THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

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CORAM: *HON. JUSTICE L.E.M.MUKASA-KIKONYOGO, DCJ.*
HON JUSTICE A.TWINOMUJUNI, JA.
HON. JUSTICE C.K.BYAMUGISHA, JA.

10 **CRIMINAL APPEAL NO.13/03**

BETWEEN

1. **TUMUSIIME ROBERT**
15 2. **BEINOBWIRA MOSES**
3. **SOWEDI SERINYINA::::::::::::::::::::::::::APPELLANTS**

AND

20 **UGANDA::RESPONDENT**

[*Appeal against conviction and sentence of the South Western High Court Circuit sitting at Fort Portal (*Zehurikize J*) dated 17th January 2003 in HCCSC No.001/02*]

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JUDGMENT OF THE COURT

This is a first appeal from the decision of the High Court wherein the appellants were
30 convicted of murder and aggravated robbery and sentenced to death.
The facts material to this appeal are that on 18th January 2001 at around 8 p.m the complainant one Mperinde Ephraim (PW1) was at home with his family having supper. While there, some one in military uniform and armed with an SMG gun entered the house. He had a torch which he was flashing. He started demanding ten million shillings and

35 threatened the complainant that if he did not produce the money he would die. The assailant assaulted the complainant who revealed that he had only two million shillings. After the revelations, two other assailants entered the house and they forced the complainant to enter his bedroom and got the money which he handed to one of them. They dragged the complainant's wife to the bedroom and brought her back and shot her in the chest. In the

40 meantime the complainant ran away raising an alarm which was answered by his neighbours. The assailants left. The complainant's wife revealed to her son Twinomujuni (PW2) that she had been shot by "Boss" who is the second appellant. They tried to take her to the hospital but she died on the way.

Immediately inquiries commenced. The security agencies went to the house of the second and

45 first appellants and arrested them that same night. They revealed that the gun and army uniform belonged to the third appellant who was the District Internal Security Organization official. The gun and the uniform were recovered in the presence of the Local Council Chairperson (PW4). The third appellant was arrested in the morning after his co-accused had revealed to the police that the gun and army uniform belonged to him.

50 They were charged, tried, convicted and sentenced to death –hence this appeal.

At the trial, the first appellant denied his involvement in the commission of the offences and put up a defence of alibi. He stated that at the time of his arrest the room where he was sleeping was searched by the police and nothing was found He made a charge and caution

55 statement which was admitted in evidence after conducting a trial within a trial. The charge and caution statement was repudiated at the main trial.

The second appellant also denied his involvement. He admitted that his nickname is "Boss". He, too, made a charge and caution statement before Inspector Muhimbura (PW6) which was admitted in evidence after conducting a trial within a trial. It was retracted or repudiated at

60 the main trial.

The third appellant admitted that the gun was his but contended that it was stolen from his house when he had gone to the bar to drink and his wife had gone to the shops to purchase some drugs. The time of the theft was about 8 p.m. He called his wife as a witness to support his story.

65 The memorandum of appeal filed on behalf of the first and second appellants had the following grounds:

1. **The trial judge erred in law and fact by wrongfully admitting in evidence a dying declaration.**

2. **The trial judge erred in law and fact by admitting in evidence a gun that was purportedly recovered in a search which was wrongly conducted.**
3. **The trial judge erred in law and fact by wrongly admitting in evidence repudiated confessions of the appellants.**
4. **The trial judge erred in law and fact by holding that the appellants' defence of alibi had been destroyed by the prosecution evidence whereas not.**
5. **The trial court erred in law and fact when it held that the participation of the appellants had been proved beyond reasonable doubt whereas not.**
6. **The trial court erred in law and in fact when it failed to evaluate the evidence for both prosecution and defence.**

When the appeal came before us for final disposal, Mr Tumwesigye learned counsel for the appellants, submitted that the dying declaration should not have been admitted because the circumstances under which the deceased identified the second appellant were not conducive for correct identification. He further pointed out that the only source of light was a torch which was being flashed. It was counsel's submission that there were other people in the house who did not recognize the attackers and therefore this casts doubt on the identification. Another factor which learned counsel pointed out which could not have enabled correct identification was the violence at the scene of crime.

In reply, Ms Josephine Namatovu, State Attorney, supported the trial judge for relying on the dying declaration after warning himself and the corroboration which he found in circumstantial evidence. She pointed out that the residents reported the matter to police who went to the house of the second appellant and found him with the first appellant. On identification by other people in the house with the deceased, the learned State Attorney pointed out that PW 2 was in hiding and as for PW1 he stated that the assailants were flashing the torch directly in his face and he was unable to identify them. On the search, she stated that it was carried out in the presence of PW4 and the secretary for defence in the absence of the first and second appellants because the police feared the mob. It was her submission that the appellants disclosed that the gun was under the mattress and that is where it was found and therefore it was also properly admitted.

On the confessions, the learned State Attorney submitted that they were properly recorded and were corroborated. She further stated that the exhibits, the dying declaration and the confessions put all the appellants at the scene of crime.

On the claim by the third appellant and his wife that the gun was stolen while they were
105 away, Ms Namatovu submitted that the attack took place at 8 p.m and therefore the gun could not have been at two places at the same time.

Section 30 of the Evidence Act (Cap 6 Laws of Uganda) governs the admission of a dying declaration made by a person who is dead as to the cause of death. It reads:

110 ***"Statements written or verbal, of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable , are themselves relevant in the following cases-***

115 ***(a) when the statement is made by a person as to the cause of his or death, or as to any circumstances of the transaction which resulted in his or death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and, whatever may be the nature of the***
120 ***proceedings in which the cause of his or death comes into question."***

The provisions of this section were judicially considered by the Supreme Court in the case of ***Uganda v Simbwa Criminal Appeal No.37/95.*** In the appeal the Court quoted with approval a passage from the decision of ***Okale &others v Republic [1965] EA 555***. The passage said:

125 ***"In this respect we would quote the following passage from the judgment of the court in Jasinga Akum v R (2) 1952 21 EACA at page 334:***

"The question of the caution to be exercised in reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from Field on Evidence (7th Edn) has repeatedly been cited with approval.
130 ***The caution with which this kind of evidence should be received has been commented upon. The test of cross-examination may be wholly wanting; and…..the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed…………."***

135 The Supreme Court emphasized the need for corroboration of a dying declaration before it can be used against an accused person. The weight to be attached to a dying declaration depends on a number of factors. In the first instance, it is necessary to determine whether the deceased was certain about the identity of the attackers. Secondly if the attack took place at night as in the instant appeal when visibility is difficult, the court must be certain that there ***140*** was no mistaken identity. Furthermore the fact that the deceased may have told different people that the appellant was his attacker does not necessarily meant that the deceased was accurate.

In the matter now before us, there is no dispute that the assailants were not identified at the ***145*** scene of crime by PW 1 and PW2. The conditions prevailing at the time were frightening and the only source of light was a torch which was being flashed by the attackers. For the dying declaration to be acted upon there must be certainty that the maker was not mistaken in her identification of the second appellant. The dying declaration has to be corroborated. The learned judge in dealing with the dying declaration and acting on it looked for corroboration ***150*** and he found it in circumstantial evidence. After analyzing all the evidence which he considered to implicate the second appellant he said:

"In the instant case, the circumstantial evidence consists of the following. After the disclosure by PW2 that boss was one of the attackers, as stated by the deceased this prompted the police and the LCS to go the home of A2 who was commonly known as
155 BOSS. A2 admits that BOSS is his nickname. He was arrested with A1 and two other boys. While they were at Mahyoro Police Post they admitted that A3 gave them the gun and uniform. As a result of this revelation the police and LCS went back to the home of A2 and recovered a gun and some army uniform…………………..
The circumstantial evidence irresistibly points to the guilt of the accused persons and is not
160 capable of any other explanation other than guilt of BOSS(A2) in whose house the exhibits were found after he and A1had admitted their involvement in the offence by use of the gun. It corroborated the deceased's dying declaration."

We agree with the learned judge's finding that the dying declaration was corroborated. The ***165*** first and second appellants were arrested the very night when the offence was committed. This was after PW 2 had told those who answered the alarm that the deceased had told him that it was BOSS who had shot her. At the police they disclosed that they used a gun which was given to them by the third appellant. They also disclosed that the gun was under a

mattress and that is where it found. The disclosure or admission is admissible in evidence

170 against the maker by virtue of ***section 29*** of the Evidence Act which reads:

"Notwithstanding sections 23 and 24, when any fact is deposed to as discovered in consequence of information from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

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We accept the submission of Mr Tumwesigye that the circumstances under which the deceased identified the second appellant were difficult and the source of light poor. Be that as it may, it seems that when the assailants were flashing the torch directly at PW 1 the deceased was able to recognize the second appellant –thus telling her son that it was 'Boss' who shot

180 her. Her identification was accurate in view of what followed later.

The prosecution also relied on the retracted or repudiated extra judicial statements of the first and second appellants. The Runyankore and English versions were exhibited at the trial. The law as stated in the case of ***Anyangu v R [1968] EA 232*** is that a statement is not a

185 confession unless it is sufficient to justify the conviction of the person making it of the offence with which he is being tried. As regards repudiated or retracted confessions, the law was concretized in the now famous case of ***Tuwamoi v Uganda [1967] EA 84*** where the court said:

"The present rule then as applied in East Africa in regard to retracted confession is that as

190 a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession is true."

195 The learned judge was alive to the principles enunciated in the above authorities and he found that the confessions of two appellants were true.

It was submitted before us by counsel for the first and second appellants that the confessions were not counter-signed by the police officer who recorded the same. The first appellant on his part during the trial within a trial claimed that he was beaten at Kamwenge Police

200 Station and after a period of one week he was taken to the office of Inspector Muhumuza who asked him to sign on a piece of paper.

At the trial he gave a different version of what happened. He stated that he was beaten and shaved with a bayonet of a gun. He was taken to a uniport and after one hour they brought papers and asked him to sign his name. These two versions cannot both be true. We have 205 perused through the statement which was recorded from the first appellant. It contains detailed information which is basically true and it was sufficient to base a conviction on it. It tallies in material particulars with the rest of the evidence adduced by the prosecution. He stated how they went to the house of the complainant and demanded money- a fact which was testified to by the complainant that the attackers demanded money. He also stated how they 210 were arrested in the house of the second appellant and who gave them the gun and army uniform. He further stated where they hid the gun. The statement was true and it was sufficiently corroborated. It therefore placed the first appellant at the scene of crime.
His appeal against conviction ought to fail.

215 As for the second appellant, the evidence implicating him is almost the same as that implicating the first appellant. He too made a confession which he retracted or repudiated. It is true and it was sufficiently corroborated.

As for the third appellant, the memorandum of appeal had four grounds.

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1. **That the learned trial judge erred in fact and law when he admitted evidence of the charge and caution statements of the co-accused and as a result came to a wrong conclusion.**
2. **That the learned trial judge erred in law and fact when he held that the appellant participated in the commission of the offence.**
3. **That the trial judge failed to evaluate evidence as a whole and thus came to the wrong decision.** (225)
4. **The learned trial judge erred in law and fact when he convicted the appellant on evidence riddled with contradictions and inconsistencies and thus came to a wrong conclusion.**

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Mr Muguluma represented the third appellant and he abandoned ground 4 of the appeal. In his submissions, he associated himself with the submissions of Mr Tumwesigye. He stated that it was a big error on the part of the recording officer not to counter-sign, the caution, the charge and the statements that he recorded from the first and second appellants. He cited no 235 authority in support of his argument. He complained that it was wrong for the officer to take a

charge and caution statements from two people charged with the same offence. He further submitted that there was no evidence that the appellant was at the scene of crime. He claimed that the only evidence implicating him is the badly recorded statements. He went on to state that the gun was not tested to ascertain whether it was used in the commission of the offence
240 and there was no evidence that the deceased died of gun shot wounds.
He invited court to allow the appeal.

From the available evidence the 3rd appellant was not at the scene of crime on the day in question. Being present at the scene of crime may be actual or constructive. The case for the
245 prosecution is that the 3rd appellant participated in the commission of the offences because he supplied the gun and army uniform which the robbers used. In other words he aided and abetted. All the three appellants would be said to have formed a common intention to prosecute an unlawful purpose under **section 20** of the Penal Code Act.
Section 19 of the same Act deals with principal offenders. It reads:
250 ***"(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it-***

(a) every person who does the act or makes the omission which constitutes the offence;
255 ***(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***
(c) every person who aids and abets another person in committing the offence."

The 3rd appellant in his defence claimed that his gun was stolen from his residence while he
260 was away and his wife had also gone to the shop to buy some drugs. The time was 8 p.m when the alleged theft occurred. PW1 testified that he was attacked at about 8 p.m and he was not challenged in cross-examination. This piece of evidence is significant in that the gun which was allegedly stolen at 8 p.m was in the hands of the robbers at the scene of crime being used to attack PW 1 and his family. The learned trial judge found the third appellant
265 and his wife liars and there is no complaint against that finding. The evidence irresistibly points to the 3rd appellant as the one who hired the first and second appellant to carry out the actual robbery.

We have given anxious consideration to the complaint raised by Mr Muguluma that the same
270 police officer recorded the two statements attributed to the first and second appellants. We think this should not have happened.

On a full consideration of the evidence adduced by the prosecution and the defence we are satisfied that the prosecution proved its case against all the appellants beyond any reasonable
275 doubt and their appeal against the conviction would fail.

Dated at Kampala this 15th day of December 2009

L.E.M.Mukasa-Kikonyogo

Deputy Chief Justice

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A. Twinomujuni

Justice of Appeal

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C.K.Byamugisha

Justice of Appeal