THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J, TSEKOOKO, MULENGA, KANYEIHAMBA AND KATUREEBE, J.J.S.C.)

CRIMINAL APPEAL NO. 20 OF 2005

B E T W E E N

AREET SAM :::
APPELLANT

A N D

UGANDA :::
RESPONDENT

[Appeal arising from the judgment and decision of the Court of Appeal at Kampala (Okello, Byamugisha and Kavuma, J.J.A), dated 5th March, 2004 in Criminal Appeal No.11 of 1998]

JUDGMENT OF THE COURT

The appellant together with one David Omujal were indicted, tried and convicted by the High Court (Arach-Amoko, J), at Soroti, of murder contrary to Sections 183 and 184 of the Penal Code and sentenced to death. They appealed to the Court of Appeal against both conviction and sentence. Before

the hearing of their appeal, David Omujal died in prison custody and his appeal abated. The learned Justices of Appeal heard the appeal of the present appellant which they dismissed. He has now appealed to this court. There is only one ground of appeal framed as follows:

> **“1. That the learned Justices of Appeal grossly erred in law and fact when having found that the confession was inadmissible, failed to reevaluate the evidence before upholding the conviction”.**

Counsel for the appellant, M/S Omonding, Ojakol and Okallany and for the appellant, Mr. Michael Wamasebu, Assistant Director of Public Prosecutions filed written submissions.

The facts of the case as summarized in the judgment of the Court of Appeal are as follows:
The deceased, Raymond Kwapi and his wife, Demetria Akiteng (PW1) were asleep in their house at Agurut village in Nyero Sub-county, Kumi District when around 9p.m they were attacked by assailants. The assailants fired gunshots from outside the house and when the deceased got up to investigate the incident, he was hit by the bullets through the closed door and died instantly.

The prosecution adduced evidence to show that two of the attackers were the appellant, Areet Sam and one Omujal David. Omujal was identified by Opade John Charles, the son of the deceased and Charles was also able to identify Omujal because he, Charles lived in a hut situated some 10 – 15 metres away from his parent's house and he could clearly see that the appellant was wearing a short sleeved white shirt and black trousers. The appellant had entered the house of the deceased after the shooting and was clearly identified by PW1, because he, the appellant was carrying a grass torch by which he could be clearly seen. PW2 had heard the attackers speaking in Kiswahili and when he peeped through a hole of his door, he first saw and identified Omujal as Omujal moved around the deceased's compound carrying a stick and actually walked to their kitchen. He could also recognize Omujal because he knew him as a person from his mother's village and as the appellant and Omujal walked passed his house at some five to six metres distance.

After their arrest and police investigations, Omujal made a confession whose voluntary nature and truthfulness were believed by the learned trial judge after conducting a trial within a trial and it was admitted in evidence. On appeal, the Court of Appeal held, rightly in our opinion, that the confession had been improperly obtained by the police and

therefore wrongly admitted in evidence by the trial court. It could therefore not be relied upon to convict the appellant.

It is on this basis that counsel for the appellant submitted before us that without the confession, the Court of Appeal erred in its subsequent finding that the appellant was guilty of murder. It was counsel's contention that having found the confession inadmissible, the learned Justices of Appeal should have satisfied themselves that there was ample and independent evidence on which the appellant could be convicted of murder. In counsel's opinion, this, the learned Justices of Appeal failed to do.

Counsel for the appellant was particularly critical of the findings of the Justices of Appeal when they stated that;

> *"The success of ground 2 does not alter the conclusion of the trial judge as she did not base the appellants' conviction solely on his confession. According to her, the confession corroborates the evidence of identification by PW1 and PW2."*

Counsel contends that the learned Justices of Appeal merely adopted the findings of the trial judge without themselves considering all the material facts in the appeal and coming to their own conclusions on them as a first appellate court. Counsel cited a number of authorities in support of their submissions including **Sirari Kisembo v. Uganda,** Crim.

Appeal No. 13 of 1998 (S.C), (unreported) and **Walugembe Henry and 2 Others v. Uganda,** Crim. Appeal No. 39 of 2003.

For the respondent, Mr. Wamasebu supported the conviction and the decisions of both the High Court and the Court of Appeal. He contended that the two courts below properly evaluated the evidence and applied the law to the facts of the case. He further contended that the way the sole ground of appeal is worded indicates that the appellant is only challenging the findings on facts of the two courts below. In counsel's view, the challenge is not well founded. Counsel contended that this court has held in several cases that save in exceptional circumstances, it will not be required to reevaluate the evidence as if it were a first appellate court. In support of his submissions, counsel for the respondent cited this court's decision in **Kifamunte Henry v. Uganda,** Crim. Appeal No. 10 of 1997 which counsel regards as being at all fours with the present appeal and **R. Mohammed Ali Hasham v. R,** (1941) EAC93 and **R v. Hassan Bin Said** (1942) EAC61.

In our view, counsel for the appellant has raised a pertinent issue with regard to a confession which was part of the evidence upon which the learned trial judge justified the conviction of the appellant and his co-accused. We also agree with counsel for the respondent that it is trite law that as a

second appellate court we are not expected to reevaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or reevaluate the evidence or where they are proved manifestly wrong on findings of fact, this court is obliged to do so and ensure that justice is properly and truly served. In our opinion, the only question to answer is whether or not there was other ample evidence to support the appellant's conviction without Omujal's confession being admitted.

We believe that there is ample evidence to show conclusively that both the appellant and his co-accused were at the scene of the murder during that fatal shooting of the deceased. The findings of the learned trial judge on this matter are vividly accurate. In her detailed judgment, she observes;

> *" As regards the crucial question whether it was the accused persons who caused the death of the deceased the prosecution contended that it was the accused persons in concert with others not before court, who caused the death of the deceased. In order to prove this contention, the prosecution relied on the evidence of two identifying witnesses, namely Demetria Akiteng, wife of the deceased (PW1) and Opado John Charles, the son of the deceased (PW2). The prosecution also relied*

on the evidence of Ochom John, an LDU (PW3) and Ilakut Steven, an LC Official (PW4)…. "

We are of the view however, that the Court of Appeal did not fully evaluate all the material evidence, even though we are satisfied that the learned trial judge did so adequately.

Thus, in considering the rest of the evidence, the learned trial judge went to great lengths to evaluate all the facts and circumstances surrounding the death of the deceased. Her detailed analysis of the events in the night of the murder leaves no room for doubt that it was the appellant and his accomplices who participated in and committed the murder of the deceased. Correctly, the learned trial judge narrates what occurred at the scene of the murder in this manner:

"All along, PW1 was lying on the bed and watching what was happening at the door. One of the attackers picked some grass, lit it and entered the house. After confirming that the deceased was dead, he came to the bed where PW1 was lying. She saw him and recognized him as Areet Sam (A1) using the light from the grass torch which he was holding in his hands. The light from the grass torch was bright. So PW1 knew A1 before. A1 is her brother-in-law and a villagemate. They even used to share drinks. PW1 also pointed A1 out in court. She

further testified that after confirming that the deceased was actually dead, A1 dragged her from the bed, took her outside the house and beat her until she fell unconscious".

In the trial court, the appellant was described as A1 while his co-accused was described as A2. Later, the trial judge described how PW2 recognised Omujal David (A2) who was moving around in the compound holding a stick. PW2 also knew A2 as a person who came from the same village as his own (PW2)'s mother. He recognised Omujal properly and would not have mistaken him for anyone else. PW2 also recognised the appellant as he walked away from the house of the deceased. Both the appellant and Omujal walked past A1's house within a distance of not more than 5 to 6 metres. He was able to identify them by the bright moonlight that shone that night. The two spent some fifteen minutes in the compound. Both PW1 and Pw2 testified that there was no grudge between them and the accused persons. PW2 did not see the grass torch light carried by the appellant during the commission of the murder at night but in the morning he saw ashes near the body of the deceased thereby corroborating the evidence of PW1. Both witnesses were able to accurately describe the clothes worn by the appellant and Omujal.

The trial judge correctly and adequately in our opinion, considered and disposed of the defences of *alibi* advanced by

or on behalf of the accused persons. The trial judge relied on the decisions in the cases of **Uganda v. Sebyala (1969),** E.A.204, **Raphael Aliphonse v. R** (1973) E.A 473, and **Raphael Kabanda v. Uganda** (1976) HCB.113 which predate our decisions in **Kifamunte** *(Supra*), **Bogere Charles v. Uganda**, Crim. Appeal No. 1 of 1997 (S.C) and similar cases nevertheless her findings and observations are in compliance with the principles we pronounced in those cases.

The destruction of the defence of *alibi* proved the appellant and his deceased co-defendant to be liars. The eye witnesses squarely placed both at the scene of the crime, we are satisfied that while we accept and agree with the learned Justices of Appeal that the confessional statement *per se* was inadmissible, there is ample evidence to justify the conviction of the appellant.

In our view, the trial judge was correct to convict the appellant notwithstanding the inadmissibility of the confession of Omujal. Consequently, the only ground of appeal must fail. We find no merit in this appeal. It is accordingly dismissed. With regard to sentence, Constitutional Appeal No.3 of 2006, **Attorney General v. S. Kigula and 417 Others** which concerns capital punishment is still pending before this court. We therefore exercise our discretion under Article 22 of the Constitution and postpone

the consideration of the sentence until after determination of the said appeal.

Dated at Mengo this 10th day of July 2007

B.J. ODOKI
CHIEF JUSTICE

J.N.W TSEKOOKO
JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

B. KATUREEBE
JUSTICE OF THE SUPREME COURT