THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, MULENGA, KANYEIHAMBA AND KATUREEBE, JJSC)

CRIMINAL APPEAL NO. 2 OF 2005

BETWEEN

1. **BAGUMA EVANS**
2. **KATUSHABE CHARITY** } **:::::::::::: APPELLANTS**
3. **BYARUGABA EMMANUEL**

VERSUS

UGANDA ::

RESPONDENT

(Appeal from the decision of the Court of Appeal, at Kampala [Mpagi-Bahigeine, Engwau and Twinomujuni, JJA.] dated 2nd March, 2005 in Criminal Appeal No. 2 of 2005)

JUDGMENT OF THE COURT

Baguma Evans (A1), Katushabe Charity (A2) and Byarugaba Emmanuel (A3) were tried and convicted by the High Court on two counts of murder and were sentenced to death on the first count. Sentence on 2nd count was deferred. Their appeal to the

Court of Appeal was dismissed. They have now appealed to this Court.

There is some confusion about the name, or description, of the 3rd appellant. Although in the indictment and in the High Court he is described as Byarugaba, his advocate in the Court of Appeal described him in the memorandum of appeal as Byaruhanga which name was adopted in that Court's judgment. This is also reflected in the memorandum of appeal to this Court. Similarly written submissions misdescribe him as Byaruhanga. In this judgment we revert to the name of Byarugaba Emmanuel (A3).

We summarise the facts first. Apparently there had been a land dispute between one Charles Karambuzzi (a father to A2) and Onesmus Twebaze (the 1st deceased) and Karambuzi lost the land dispute in court. There was a house belonging to the 1st deceased on the disputed land. In early January, 2000, the first deceased got court orders to enforce the Court decision by evicting Karambuzi from the house. Court brokers were assisted by policemen and local askaris to evict Karambuzi. During the eviction process, Karambuzi together with the three appellants unsuccessfully resisted. Indeed the Karambuzi group was subdued and Karambuzi was arrested and detained because of his resistance to execution. There and then, according to Rukundo Hadad (PW6), A2 and A3 uttered death threats against the first deceased. Thereafter, PW6 used to see the three appellants move about in the area together. He also learnt that the three planned to kill him and Twebaze. They both reported the matter to Kambuga Police who carried out some investigations. Before

30th January, 2000, A2 was seen moving around with A1 an army man. On the 30th January, 2000, the three appellants were seen at least thrice moving together near the home of the 1st deceased. Later in the evening (about 8:30pm) the 1st deceased was outside his residence while his wife Ngazare Paragia (2nd deceased) and their daughters Aturinda Mercy (PW7) and Atukunda Anita were inside their residence. At that time as Twebaze was about to enter into the house, and Anita was proceeding to open the door for him, the 1st appellant threw a hand grenade at him. The hand grenade exploded injuring the said Anita and killing the 2nd deceased, and it seriously injured the 1st deceased. Very soon thereafter A2 and A3 appeared at the scene and asked PW7 and Anita who was in agony as to what had happened.

According to PW7, *"following the blast the first people to our home were Katushabe (A2) and Emmanuel (A3). They asked us what had happened. We told them we had been killed. They laughed and said can you also be killed? They then went away laughing"*. After they left, other people came. The 1st deceased was taken to hospital where he died later. As a result the 2nd and 3rd appellants were arrested in connection with the murder of the deceased persons. Because of information given by Rukundo Hadad (PW6) and Aturinda Mercy (PW7), a hunt for A1 was mounted and two days later he was arrested at a road block while he was travelling to join his army unit. After his arrest, he made a charge and caution statement confessing his participation in the

commission of the crime to a magistrate, Mr. Charles Yeteyise, (PW5).

At the trial, the prosecution called a number of witnesses including PW6, who testified about threats made by A2 and A3 about the murder of the deceased. PW6 gave evidence of how he heard the threats made by A2 and A3. PW7 testified about how she saw A2 and A3 soon after the grenade explosion and what they said. PW5 produced the confession statement, after a trial within a trial.

All the three appellants gave sworn evidence. The 1st appellant denied knowledge of the other appellants and everything connected with the offences. He admitted making a statement to PW5 allegedly because of torture. He claimed that he had been tortured by the army and the police personnel and was told to say what is contained in the confession statement. He raised an alibi to the effect that he was not at the scene of the crime but somewhere else. A2 denied the offence and denied knowledge of A3. She admitted she knows Rukundo (PW6) and claimed that both Rukundo and his sister told lies about her. A3 claimed that he did not know A1 and A2. He denied everything that was stated by Rukundo in his evidence. He admitted that on the night in question at about 7:30pm, he was in the village.

After the trial, the learned trial Judge summed up the evidence and the law to the two assessors. He directed the assessors to

consider the evidence about participation in the murder by each of the three appellants. He directed the assessors on the nature and import of the confession of the 1st appellant. He referred to the evidence of PW6, PW7 and PW8 and to the threats allegedly uttered by the 2nd appellant. He directed the assessors on the relevancy of a dying declaration made by the 1st deceased to PW10 (Asiimwe Agard) and to the alibi made by the accused persons. In a joint opinion the two assessors believed the prosecution witnesses including an alleged dying declaration of the 1st deceased and held that A1 was a liar. They advised the trial judge to convict all the appellants.

In his well reasoned judgment, the learned trial judge considered the confession statement and found it to be true. He considered various pieces of circumstantial evidence and believed the evidence of PW5, PW6, PW7 and PW8, and found all the appellants to be liars. He found them guilty and sentenced them to death on the first count but deferred sentence on the 2nd count.

On appeal, the Court of Appeal upheld the findings of the trial judge and dismissed the appeal. The appellants have now appealed to this Court. Each one of them was represented by an advocate who filed separate memorandum of appeal for each of the appellants.

Each advocate filed separate written arguments in support of the appeal of each appellant. Mr. Odiit Andrew, Senior State Attorney, for the respondent, filed an omnibus single reply.

As we proceed to determine this appeal, we bear in mind that the case of each appellant has to be considered separately.

Two alternative grounds of appeal for the first appellant are as follows:-

1. **The learned Justices of Court of Appeal erred in law when they failed to properly subject the evidence on record to fresh scrutiny and evaluation thereby upholding the Appellant's conviction and sentence.**

2. **That in the ALTERNATIVE but WITHOUT PREJUDICE to the aforesaid, the Appellant shall invoke the principle of fair trial and seek to mitigate the death sentence to custodial sentence.**

On behalf of A1, Mr. Alli Gabe in reality presented a statement of arguments on the first ground only. We must point out at the outset that his submissions are, with respect, somewhat speculative and puzzling. This is because instead of pointing out the errors of and criticising the Court of Appeal in the way it evaluated evidence and arrived at its conclusions, he goes out of his way to reproduce lengthy passages of the confession of his client which he follows with fanciful imagination as to why the confession cannot be true. He creates a lot of his own imaginations about what the police and the army did as to induce

his client to confess. We note that his speculation is not based on evidence on the record before us.

Be that as it may, counsel submitted that although the Court of Appeal correctly set out the law in respect to its duty as a first appellate Court, it did not properly evaluate the evidence as a whole. He criticised the learned trial judge for his observations while admitting A1's confession statement. He contended that A1 was subjected to intimidation, threats and torture and, therefore, the confession statement is not of his own. Learned counsel contended that PW5 did not follow the procedure approved by this Court in the case of **Festo Androa and another vs. Uganda** (Supreme Court Criminal Appeal No. 1 of 1998). Learned counsel contended that because the confession was incoherent it could not have been made voluntarily. The learned counsel then embarked on a voyage of fanciful imagination during which he framed twenty two imaginary questions from which counsel expects us to infer that the confession was not properly obtained.

Counsel contended that the two courts below erred in their application of the doctrine of common intention to this case. Learned counsel criticised the trial judge for relying on the evidence of PW6 with regard to resistance to the Court brokers by the 2nd and 3rd appellants. He strangely harbours the illusion that because both PW6 and PW7 are close relatives of the deceased persons, therefore, their evidence about the movements of the three appellants on the day of murder should not be relied on.

In his written arguments, Mr. Odiit supported the decisions of the two courts below. Regarding the confession, the learned Senior State Attorney submitted that the Justices of Appeal properly directed themselves on the issue of a retracted confession before they upheld the conclusions of the trial judge.

We are not persuaded by the fanciful contentions of Mr. Alli Gabe. The trial judge properly conducted a trial within a trial before he admitted the confession evidence. In his judgment, the judge carefully evaluated the relevant facts and evidence before he held that the confession can not but be true.

We note that the appellant admitted making the statement to the magistrate (PW5) but claimed that he recited to the magistrate what the police told him to say. We agree with the trial judge that the stage when the appellant was before the magistrate was the appropriate moment when he should have told the magistrate that the words he was about to say were not his words but of policemen. This he did not do. It is note worthy that after the 1st appellant had concluded making and signing the statement, he remembered and asked the magistrate to include the fact that "he had not received the money from Katushabe". In the body of the confession he had stated that Katushabe (A2) had promised to pay him money after he kills the 1st deceased. A1's request for the magistrate to add the fact of non-receipt of money clearly shows that the appellant knew what he was telling the

magistrate. In our view, the statement shows very clearly that the magistrate took all the precautions set out in the circular of the Chief Justice issued on 2nd February, 1973, which was subsequently approved first by the East Africa Court of Appeal in **Beronda vs. Uganda** (1974) E.A. 46 at page 47 and later by this Court in **Festo Androa** case (supra). The Court of Appeal acted properly when it upheld the conclusions of the trial judge.

On the issue of common intention, there is ample evidence to show that the three appellants acted in concert. PW6 heard death threats uttered by A2 and A3. He saw all the three appellants moving together including on the day of the murder, in the area. 1st appellant admits in his confession that he first stayed in A3's home and for three days before the murder in A2's home. A1 in his confession reveals the motive of the murder and that fact is evident from the threats uttered by A2 and A3 which utterances were heard by PW6.

On the issue of A1's participation, we are satisfied that not only does the confession fully support the conviction of the appellant, the evidence of PW6 about his suspicious presence in the area corroborates A1's confession about his presence in A2's home and supports the conviction of the first appellant. We have no hesitation in rejecting his alibi. Accordingly, his grounds of appeal must fail. His appeal on conviction is dismissed.

Three grounds of appeal by A2 which were filed by Mr. Robert Tumwine of the Public Defender Association, read as follows:-

1. **The Honourable Justices of Appeal erred in law in admitting an involuntary confession that was relied upon leading to the second appellant's conviction.**

2. **The Honourable Justices of Appeal failed to correctly re-evaluate the whole prosecution evidence that was very presumptuous and tainted with uncertainties which was relied upon to convict the second Appellant.**

3. **The Honourable Justices of Appeal erred in law in failing to correctly re-evaluate the second Appellant's defence of alibi which the lower Court had disregarded; hence leading to her conviction.**

Mr. Robert Tumwine contended in his written submissions that the confession statement by A1 was involuntary and it should not have been used as a basis of conviction of A2. Like Mr. Alli Gabe, Mr. Tumwine contended that A1 made the confession statement after he was tortured by the police. Learned counsel contended that the trial judge misdirected himself on the principles applicable to retracted confessions which principles are set out in the case of **Tuwamoi vs. Uganda (1967)** E.A. 84. Learned counsel also contended that the Court of Appeal erred in upholding the admission by the trial judge of an involuntary

confession. In connection with that, he referred to the following passage from the judgment of the Court of Appeal-

"We agree with this finding of the learned trial judge. We have not found any evidence that can justifiably raise a possibility that the confession in this case could have been obtained after the torture of A1. We agree that A1 promptly and voluntarily confessed to the murders after his arrest".

According to counsel, had the Court of Appeal correctly reevaluated the evidence on the confession, the Court would have found that it was wrongly admitted, and therefore there would have been no evidence implicating A2. Counsel claimed that the confession was made in English and translated by the interpreter (Barisigara Deo) into Runyankore and yet it should have been the reverse. For this, he relied on the case of **Festo Androa and another** (supra).

On the second ground, Mr. Tumwine contended that the prosecution evidence was tainted with uncertainties. In his own words-

"There is a lot of prosecution evidence that was very presumptuous and so uncertain that Court should have interpreted in favour of A2.

He submitted that the Court of Appeal did not re-evaluate the "presumptuous" evidence. Learned counsel set out seven pieces

of evidence which he claimed was presumptuous and presumably, which the two Courts failed to consider so as to acquit A2.

On the third ground, counsel criticised the trial judge for not accepting A2's alibi. According to counsel, the evidence of Aturinda Mercy (PW7) required corroboration and did not put A2 at the scene.

The cases against A2 and A3 are so intertwined that the evidence and submissions on their respective appeals have to be discussed together. We will first reproduce the two grounds of appeal filed by Sekabojja & Co. Advocates on behalf of A3-

1. *The Court of Appeal erred in law and in fact to uphold the appellant's conviction and sentence basing on the doctrine of common intention that did not prove his guilt beyond reasonable doubt.*

2. *The Court of Appeal erred in law and in fact when it did not properly evaluate the evidence on record and thereby arrived at a wrong decision confirming the decision of the trial court.*

In effect what counsel for A3, submitted on the two grounds, is that the evidence of PW6 and PW7 did not establish the guilt of A3. Learned counsel appears to suggest that the doctrine of common intention could not apply to his client.

As stated already Mr. Odiit Andrew, made joint submissions on all the three memoranda of appeal.

First on retracted confession, the Senior State Attorney submitted, correctly in our opinion, that the Justices of Appeal properly evaluated evidence on record and found that the confession is true. He further submitted, again correctly, that the learned Justices properly directed themselves on the law and facts, and agreed with the findings of the trial Judge that the confession was true.

While considering A1's appeal, we considered the contentions about his confession statement and upheld the conclusions of the two courts below. We note that the trial Judge carefully examined the evidence in the case. The learned trial Judge first summarised the evidence as to how court brokers and police went to the disputed land to evict A2's father in early January, 2000. A1, A2 and A3 were found at the scene and so was PW6. A2 and A3 obstructed the court brokers from putting the first deceased in possession of his family house.

The court brokers were forced to call for re-enforcement. Upon return the dispute house and with help of LC3 Chairman, Hajji Bale, the brokers were eventually obliged to arrest and detain Karambuzzi, A2's father, a fact which A2 confirmed in her own evidence. There and then PW6 heard A3 declare in the presence

of A2 that *“they have taken Karambuzzi but Onesmus would not sleep in the house……. Onesmus would lose the land and life”.*

The following week A3 and A2 were summoned by Rukungiri Police. After receiving the summons A3 in the presence of A2 and in the hearing of PW6, A3 said *“they would be arrested but they would do something to Onesmus”*. After this, PW6 used to see A2 and A3 “patrolling” the area in the company of A1. PW6 repeated this evidence during cross-examination by the two counsel who represented the three appellants at the trial. PW6 stated that during day time on the fateful day of 30th January, 2000, he saw the appellants walking around the village together. They seemed to be reconnoitering. The learned trial Judge was impressed by the demeanour and the evidence of PW6 whom he believed.

In his evidence on oath, A1 admitted making the confessional statement but claimed that he was tortured by army soldiers and police who ordered him to say what he said. He admits that he was arrested on 1st February, 2000 at a roadblock while on the way to join his army unit and was told that he was a murder case suspect. This early police confronting of A1 with this information is important because people at the roadblock could not have known the case against A1 so soon after the murders so as to arrest him unless such information was provided by a source from the scene of crime.

In her evidence in court, A2 denied knowledge of A1 and A3. However, when she was cross-examined on statements she made

to police, in which she admitted knowing the two, she claimed it must be the police who inserted that information. She admitted she was arrested on the night of the murder. She admits in her own evidence that PW7 was at the scene of murder although in a state of shock.

That witness (PW7) was aged 13 years when she testified, not on oath, as she did not know why people swear. According to her, she knew A2 and A3 because they are from Kambuga in the same area as herself. According to her the first deceased returned home at about 8:00pm. Anita and their mother, the second deceased, were at home. As Anita went to the door to open for the deceased Twebaze there was a sound of a big bang and light. The mother fell down bleeding. Anita was injured in the stomach. The first deceased was injured on the legs and other parts of the body. After the blast, it was A2 and A3 who apparently suddenly appeared at the scene before any other person came. A2 and A3 are stated to have asked what had happened. Anita replied while PW7 was hearing *"we have been killed"*. *"They then laughed and A2 said can you also be killed. They then went away laughing. When they went away, other people came"*.
This obviously cynic behaviour of the two appellants connects them to the murder.

According to PW7 there was moonlight outside and there was a light from a lamp in the house. A2 and A3 talked to Anita for

about one minute, before leaving. Anita was in pain but could talk.

In her own evidence, A2 stated that she went to the scene at about 8:00pm and saw PW7. A2 thus corroborates PW7 about being at the scene after the blast. A2 also stated that after returning home, someone followed her and knocked on their door. The person said A2 was required to make a statement. Thus she was arrested and taken to police because of this case.

The learned trial judge was alive to the issue of the absence of evidence of an eye witness to the attack. He inferred the guilt of the 2nd and 3rd appellants from circumstantial evidence. He directed the assessors, and himself, about the caution required in acting on circumstantial evidence as set forth in the case of **Simon Musoke vs. Uganda** (1958) EA. 715, namely that the *evidence must show that an accused is guilty and that there are no coexisting factors that tend to weaken or destroy the inference of guilt*. The learned judge reviewed various pieces of evidence constituting circumstantial evidence in this case before coming to the conclusion that A2 and A3 were guilty.

He first referred to the land dispute between A2's father and Twebaze, the obstruction of court brokers leading to the detention of A2's father. He referred to the threats uttered by A2 and A3.

A1 is an army man. The judge adverted to the absence of evidence from court brokers and said that that did not affect the

evidence of PW6 who impressed him because he gave *“testimony in a calm, composed and reassuring manner”*.

The second circumstantial piece of evidence is A1, A2 and A3 were seen moving together in a suspicious manner. He referred to movements of A1 in company of A2 and A3. The same three were seen moving together on the day of the murder. D/PP Juuko (PW8) of Kambuga Police confirmed that a report was made and investigations were made in respect of the suspicious movements of A1, A2 and A3 in the area where murder took place.
Then he referred to the evidence of PW7, that before the blast at around 7:30pm, she had seen A2 and A3 together.

The judge disregarded the fourth piece of evidence concerning a dying declaration made by Twebaze to Asiimwe Agard to the effect that it was A1, A2 and A3 who killed him.
The fifth piece of evidence considered by the Judge is the confessional statement which A1 had made but later retracted. The judge cautioned himself about its use as evidence. He accepted it as a true confession. The learned judge found all the appellants liars. Further he held that on the evidence available there was a common intention to kill at least Twebaze.

In the Court of Appeal A1 and A2 filed a joint memorandum of appeal containing three grounds. The first criticised the trial judge for his reliance on involuntary confessional statement. The second criticised the judge for his reliance on a dying declaration.

The third ground complained that the judge erred in relying on circumstantial evidence. During argument, the second ground was abandoned.

There were four grounds of appeal filed by A3 in the Court of Appeal. The first was that circumstantial evidence did not point to the guilt of A3. The second was a complaint that the judge should have upheld A3's alibi. The third was that the trial judge erred when he stated that he found contradictions in prosecution case to be minor. The last complaint relates to the application by the Judge of the doctrine of common intention. Before consideration of the submissions, the Court of Appeal first reminded itself of its duty as a first appellate Court. On the admission and reliance by the trial Judge on the confessional statement, the Court of Appeal quoted a passage from the judgment of the learned trial judge where he found that *"like the assessors; I do not have even the slightest doubt in my mind that the confession is true"*. The court referred to the portion of the judgment where the judge rejected the alibis of all the three appellants.

The Court concluded-

"He (A1) was arrested in circumstances where evidence of his guilt was written all over his face. The confession is also very well corroborated by other evidence, oral and medical. The trial judge was justified to rely on it. Since it implicated the maker (1st

Appellant) and the 2nd appellant, the conviction against the two was justified".

Indeed the Court of Appeal held that the learned trial judge *"detailed the evidence which independently implicates the two appellants in the murder"*.

We respectfully agree.

We think that the learned trial judge had ample evidence on the basis of which he convicted the appellants. The Court of Appeal was therefore correct in upholding the conviction. We think that the evidence of PW6 taken together with the confessional statement which the first appellant admitted to have made could constitute sufficient evidence justifying not only A1's conviction but also the conviction of A2. In the case of A2, by virtue of S.28 of the Evidence Act, A1's confession may be taken into consideration to prove the guilt of A2; see Anyangu vs. Republic (1968) E.A. 239 at page 240 and our judgment in **Oryem Richard & Another vs. Uganda** (Supreme Court Criminal Appeal No. 2 of 2002 at page 9.

There can be no doubt whatsoever that on the facts of this case and on the basis of the evidence of PW6 `together with that of PW7 the courts below were correct in applying the doctrine of common intention. The three appellants had been acting in concert to kill Twebaze since the day the father of A2 was committed to prison.

Accordingly, all the grounds of A2 and A3 must fail and their respective appeals against convictions are dismissed.

Because of the decision of the Constitutional Court in Constitutional Petition No. 6 of 2003 **S. Kigula & 417 Others vs. Attorney General** from which an appeal is pending in this Court, we postpone confirmation of sentence in this appeal under Article 22(1) of the Constitution, until determination of the said pending appeal to this Court.

Delivered at Mengo this 16th day of October 2007

B. J. ODOKI
CHIEF JUSTICE.

J. W. N.TSEKOOKO
JUSTICE OF THE SUPREME COURT.

J. N. MULENGA
JUSTICE OF THE SUPREME COURT.

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT.

B. M. KATUREEBE

JUSTICE OF THE SUPREME COURT.