THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. MR. JUSTICE S.G.ENGWAU,JA***

HON. LADY JUSTICE C.N.B. KITUMBA,JA

HON. LADY JUSTICE C.K.BYAMUGISHA,JA

CRIMINAL APPEAL NO.128 OF 2001

BETWEEN

WAMUKOTA STEPHEN::::::::::::::::::::::::::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

(Appeal against conviction and sentence of the High Court of Uganda at Mbale(*Maniraguha J) *dated 18/05/2001 in HCCSC No.21 of 1999)

JUDGMENT OF THE COURT

The appellant herein, Stephen Wamukota, was charged with two counts of murder contrary to **sections 188** and **189** of the **Penal Code Act (**Cap. 120 Laws of Uganda)(hereinafter called the Act). It was alleged in the particulars of the indictment in the first count that on or about the 12th day of February, 1998 at Sono village, Bumbo in the District of Mbale, the appellant together with others still at large murdered one **Matayo Nambale.**

In the second count, it was alleged that the appellant together with others still at large on the same date, the same village murdered one **Chairo Andore.**

On arraignment, the appellant denied both counts.

The facts that led to the prosecution of the appellant as found and accepted by the trial Judge are that on the night of 12th February 1998 a group of seven people, namely the

appellant Wamukota Stephen, Tom Wafula, Musa Boyo, Sabulaon Butala Moses Makoye and Wanyonyi John went to the home of the late Chairo Andore at about midnight. They had already arrested Nambale Matayo whom they had tied three piece popularly known as *kandoya.* The seven people were armed with sticks, which they used to assault the deceased. They took them away. The following day, Chairo's body was discovered about 100 metres from his home and that of Nambale was also found in his sorghum garden which was about 120 metres from Chairo's home. The matter was reported to the police who arrested the appellant. For reasons that were not explained by the prosecution, the rest of the suspects were not apprehended.

The prosecution called a total of four witnesses to prove the indictment. The appellant was the only witness and in his defence he totally denied the indictment. The learned trial Judge rejected his defence. However, he found that the prosecution failed to prove malice afore thought. He acquitted him of murder and convicted him of manslaughter. He sentenced him to 8 years imprisonment on both counts and the sentences to run concurrently. His appeal to this court is against the convictions and the sentences imposed by the trial court.

The memorandum of appeal contains the following grounds:

1. **The learned trial judge erred both in law and fact when he failed in his duty to subject the evidence to a fresh and exhaustive scrutiny and hence came to an erroneous decision.**
2. **The learned trial judge erred in law and fact when he made a subtle omission of not weighing the appellant's case against the respondent's case and thus arrived at an erroneous conclusion.**
3. **The learned trial judge erred in law and fact when he failed to consider the appellant's defence of alibi**
4. **That the sentence of 8 years imprisonment is excessive in the circumstances given the fact that the appellant had been on remand for a period of 3 years at the time of sentencing.**

When the appeal came before us for disposal, Mr Mungoma Stephen learned counsel for the appellant, submitted on the first three grounds of appeal together and the last ground separately. The main thrust of the complaint in these grounds was that the learned trial Judge did not evaluate the evidence properly before reaching his

conclusion. The prosecution supported the decision of the learned trial judge in convicting the appellant and the sentence he imposed.

The case for the prosecution was that there was a common intention between the appellant and others still at large to kill the deceased person within the meaning of **section 20** of the **Act.** The section provides that:

" when two or more persons form a common intention to prosecute an unlawful purpose with one another and in the prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence"

The section has been held to mean, *inter alia,* that it is not necessary for the accused persons to have had any concerted agreement before the attack on their victim, but their intention may be inferred from their presence, their actions or omissions and failure to disassociate oneself from the attack; and if the violence of any degree had been used in prosecuting a common design incidentally resulting in death, and if the offence charged was a probable consequence of the use of that violence, then all sharing the design are murderers: See **Bumbakali Lutwama &Others v Uganda Criminal Appeal No.38/89**(unreported); **Mungai v R [1965] EA**

Other authorities that have considered the provisions of the section are **R v Ramiji (1946) 8 EACA 127.** The facts of the case were that four people were in a room with the deceased and a noise was heard outside suggesting that the deceased was being strangled. It was later discovered that the deceased had been strangled but it was not possible to find which of the four strangled the deceased. At the trial for the murder of the deceased, it was held that while evidence showed a common purpose to assault the deceased, there was no common purpose to strangle and the accused were acquitted.

Gitau v R [1967]EA 449. In this case two policemen on patrol duty and armed with rifles saw a man whom they suspected to be a *Masai* cattle thief. They challenged him and he ran. Both fired and one of them hit and grievously injured him. The intention of the two policemen was obscure. At the trial they were convicted of jointly and unlawfully doing grievous harm. They appealed. It was held on appeal that before both appellants could be jointly convicted under the then **section 22** Act, it had to be shown that the wounding was a probable consequence of the prosecution of their

purpose to shoot in the air; but it was never shown that the appellants agreed on the manner of firing and the injury could not be said to be a probable result of what the appellants agreed to do if indeed they agreed at all.

Mugao& Another v R [1972]EA 543. The facts of this case were that the appellants and others joined together in beating two suspects with light sticks with the intention of forcing them to reveal information, one of them was released and the other detained in a hut guarded by two people. He died the following day. There was no evidence to show that the deceased received the blow, which caused his death for which a heavy blunt instrument must have been used while being beaten by the appellants. On appeal, it was argued on behalf of the prosecution that even if the fatal blow, which caused death, had been struck during the night after the departure of the appellants, they were responsible. In allowing the appeal, the court held that there was no common intention that there should be further violence to the deceased or could it have been reasonably anticipated.

With the above legal proposition in mind, we shall turn to the facts of this appeal. The appellant was the secretary for defence of Sono village where the offences were committed. There was no evidence as to why he led a group of people he was with, to arrest the deceased. There were two witnesses called by the prosecution namely Saleh Isaaya (P.W.3) the son of Chairo and Deheipa Kasei (P.W.4) his widow. P.W.2 testified that on the day in question, at around midnight, the appellant came with Koril Wilson, Tom Wafula, Musa Boyo, Sabulon Butala, Moses Makoye and Wanyonyi John. They were with the late Matayo Nambale who had been tied up with a rope. They were carrying clubs. The appellant was carrying a walking stick that he used to beat Matayo and Chairo. He is the one who tied his father with a rope. The following day, at about 6 a.m the body of his father was found lying in a banana plantation of Wakuma.

The testimony of P.W. 4 was to the effect that on the day material to this appeal, the appellant came to the their home with Abdalla Kolir, John, Moses whose other names she did not know and Musa Boyo. She was about to go to sleep and they asked her to open the door, which she did. The appellant was armed with a stick and a torch. The people he had, carried a club and a panga. When she opened the door, they tied her husband and started beating him with sticks. As for Matayo Nambare, Moses kicked him on the throat and it became swollen and he stopped talking. The appellant then

ordered her husband to lead the way. When she asked the appellant where they were taking her husband, he replied that they were taking him to Kikwe's home or to his home. The next day the witness woke up very early in the morning to look for her husband and she found his body in a banana plantation. The matter was reported to the local council I chairman.

A doctor examined the bodies. He compilied two reports that were tendered in evidence by Dr Peter Nabende (P.W.1). The findings were that the bodies had bruises all over. The cause of death was neurogenic shock after being battered with blunt weapons. In cross-examination, he stated that the beatings and the bruises on the head caused the shock because it impaired the nervous system.

The prosecution never investigated the reason why the deceased persons were arrested. At the home of Achiro, the appellant is reported to have told P.W.4 that he was taking the deceased to his home or to the home of the local council 1 chairperson. What happened between that time and the discovery of the bodies is not known. As learned counsel for the appellant rightly submitted, this was a case that depended on circumstantial evidence. The law regarding circumstantial evidence has been set out in numerous authorities of this Court and the Supreme Court. It is that when the evidence incriminating the accused is entirely circumstantial, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty: See **Simon Musoke v R [1958] EA 715; Andrea Obonyo & others v R [1962] EA 545; Mcgree v DPP [1973] C.L.R.232**

It was pointed out in these cases that where the evidence is circumstantial it must be such that it produces moral certainty beyond reasonable doubt that it is the accused that committed the crime. It was further pointed out that the facts proved by the prosecution must be such that there are no co-existing circumstances, which would destroy the inference of guilt. In other words, in order to support a conviction, circumstantial evidence must point irrestitably to the accused as the one who committed the offence.

In the instant appeal, the facts that were proved by the prosecution were that the appellant as secretary for defence in the village led a group of people to arrest the

deceased. In the course of the arrest, they were assaulted with sticks or whatever weapons that was available. The assault with blunt weapons is consistent with the findings of the doctor. But there was no evidence to the effect that it was the assault by the appellant that caused the death of the deceased. The prosecution had a burden to prove the guilt of the appellant beyond reasonable doubt as the one who caused the death of the deceased. In our view it did not. However, the evidence adduced shows that the deceased were assaulted in the presence of the appellant and he did nothing to stop the men he had from assaulting the deceased. He was the leader of the team and therefore had a duty to restrain them in our opinion. He, too, was reported to have assaulted the deceased and he ordered them to be tied with ropes.

On an appraisal of the evidence as a whole, we are not satisfied that the prosecution proved beyond any reasonable doubt that the appellant caused the death of the deceased unlawfully. The evidence on record establishes assault occasioning actual bodily harm contrary to **section 235** Act. For that reason the appellant is acquitted of manslaughter and instead is convicted of assault occasioning actual bodily harm.

As for the sentence, the appellant had been on remand for a period of three years before his conviction and sentence on 18/05/01. The offence with which we have convicted the appellant carries a maximum sentence of five years. At the material time, the appellant has served a period of over two years. Therefore we sentence him to a term of two and a half years imprisonment. The period to run from the date of first conviction i.e 18/05/2001. The appeal is allowed in the terms set out herein.

Dated at Kampala this 2nd day of April 2004.

S.G.Engwau

Justice of Appeal

C.N.B. Kitumba

Justice of Appeal

C.K.Byamugisha

Justice of Appeal