THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CRIMINAL APPEAL NO. 44 OF 2001

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KATO, JJSC.)

1. **CPL KASIRYE HAMUZA)**
2. **PC MUSINGO PETER)**
3. **NURU KONDE WAISWA) :::::::::::::::::::: APPELLANTS**
4. **NDOLERIRE FRED)**
5. **SGT KULE DENNIS)**

VERSUS

UGANDA ::RESPONDENT

(Appeal from the Judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ, Okello and TwinomuJuni JJ.A) dated 28/8/2001 in Criminal Appeal No. 70 of 1999).

JUDGMENT OF THE COURT

This is a second appeal. The appellants were convicted *b*y the High Court on five counts of aggravated ro *b bery* contra*r*y to Sections 272 and 273 (2) of the Penal Code Act. The fifth appellant was, in addition, convicted of murder contrary to sections 183 and 184 of the Penal Code Act, in count one. They appealed to the Court of Appeal which allowed the appeal on count one as regards the fifth appellant and counts 3,4 and5 in respect of all the appellants. The appeal was

dismissed in respect of counts 2 and 6. The appeal before us now is in respect of those two counts.

The brief facts of the case as presented before the trial court and accepted by it are as follows:

The appellants planned to go and rob a coffee factory belonging to one Sentongo Salongo at Jinja. The fourth appellant Fred Ndoleire hired a car Reg. No. UBG 969 from a tours agent known as Equator Tours and Travel Company in Kampala for the purpose of accomplishing the plan. On 7/5/1996, Kasirye and Ndolerire, the first and fourth appellants respectively, left Kampala for Jinja, in the said vehicle which was driven by Hamuza Kasirye from Kampala to Jinja. On reaching Jinja the two went to the home of the third appellant, Nuru Konde Waiswa, where they were joined by the other appellants and obtained two pistols. The group then proceeded to the place of the intended robbery. On arrival at the factory Kasirye was recognised by the workers who greeted him as a person whom they knew before. Thereupon Kasirye told his fellow robbery conspirators that the mission was impossible. The planned robbery in that place was abandoned. The team decided to go and carry out robberies elsewhere to avoid going back empty-handed. In order to execute the new plan, the group, which at that time did not include Nuru Konde Waiswa and Fred Ndolerire, proceeded to Kamuli where they committed a number of robberies and one murder. The appellants were later on arrested at different places and times, Kasirye, Musingo and Ndolerire made charge and caution statements to the police, but the trial Judge rejected them; he however admitted in evidence the statements made by the same appellants to the magistrate grade I, Mr. Auguandia Godfrey Opifen, (PW7).

At the trial, all the appellants denied ever having committed the offences. Each of them gave different defences. Kaisrye admitted having been present when the offences were being committed but he pleaded that he was acting under compulsion. Musingo, Nuru Konde Waiswa and Sgt. Denis Kule pleaded alibi. Fred Ndolerire, while admitting that he hired the vehicle from Kampala to Jinja, he

denied that it was for the purpose of committing any offence. It was for the purpose of collecting his de *b*ts.

The learned trial judge rejected all the defences and convicted the appellants and sentenced each of them to death. Hence this appeal.

The first appellant Kasirye Hamuza (A1) framed two grounds in support of his appeal. They are: -

1. **The learned Justices of Appeal erred in law and fact when they upheld the trial Court's finding that the doctrine of common intention applied to the first appellant.**

2. **The learned *J*ustices of appeal erred in law and fact when they upheld the trial court's dismissal of the first appellant's defence of compulsion.**

Mr. Steven Mu *b*iru who appeared for this appellant, argued the two grounds separately. On the first ground he su *b*mitted that the Justices of Appeal were wrong when they held that the appellant shared a common intention with the other appellants and that the appellant's counsel conceded to that fact when there was no evidence to support that finding. According to him, the appellant's counsel at the trial conceded only to what happened at the factory where the original plan a *b*orted *b*ut not what took place later. Mr. Mu *b*iru further su *b*mitted that although the appellant took part in the hiring of the vehicle he did not know that those who hired it were going to use it for stealing.

Mr. Michael Wamase *b*u Assistant D.P.P, who appeared for the respondent, conceded that the Justices of Appeal were not correct when they held that Mr. Muguluma had conceded *b*efore them that the appellant had willingly participated in the commission of the offences.

This is what their Lordships said on this point:

> **"Mr. Edward Muguluma Damulira learned counsel for the first appellant conceded that from the on set up to the site of the planned robbery which aborted the appellant was part and parcel of the plan to rob".**

With due respect to their Lordships, this passage does not agree with what Mr. Muguluma said in that court according to the availa *b*le record. The following statement is what Mr. Muguluma said: -

> **"Mr. Mugulama for** A1 **states it is our submission that** A1 **had nothing to do with the plan to rob Haji Sentongo of Jinja.** A1 **was a mere hire driver he was hired on 7/5/96 by Ndolerire....."**

We agree with counsel on *b*oth sides that the holding *b*y the Court of Appeal a *b*out the purported concession *b*y Mr. Muguluma concerning appellant's participation in the commission of the offences was not *b*ased on what was on the record. Mr. Muguluma only conceded to the appellant having *b*een hired to driv*e* a v*e*hicl*e* from Kampala to Jinja.

On the issu*e* of common intention, Mr. Wamase *b*u su *b*mitted that the appellant was not a mere innocent driver who did not know for what the vehicle had *b*een hired. According to him the appellant must have known that the vehicle was to *b*e used in the ro *b b*ery, as he was instrumental in getting the vehicle. He deceived the owner of the vehicle that it was to *b*e used for campaigning.

As far as this particular appellant was concerned, the issue of common intention was not raised in th*e* Court of App*e*al, so it was n*ev*er consid*er*ed. Th*e* court d*e*alt with th*e* issu*e* only in r*esp*ct to Nuru Kond*e* whom th*e* court found to

have had common intention. Since the question of common intention is a matter of mixed law and fact, we have to consider it.

The appellant's own testimony shows that the appellant drove the vehicle from Kampala up to the point when it got involved in an accident after the robberies had been committed. He raised the issue of compulsion to which we shall return shortly. After considering all the available evidence we are satisfied that the appellant had a common intention with the other appellants to commit the robberies, which are the subject of this appeal. We are of the view that if this point had been raised in the Court of Appeal, in view of the available evidence, that court would have come to the same conclusion that there was common intention between the appellant and the other appellants. Ground 1 of the appeal must fail.

On the second ground of appeal, Mr. Mubiru submitted that their Lordships were wrong in holding that the appellant was not acting under compulsion at the time the offences were being committed. He attacked the finding of the court that the appellant had said that he had been recognized at the factory and that he and others had decided to go to Kamuli to rob. In his view the evidence in support of that finding should not have been admitted as it was hearsay from PW3 who was not present at the scene. According to him the appellant was not a willing participant, he was forced to do whatever he did by the armed robbers. Learned counsel relied on the authority of: **Shepherd v R (1988) 86 Cr. App. R. 47.**

Mr. Wamasebu argued that the appellant was not acting under any duress as he even went to check on his sister during the journey for commission of the robberies. According to him, if the appellant was under duress he could not have failed to mention that fact in his confession which he made before the magistrate. He contended that the defence of compulsion was not available to the appellant.

Section 16 of the Penal Code Act sets out circumstances under which an accused person can rely on the defence of compulsion.

The section reads:

" A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence."

In the instant case, the defence was raised at the trial and before the Court of Appeal. Both courts considered the defence and rightly, in our view, rejected it. The assessors also rejected it. The conduct of the appellant before and after the robberies cannot be said to be that of a person who was acting under compulsion. Although the appellant in his statement to the Magistrate (PW7) kept on using expressions like "I was directed" or "I was ordered" that does not necessarily mean he was not a willing participant or he was acting under compulsion. **The Shepherd** case (Supra), which was cited to us by the appellant's counsel, is distinguishable from the present case. Firstly, in that case the question of compulsion was not put to the jury, unlike in the present case where the learned trial judge clearly summed up to the assessors on the issue of compulsion. Secondly, in that case one of the persons, whom the appellant alleged to have forced him to participate in the theft, actually assaulted the appellant at the court premises when the hearing of the case was going on, which was not the case in the present case. First appellant's second ground of appeal must fail.

The second appellant, Musingo Peter (A2) raised 3 grounds of appeal but the second ground was abandoned. The remaining two grounds, which were argued before us, are:

1. **That the Honourable Justices erred in law and fact when they relied on extra-judicial confessions to confirm the conviction whereas such extra-judicial confessions were not corroborated.**

2**.....**

3. **That the Honourable Justices erred in law and fact when they relied on common intention to confirm the conviction whereas the principles of common intention were not proved by the prosecution.**

Ms. Diana Musoke, who appeared for this appellant, argued the two grounds separately. On the first ground she submitted that the Court of Appeal erred when it relied on the confession of Ndolerire (A4) to convict the second appellant. According to her, that confession did not show that the appellant was in any way involved in the commission of the offences. In her view, the confession only showed that the appellant moved with those people. On the second ground she submitted that the appellant did not have any common intention with those who were involved in the commission **of** the offences nor did he take part in the robberies.

On his part, Mr. Wamasebu argued that the confession made by Ndolerire against the appellant was corroborated by the evidence of Fabiano Byantalo (PW1) and that of Kiyimba (PW2). In his view there was overwhelming evidence against the appellant who had a common intention with the other robbers.

We shall consider the two grounds together. Not only did the second appellant have common intention with the other robbers but he actively participated in the robberies. This appellant was identified at the scene of crime by Fabiano Byantalo (PW1), Robert Kiyimba (PW2) and Ngobi Kasiba Godfrey (PW5). The Court of appeal, in our view, properly evaluated the evidence incriminating the second appellant as the following passage shows:

"In the instant case PW1 and PW2 identified appellant No.2 at different scenes of crime on the same day during a broad daytime. PW1 described the appellant as the person who had a pistol and was the very person who ordered the driver to get out of the motor vehicle. He was the person who ordered the witness to remove his wristwatch. He was also the person who took from the witness's pocket cash of Shs. 65,000/=. PW1 stated that the operation lasted for 3 minutes.

PW2's testimony also corroborated that of PW1 that A2 was the person who had a pistol. PW2 stated that he identified this appellant better when the appellant was moving around some 5 to 6 meters from the vehicle. It was about 5 p.m. and the operation lasted 5 minutes. He had known the appellant before because he had trained with him as policemen at Masindi Police Training School. After the training, he lived with him at Naguru Police barracks for 1 1/2 years before they again returned for further training together. From the above evidence, we are satisfied that the identification of appellant No 2 by PW1 and PW2 could not have been mistaken. The conditions under which he was identified favoured correct identification"

With due respect to the learned counsel for the appellant, we do not agree that the appellant's conviction was based on the confession of the fourth appellant. The conviction was based on the identification evidence as indicated above. We, however, agree with her when she says that Fred Ndolerire does not specifically mention the name of the appellant as Peter Musango. Be that as it may, Peter Musingo was properly identified at the scene of crime by PW1 and PW2. He could have been convicted even if the confession of Ndolerire was to be ignored. We find no merit in the two grounds of appeal, which must fail.

That leads us to the case of the third appellant, Nuru Konde Waiswa (A3). The appellant lodged 6 grounds of appeal but the second ground was abandoned. The remaining 5 grounds which were argued are:

1. **That the learned *J*ustices of Appeal erred in law and in fact when they upheld the finding that the Appellant No.3 housed the robbers and issued them with guns which were kept at his place for operation and as a result came to a wrong decision.**

2.....

3.That the learned *J*ustices of appeal erred in law and in fact when they upheld the finding that there was common intention.

4.That the learned *J*ustices of Appeal erred in law and in fact when they held that the extra-judicial statement of Ndolerire was rightly used against his co-accused and as a result arrived at a wrong decision.

5.The learned *J*ustices of Appeal erred in law and in fact when they failed to find in favour of the appellant the contradictions in the prosecution case.

6.That the learned *J*ustices of Appeal failed in law and in fact to evaluate evidence as a whole.

The gist of Mr. Muguluma's su *b*mission was that their Lordships in the Court of Appeal were wrong to *b*ase their decision on th*e* confession of Ndol*e*rire who was an accomplic*e* with the third appellant. H*e* cont*e*nd*e*d that Ndol*e*rire in his confession did not say that the guns were supplied *b*y the third appellant. H*e* also argu*e*d that sinc*e* Ndol*e*rir*e* did not sp*e*nd a night at the home of the appellant he could not tell who slept there.

Mr. Wamase *b*u conceded that there was no evidenc*e* to corro *b*orate Ndolerir*e*'s confession against the appellant who was an accomplice. In his view

the evidence which would have corroborated the confession was found to be inadmissible.

The case against this particular appellant was that he accommodated the robbers a night before the robberies and that on the fateful day he provided them with the guns, which were used in the robberies. There is no doubt that the conviction of this appellant was substantially based on the confessional statement made by his co-accused. Section 28 of the Evidence Act makes it lawful to take into account co-accused's confession incriminating a fellow co-accused with whom he/she is being tried together. The appellant in this case is not only a co-accused but an accomplice with the fourth appellant. The law relating to the evidence of an accomplice is contained in section 131 of the Evidence Act which reads thus:

> **"131. An accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".**

Although the law as stated above does not require corroboration in support of accomplice's evidence, a practice has developed in our courts requiring corroboration or in its absence a warning by the judge to himself and assessors on the danger of basing a conviction on uncorroborated evidence of an accomplice. (S**ee: Fabiano Obel & Others** -V- U**ganda (1965) EA 622).** The learned trial judge was alive to this practice, for in his judgment, he said:

> **"Haji also told PW6** S**gt Walimbwa that it was Mukonjo A6 who shot Mudooba. This would also be accomplice evidence and the law on accomplice evidence is clear.** S**uch evidence should not be used as a basis for conviction. Rather it lends assurance to other evidence. It would therefore require corroboration by some other independent evidence".**

In his summing up notes to the assessors he said:-**"<u>Accomplice Evidence</u>:**

Court not to rely on this as a basis for a conviction. Usually desirable to get corroboration from some independent evidence".

The learned trial Judge however, did not correctly apply the above principle to the facts relating to the case of the third appellant. The assessors were not satisfied with the evidence against this appellant so they advised that he be acquitted.

The Court of Appeal glossed over the issue and concluded that the statement of co-accused Ndolerire could be used to convict the appellant. Had both courts isolated the position of the appellant from that of the other appellants, they (courts) would have found that there was no independent evidence to corroborate Ndolerire's confession against this appellant. We agree with Mr. Muguluma's contention that in his confession Ndolerire did not specifically say that the appellant had given the guns to the robbers, he simply said:

"That is all. Another point probably is that these guns which were used were picked. I believe, from Haji's place in Jinja".

That statement clearly shows that Ndolerire was not sure that the guns were picked from the appellant's home.

We agree with the submissions of both counsel that the statement of Ndolerire was not sufficiently corroborated to warrant the third appellant's conviction. The issue of common intention could only be considered against him if there was some other evidence incriminating the appellant in the commission of the robberies. The appellant's grounds 1,3 and 4 of appeal must succeed.

In view of our decision on grounds 1, 3 and 4 we see no point in considering grounds 5 and 6.

There are four grounds of appeal in respect of the fourth appellant, Fred Ndolerire, (A4)|They are: -

1. That the learned Justices of the Court of Appeal erred in law in upholding the finding of the learned trial judge that the extra judicial statement made by the 4th Appellant before the Magistrate was voluntary.

2. That the learned Justices of the Court of Appeal erred in law and on the facts in holding that the extra judicial statement made by the 4th Appellant was a full confession of the offences indicted on the 2nd and 6th counts and that the said extra judicial statement was sufficient to support the conviction of the 4th appellant of the offences of aggravated robbery indicted on the 2nd and 6th counts.

3. That the learned Justices of Appeal erred in law and on the facts in upholding the finding of the trial judge that the 4th appellant had shared a common intention with his co accused to travel from Jinja to Kamuli and commit the offences of robbery with aggravation indicted on the 2nd and 6th counts.

4. That the above errors occasioned a miscarriage of justice to the Appellants.

Mr. Emesu, who represented the appellant in this appeal, argued the grounds generally. He submitted that the trial within trial was not conducted properly as far as his client was concerned. According to him that trial was in respect of A1 and A7 therefore it was wrong for the trial judge to hold that the trial within trial had proved that the appellant had made his statement voluntarily. In his view that trial was held prematurely as the appellant's statement had not yet been tendered for consideration by the court. He further contended that their Lordships were

wrong to hold that the appellant's statement was a full confession, because the confession was in respect of an offence which was not committed, on this point he cited: **R V Mali Kiiza s/o Lusota (1941) 8 EACA 25.** In his view, the appellant's statement was not relevant to what happened in Kamuli after the original plan at Jinja had aborted. According to the counsel, the circumstantial evidence concerning the hiring of the vehicle by the appellant was not enough to warrant his conviction, as there was no common intention in respect of what happened at Kamuli.

Mr. Wamasebu conceded that there was an irregularity in the way the trial judge handled the trial within trial concerning this appellant. He, however, argued that the irregularity had been cured by the appellant having been given a chance to testify in the trial within trial. He contended that the confession was voluntarily obtained as the magistrate who wrote the confession testified that there were no threats at the time the confession was being made. Mr. Wamasebu, further argued that the confession was not confined only to what happened at Jinja but was extended to Kamuli under the doctrine of **"Transferred intention".** As the appellant facilitated the robbers with transport and fuel and the robberies were actually committed, he had common intention to commit the robberies.

The record shows that the first complaint by Mr. Emesu was not raised in the Court of Appeal. Ordinarily we would not have considered that point but in interests of justice we have decided to consider it.

As rightly conceded by Mr. Wamasebu, the manner in which the trial within trial was conducted in respect of the fourth appellant was irregular. It was not proper for the trial Judge to proceed with the trial within trial in respect of this appellant when the ground for such a trial had not been laid. The proper procedure to be followed was for the prosecution to call the person who recorded the confession to testify about it and if the defence objected to the admissibility

of that confession then a trial within trial would have been conducted. We are, however, of the view that the irregularity did not cause any miscarriage of justice as the appellant in fact testified in the trial within trial proceedings. His active participation in the proceedings cured the procedural irregularity.

On the issue of the appellant's confession not having been voluntary, we are satisfied that the Court of Appeal was justified in holding that the confession was voluntarily obtained. Their Lordships finding, with which we agree, was as follows: -

> **"Clearly, there was no way the appellant could have seen a policeman standing outside the Magistrate's chambers pointing a gun at the appellant while his statement was being recorded. That claim cannot be true. As for the alleged earlier threats, we think that, the caution administered to the appellant by the Magistrate before recording the appellant's statement effectively removed them. We are, therefore, satisfied that the extra-judicial statement was voluntary and was rightly admitted in evidence."**

With due respect to Mr. Emesu, we do not agree with his contention that the appellant's confession was irrelevant to what happened in Kamuli and that he had no common intention with those who went to robbery there. The purpose of hiring the vehicle was to use it for robbery, it is immaterial where that robbery was eventually committed. The appellant had a common intention with that group which went to Kamuli with the vehicle hired by him, although he remained in Jinja. According to his evidence in court and that of the first appellant, Hamuza Kasirye, the appellant refueled the vehicle while in Jinja; his explanation that the fuel was intended to take the vehicle back to Kampala cannot be true in view of what happened. The Court of Appeal, correctly in our view, held that the appellant was criminally liable under the doctrine of common intention. We find no merit in the grounds of appeal raised by the appellant. They must fail.

The fifth and last appellant Sgt. Kule Denis (A5) presented four grounds of appeal: -

1. **That the learned *J*ustices of appeal erred in law and fact in finding that the accomplice evidence of A1 put the appellant at the scenes of crime**

2. **That the learned *J*ustices of Appeal erred in law and fact in upholding the identification evidence of PW1 and PW2 as a basis for conviction.**

3. **That the learned *J*ustices of Appeal erred in law and fact in rejecting the Appellant's defence of alibi.**

4. **That the learned *J*ustices of Appeal erred in law and fact in confirming the conviction of the Appellant without a thorough re-evaluation of the evidence on record.**

Mr. Kunya who represented the appellant argued the four grounds separately. On the first ground he su *b*mitted that the Court of Appeal should not have *b*ased the appellant's conviction on the evidence of the first appellant who was an accomplice and who had a reason for implicating the fifth appellant and that reason was not considered *b*y the two courts *b*elow.

On the second ground he argued that the evidence of PW1 and PW2 was not credi *b*le, as the two witnesses did not know the appellant *b*efore and conditions favouring correct identification did not exist. As for the third ground the learned counsel contended that the Court of Appeal and the trial court did not consider the appellant's defence of ali *b*i, had that defence *b*een considered a dou *b*t would have *b*een raised in favour of the appellant.

Regarding the fourth and last ground, the counsel submitted that there were points, which were raised at the trial but were never considered by the court. He gave as an example, the manner in which the appellant was arrested at Kirinya prison where he had been detained for a different offence of trading without a licence.

On his part, Mr. Wamasebu, submitted that there was overwhelming evidence against the appellant. That evidence was to be found in the testimonies of PW1 and PW2 and the confessions of A1 and A4. He contended that conditions for correct identification of the appellant existed.

In our view, the first three grounds of appeal were ably handled by the Court of Appeal as follows: -

> **"The main complaint in grounds 3 and 4 was that the trial Judge accepted wholesale the prosecution case and rejected the appellant's alibi without giving it judicious consideration. We find no merit in this complaint. The accomplice evidence of A1 put the appellant at the scene of crime. That evidence was amply corroborated by clear evidence of identification by PW1 and PW2. as seen above the evidence of identification was thorough. The witnesses described clearly the parts played by the appellant in the commission of the offence. That ruled out the alibi put by the appellant"**

In our opinion the Court of Appeal was justified in reaching the above decision. The appellant's conviction was not based on the evidence of the first appellant alone but also the evidence of PW1 and Pw2 who saw the appellant at the scene of crime. Even if the evidence of the first appellant were to be ignored,still the fifth appellant would have been convicted on the evidence of PW1 and PW2. That disposes of grounds 1, 2 and 3 raised by the appellant's counsel. The three grounds must fail.

As for the fourth and last ground of appeal where the counsel complained that the court did not consider the manner in which the appellant was arrested, we

would like to say that the point was not relevant to the outcome of this case. The court having rejected appellant's defence of ali bi, it is immaterial whether the appellant was arrested while at Kirinya Prison **or** somewhere else. The appellant's story that on 7/5/1996 he was in Kasese where he had gone to buy some clothes was, in our view, rightly rejected by the trial court and the Court of Appeal which believed the evidence of prosecution witnesses (PW1 and PW2) plus the evidence of the first appellant who saw the appellant committing the offences. The fourth ground of appeal must also fail.

In conclusion, we find no merit in the appeals of Cpl Kasirye Hamuza (A1), P.C. Musango Peter (A2), Ndolerire Fred (A4) and Sgt Kule Dennis (A5) Their appeals are accordingly dismissed.

We have, however, found merit in the appeal of Nuru Kondе Waiswa (A3). His appeal is allowed. The convictions on both counts are quashed and the sentence imposed upon him is set aside. Unless he is being held in Prison for some other lawful purpose, he is to be set free forthwith.

Dated at Mengo this 18th day of May 2004.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J. W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

C.M. KATO

JUSTICE OF THE SUPREME COURT