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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA.

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CoramHon Justice S.G. Engwau, JA

Hon Justice A. Twinomujuni, JA

Hon Justice A.S. Nshimye, JA

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CRIMINAL APPEAL NO.178 OF 2003

BETWEEN

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1. NSUBUGA ALEX

2. WANELOBA FRED

3. RA. NO. 144379 PTE BAMANYA JOHN

:::APPELLANTS

VS

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UGANDA :::::::::::::::::::::::::::::::::::::::RESPONDENT

JUDGMENT OF THE COURT

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The three appellants were jointly indicted on two counts of murder and aggravated robbery c/s 183 and 184 and 273(2) of the Penal Code Act in the High Court sitting in Mbale. They were tried, convicted and sentenced to death on 11/8/2003. They appealed to this Court against both conviction and sentence.

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The following were the brief facts of the case.

10 In the night of 6th January 2001 at Busamaga village in Mbale District, the appellants murdered one Kairu Alfred. During the same night in the same house in which they killed the deceased, they robbed Mutenyo Steven cash worth shs 422,000/=, a mobile phone, a camera, (Polaroid), two wrist watches and a traveling bag all valued at shs 2,000,000/= and at or immediately before the said robbery used a gun. An alarm was made and neighbours came who found the deceased in critical condition. Some people saw the attackers armed with a gun and a panga. The deceased was rushed to hospital, where he later passed away.

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The first appellant Nsubuga Alex was arrested by villagers who had information that he had been identified as one of the attackers. He was handed over to the police. In his charge and caution statement, revealed his co appellants.

20 Appellant N0. 2 was arrested from the DISO's home where he was on guard duty as a member of the Local Defence Unit (LDU). An SMG gun N0.128134077 was recovered from him. Appellant N0. 3 a soldier was arrested from the home of the RDC where he was also doing guard duties. Also an SMG gun N0. UE 7701-1998 with 89 ammunitions was recovered from him and was exhibited in court.

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The defences of the appellants which were general denials of non participations were rejected by the trial judge.

30 In their latest memorandum of appeal filed on their behalf by their counsel in court on 8/1/2009, they raised 3 grounds of appeal namely:

- 1. That the learned trial judge erred in law and fact in finding that the offences of murder and robbery with aggravation had been proved beyond reasonable doubt.***

5 2. *That the learned trial judge erred in law and fact in rejecting the appellant's defences and convicted them on incredible contradicting inadequate and uncorroborated prosecution evidence.*

10 3. *That the learned trial judge erred in law and fact in sentencing the appellants to death basing herself on wrongly passed conviction*

During the hearing of the appeal, the appellants were represented by Mrs Kasande Mulangira on state brief. On the other side M/s Abodo Jane Francis, a Principal State Attorney represented the respondent.

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On ground one.

Counsel Kasande Mulangira dwelt on the participation of the appellants. She submitted that the prosecution in the court below did not discharge its burden of proof beyond reasonable doubt, because the ingredients of murder and robbery were left out. In her view the judge wrongly
20 evaluated the evidence and came to a wrong conclusion. For example, she pointed out that it is not true that when Nsubuga was arrested, he said he was with the other appellants.

She complained about the hasty manner in which the trial within a trial was conducted. The appellants were not given a chance to defend themselves. P.W.4 was not sworn when he was
25 giving his testimony in the trial within a trial.

On ground 2

She adopted her submission on ground one.

30 **On ground 3**

She submitted that the learned judge erred in rejecting the alibi of the appellants. For example in their defence they referred to DISO and RDC who were not called. The appellants should have been given the benefit of doubt.

5 In her view the conviction was based on weak evidence which led to the appellant's being sentenced to death. She prayed that her clients' appeal be allowed, conviction quashed and sentence set aside.

10 **In reply** Counsel Jane Francis Abodo opposed the appeal. She submitted that P.W.I knew appellant N0.1 very well. It was 9:00 pm. He was with the deceased and had a torch. The witness and the appellants were 1-2 meters apart. He had known AI for 3 years and was staying in the same house with P.W.2 who is his cousin and an aunt to P.W.I. He also told Police that very night that he had recognized AI.

15 P.W.I saw 2 people but recognized AI. She went on to submit that P.W.2 who was in bed recognized Wanyera who was not arrested. It is A2 who had a gun. The witness testified further that they were in a corridor under strong light of a florescent lamp of 100 watts. In addition to knowing them, they were in the house for about 30 minutes. They demanded for money. She heard and recognized their voices which she knew well before. Counsel went on to point out that
20 P.W.I made a statement that night and mentioned AI as having been one of the assailants. AI was arrested on 7/1/2001 while A2 and 3 were arrested the following day prompted by the statement AI made to the Police in which he mentioned 3 people he was with. Counsel argued that even if AI had not mentioned his co accused, P.W.I identified AI while P.W. 2 identified A2.

25 AI during cross examination corroborated the evidence of P.W.I and P.W.2 that he was staying at the home of P.W. 2. She requested us to find no merit in the appeal and dismiss it accordingly.

After having heard both counsel for the appellants and the State, our duty as a first Appellate Court to evaluate the evidence as a whole and come to our own conclusions in particular with
30 regard to the complaints contained in the memorandum of appeal. See **Bogere Moses Vs Uganda Supreme Court Cr. Appeal N0. 1/1999**

In ground one the appellants complained that the offences of murder and robbery with aggravation were not proved beyond reasonable doubt. On this point the learned trial judge first
35 considered the evidence on the first count of murder.

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This appears from page 2 to page 10 of her judgment. She considered and evaluated all the essential ingredients of murder and the confession of appellant N0.I. She also considered the defences of the appellants which were general denials and rejected them. We have also evaluated the evidence as is our duty as the 1st Appellate Court. Appellant N0. I is a cousin of P.W.I. They lived in the same house for 3years before he was chased away for theft tendencies. According to P.W.I, he and his other members of the family were in the house some watching Television. Suddenly they noticed that the security light had gone off. They thought that the bulb had blown. Their mother told them to go and replace it. The deceased was in front of P.W.I and flashed a torch. He saw and recognized appellant N0. I and his fellow attackers who were 1-2 meters away. The above evidence is corroborated by the 1st appellant's charge and caution statement which was admitted in evidence after being tested for its voluntariness in a trial within a trial. This is what appellant N0. I told Police:-

"It is true that on the 7th/1/2001 at Busamaga I was with the men I knew as Fred, Alex, and another whom I know as a friend to Fred. I do not know the surnames of the said three men. Fred and his friend were armed with guns. The three picked me from my residence and I went... remove the fuse from the meter box and I did it. Alex went and removed the bulb which was at the door way and Fred stood aside and I stood near him. Fred then asked me to show him Mr. Mutenyo's bedroom and before I did it someone flashed a torch from inside the house. Fred fired his gun through the door and I heard some one cry inside the house that he had been shot at. A voice came thus: "I have been killed, Nsubuga come and finish me" An alarm was made inside the house and Alex and Fred forced their way inside the house. I and Fred's friend remained outside. Later I saw Fred coming out with a suit case which looked heavy. Alex carried a Television deck and we went towards Masaba garden. Alex, Fred and his friend with the loot..... The person who was shot at during the robbery mission died at Mbale hospital. I was arrested on 8/1/2001 by the Wanainchi and handed to Police. That is all I can state. Statement made by me, recorded for me, and read back to me. It is found true and correct."

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5 From the above statement, the timing in the removal of the fuse from the meter box and the removal of the bulb by one Alex tallies with the going out of the security light. Also in our view the dying declaration heard by appellant N0. 1 and put in his statement “**I have been killed Nsubuga come and finish me**” shows that the deceased had identified appellant N0. 1 with the assistance from the flashed torch

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We, like the trial judge believe that P.W.I properly identified appellant N0. I who in turn named his co attackers in his charge and caution statement quoted above.

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P.W. 2 also recognized appellant N0. 2 as the person who had a gun. This was in a corridor under strong light of a florescent lamp. They were together for a period of about 30 minutes. We see no where the trial judge went wrong in her conclusion that the prosecution had proved beyond reasonable doubt the charge of murder against the 1st and 2nd appellants. Under the principle of common intention, it does not matter who fired and killed the deceased. They are both guilty of murder. We therefore uphold her finding against the two appellants on count one.

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Our view is however different with regard to appellant N0. 3. We shall deal with this case after disposing of ground 2 below.

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The judge equally considered the evidence which was adduced to prove each ingredient of the robbery offence which appears on page 10 to 12 of her judgment. We are unable to fault her finding on that count also, and find no merit in the 1st ground of appeal.

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The second complaint of the appellants was in respect of the judge rejecting their defences. This brings in the issue of whether the appellants were properly identified. The evidence against Nsubuga Alex was that of P.W.I Abdulla Kawanga. He and the deceased went out to check why security lights had gone out. The deceased had a torch which he flashed. P.W.I saw two people about a meter from the main door and one had a gun. He was able to recognize the appellant because he was a cousin. P.W.I and the deceased retreated back in the house. As they closed the door behind themselves, there was gun fire. It hit the deceased who was behind the witness. He later died in Hospital. When the attackers entered the house and the bed room where P.W.2 was

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she was able to identify appellant N0. 2 who was holding a gun.

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In dealing with the defences of the appellants the learned trial judge had this to say.

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P.W.2 said that actually he was living with AI when he was a student at Elgon School in S.4. And she said that she chased him away 2 months before this incident happened. I find the testimony of P.W.2 truthful and AI was merely concocting the issue of a grudge. In any case when P.W. 2 testified as above there was no challenge or cross examination on those material facts. So the only inference, I could draw was that P.W. 2 was speaking the truth. See Otti Sebastian VS Uganda [SCU] Cr. Appeal N0. 17/98 also James Sewabiri and Another Vs. Uganda [SCU] App N0. 5/90.

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Besides all the three accused persons denied having known each other despite the strong evidence as on record and the confession of AI. This just showed that the accused persons were merely lairs and I couldn't believe them. Before I take leave of this case, I should mention that the presence of AI at the scene was heavily corroborated by P.W.2 when she gave her testimony. She appeared very truthful and reliable.

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Firstly P.W.I had seen AI as he flashed the door. And indeed when P.W.I and the deceased went out, they had noticed that the security lights were not on. AI in the confession brought it out that he was told by his co assailants to go and removed the bulb which was at the door way and Fred A2 stood aside and AI stood near him. That A2 asked him to show him P.W.2's husband's room and that before he did it, someone (P.W.I flashed a torch from inside the house that he had shot at. That he said, "Nsubuga come and finish me" (See statement) it was tendered and exhibited and marked Exp 4. P.W. 4 said that when she went to the hospital where Kairu was she told them that it was Nsubuga who had killed him and it was in the morning hours of 7th day of the material month and year as indicated. S. 155 of the Evidence Act in regard to the nature of statements is clear. This kind of evidence corroborated strongly the prosecution

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5 *case in the material particular as to the presence of AI at the scene of crime in addition to the direct and circumstantial evidence already talked about in this judgment.*

10 *P.W.2 didn't only hear immediately after the shooting of the deceased when the deceased told them that the assailants had left and wanted to be taken to hospital, but even when she went to hospital the deceased told her. This meant that the deceased was certain of his assailant who was doing it in concert with A2 and A3 as already stated in this judgment. And there is no doubt that A2 had a gun because the gun he had was that one recovered though there is no*
15 *evidence that the ammunition was discharged from that particular gun. It is my view that this was not prejudicial to the prosecution case because of the strong evidence as adduced on record and summarized in this judgment. So the conviction will not be solely be on a dying declaration as far as count I is concerned (see Okwel Vs Uganda cr. Appl N0. 12/90 SCU and Tindigwira*
20 *Aulable Vs Uganda Cr. Appeal N0. 9/87 CA applying those principles as embodied in those cases there is no doubt that the accused were criminally liable. I find even S.30 of the Evidence Act equally applicable and relevant in the circumstances of this case.*

25 *I am alive to the fact that there is need for caution to be exercised in the reception of dying declarations and the necessity for their corroboration. In the case of Jasinja Akumu Vs R [2]1945] 21 EACA, it was said among the need for caution is because the test of cross examination may be wanting and the particulars of the violence may have occurred under circumstances of*
30 *confusion and surprise calculated to prevent them being accurately observed.....”*

The trial court correctly and adequately in our opinion, considered and disposed of the defences of alibi advanced by the appellants N0. 1 and 2. We agree that there was sufficient justification
35 to reject their defences. They could not have been properly identified at the scene of crime and at

5 the same time be elsewhere as they claimed. The 2nd ground of appeal would also fail. The 3rd ground would consequently fail too.

10 However, the case against the 3rd appellant appears to be different. None of the witnesses who testified in court mentioned him or pointed at him as having been identified as one of the attackers. In appellant N0. 1's statement, he mentioned himself, Fred, Alex and another he knew as Fred's friend. The prosecution did not attempt to establish who Fred's friend was. The only clue is from P.W.3 the investigating officer who said that he interrogated Nsubuga appellant N0. 1 who told him that he was with Waneloba Fred an LDU guarding DISO's home and a soldier guarding the residence of Deputy Resident District Commissioner. Although this witness
15 recovered an empty cartridge from the scene of crime and an SMG gun N0. UE 7701-1998 from appellant N0. 3 at the deputy RDC's residence, no expert evidence was led to establish that the empty cartridge was fired from the gun that was recovered from appellant N0. 3 so as to connect him to the scene of the crime.

20 For the above reasons we find it very un-safe to allow the conviction against him to stand. His appeal therefore succeeds. The convictions on both counts are quashed and sentence of death set aside. He is set free unless he is otherwise lawfully detained on other matters. The appeal of appellant No. 1 and 2 is dismissed and the sentence is confirmed.

25 **Dated at Kampala this 3rd day of May 2010.**

**HON S.G. ENGWAU
JUSTICE OF APPEAL**

30 **HON A. TWINOMUJUNI
JUSTICE OF APPEAL**

**HON A.S. NSHIMYE
JUSTICE OF APPEAL**

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