.

(12) An English translation of the vernacular statement including the prefatory memorandum, should then be made by the magistrate or the interpreter, as the case may be.

(13) After the foregoing has been complied with the prisoner should be handed back to the police officer who has been waiting outside the Chambers.

(14) The originals of the statement - vernacular and its English translation - should also be handed over to the police.

(15) Section 24 speaks of "immediate presence of a magistrate". Any Magistrate is competent to take a statement in the manner aforesaid. It must be understood that the qualification of a Magistrate to take an extra-judicial statement is a personal one, and is not tied to his territorial jurisdiction.

(16) Whereas it is expected that the police will take prisoners before

~~a magistrate for this purpose during the usual working hours, he may nevertheless be called upon at any time to take such statements. Should this be after office hours the Magistrate should, move to his official chambers, or, alternatively, sit at any other private place (excluding the police premises) and, after procuring any -Civilian interpreter, should one be necessary, and taking note of his name, profession and address in the prefatory memorandum proceed to record the statement in accordance with the procedure set out above.~~

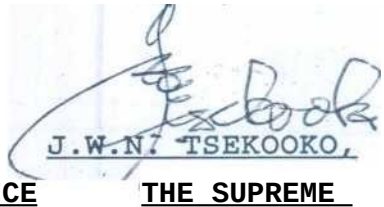
(17) ~~Care should be taken that as far as possible the magistrate who takes such a statement does not subsequently try the prisoner".~~

~~We suggest that pending the making of Rules by the Minister as required by s.24 (2) of the Evidence Act the Police should with necessary modifications follow these guidelines when recording statements from suspects.~~

Delivered at Mungo this 2nd day of October 1998.

A.H.O. ODER,

JUSTICE OF THE SUPREME COURT.



JUSTICE THE SUPREME COURT.

A.N. KAROKORA.

JUSTICE OF THE SUPREME COURT.

JUSTICE OF THE SUPREME COURT.

E.L.M. MUKASA-KIKONYOGO, JUSTICE OF THE SUPREME COURT.