THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPEAL NO.76 OF 1998

SEMAMBO C. AND FRED MUSISI SEMAKULA…… APPELLANTS

VERSUS

UGANDA…… RESPONDENT

(Appeal from a judgment of the High Court
of Uganda at Mubende (Lady Justice Bossa)
dated 4/12/98 in C.S.C. No. 39 of 1998)

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.
HON. MR. JUSTICE C.M. KATO, J.A.
HON. MR. JUSTICE A. TWINOMUJUNI, J.A.

JUDGMENT OF THE COURT

The two appellants were convicted by the High Court of the murder of one John Bosco Sembatya, contrary to section 183 of the Penal Act and sentenced to death. They appeal against the conviction.

There are ten grounds of appeal but only the tenth ground was argued as it rested on a very important point of law. The ground states that the trial Judge erred in law to find that the appellants had committed the offence when considering whether they had a case to answer or not. We think the ground was well taken although Mr. Muguluma Darnulira, Counsel for the appellants, had no authority to support it. The Director of Public

Prosecutions was not represented although Mr. Ogwal Olwa Principal State Attorney had been served with the hearing notice.

In this case the prosecution called eleven witnesses. It then closed its case. There was no submission of no case to answer, but the trial Judge, quite rightly, addressed the matter as she was enjoined to do under section 71 of the Trial on Indictments Decree, 1971.

She dealt with the matter as follows:

> "Whether or not the defence made a submission of no case to answer it is incumbent upon this court to make a ruling on whether or not a case has been made out sufficiently to justify accused being put on their defence. It is my finding that there is sufficient evidence before court that accused committed the offence with which they are charged. I therefore rule that a prima facie case has been rested against them requiring them to be put on their defence. The accused will therefore be put to their defence."

The appellants then made their defences which the trial Judge rejected as in her opinion, the circumstantial evidence showed that the appellants had committed the offence charged. Mr. Muguluma Darnulira's complaint is that the appellants were found guilty before they were heard which occasioned a miscarriage of justice.

It is clear that the statement of the trial judge quoted above was based on the wording of sub section 2 of section 71 of the T.I.D. We find that section badly drafted and misleading since the High Court is not the committing court and does not in fact hear the side of the accused until it has ruled that he has a case to answer. It seems that there is no provision for the accused person to make statements or give evidence even before the committing court.

There can be no doubt that the trial Judge went far beyond what was required when she held that the appellants had committed the murder when considering whether they had a case to answer or not. It is trite law that the onus is on the prosecution to prove its case beyond reasonable doubt when all the evidence has been heard. At the close of its case the prosecution need not have proved the case beyond reasonable doubt, but must have established a prima facie case.

A prima facie case means a case sufficient to call for an answer from the accused person. At that stage the prosecution evidence may be sufficient to establish a fact or facts in absence of evidence to the contrary, but is not conclusive. All the court has to decide at the close of the prosecution case is whether a case has been made out against the accused just sufficiently to require him or her to make his or her defence.

It may be a strong case or it may be a weak one. At that stage of the proceedings the court is not required to decide whether the evidence, if believed, proves that the accused is guilty of the offence charged. The position of the trial judge was ably considered and put by the Court of Appeal for East Africa in the case of Wabiro alias Musa v R [1960] E.A. 184 at p. 185 as follows:

> "In a case upon indictment before judge and jury, if there is a submission of no case to answer, the judge must decide as a matter of law (Rv Abbott (2) Q.B 497) whether there is evidence fit to be left to the jury. If he decides that there is, it by no means follows that the jury will convict upon it."

Needless to say, in this country the Judge is also the Jury. In Wabiro (Supra) the court approved the statement by Professor Glanville L. Williams in his text book on CRIMINAL LAW (1953) at page 695 as follows:

> "On a trial on indictment the tribunal is a composite one consisting of a judge and jury. Both these have to be persuaded in order to establish a case. It is the duty of the judge to decide whether there is any reasonable evidence for the jury, and to withdraw the case from them if he considers that there is none. The question he has to decide is whether there is any evidence on which the jury can reasonably find that the fact is proved. He does not state his own opinion whether the fact is proved. (the underlining is for emphasis only)."

Therefore the provision in S. 71(2) of the T.I.D. requiring the trial Judge to find that the accused has committed the offence is bad law in our view.

Clearly, a prima facie case does not mean a case proved beyond reasonable doubt or, as in the instant case, that the evidence sufficiently proved that the appellants had committed the offence. Having made that finding it was pointless to put the appellants on their defence. The procedure adopted by the trial judge was highly irregular and prejudicial. It rendered the trial fatally defective. The same thing happened in Uganda v Ali Fadhul, High Court Criminal Session case No. 35 of 1987. On appeal to the Supreme Court (Ali Fadhul v Uganda Criminal Appeal No. 30 of 1989) (unreported) held that the trial judge was not entitled to pronounce the accused guilty before putting him on his defence and that what had happened had rendered the trial a mistrial and had occasioned a miscarriage of justice. The appeal was allowed and a retrial , ordered. This is the position here.

In the result we allow the appeal on this ground alone. The conviction is quashed and sentence set aside. It is ordered that the appellants be retried by another Judge as soon as is practicable. Until then the appellants shall remain in custody.

Dated at Kampala this 29th day of July 1999

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

C.M. KATO
JUSTICE OF APPEAL

A. TWINOMJUNI
JUSTICE OF APPEAL