THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE A. TWINOMUJUNI, JA
HON. MR. JUSTICE S.B.K. KAVUMA, JA
HON. MR. JUSITCE A.S. NSHIMYE, JA

CRIMINAL APPEAL NO. 39 OF 2010

UGANDA……..APPELLANT

V E R S U S

KATO KAJUBI GODFREY ……RESPONDENT

[Arising from the judgment of
the High Court at Masaka (Mukiibi, J)
dated 23rd April 2010 in Cr. Session Case No.16 of 2009]

JUDGMENT OF THE COURT:

[1] INTRODUCTION

This is an appeal against the ruling of the High Court of Uganda in which the learned trial judge acquitted the respondent of the indictment of murder c/s 188 and 189 of the Penal Code Act on a submission of No Case to Answer. The Director of Public Prosecutions was not happy with the ruling and hence this appeal.

[2] BRIEF FACTS

The facts as ascertained by the learned trial judge from the evidence of 22 prosecution witnesses are as follows:-

> **"On the 27th day of October, 2008 at Kayugi village in Masaka District Kato Kajubi Godfrey murdered Kasirye Joseph. On that day Kasirye Joseph aged 12 years (now deceased) disappeared from his grand father's home, one Matia Mulondo (PW1). Kasirye Joseph was staying with Matia Mulondo (PW1). Prior to the disappearance of Kasirye Joseph, Kateregga Umaru alias Bosco (PW3), a neighbour, had paid a visit to Mulondo's home. Kateregga Umaru alias Bosco (PW3) talked to Kasirye Joseph (deceased). The latter gave Kateregga Umaru (PW3) water to drink. Shortly afterwards Kateregga Umaru (PW3) left. Kasirye Joseph (deceased) picked a ten litre jerican purportedly to go and fetch water. It was at 7.30 p.m. Kasirye Joseph (deceased) never returned. A search for him that night was in vain. The next morning (that is on 28th October, 2008) residents saw Umaru Kateregga (PW3) and his wife Mariam Nabukeera (PW4) leaving the village carrying a bag. SPC Sebwana, who had been tipped off of the suspicious conduct of the two, arrested them and led them to the LC1 Chairperson of the area, one Matovu Gerald (PW6). The latter forwarded them to Kako Police Post. The two suspects were later transferred to Masaka Police Station.**
>
> **On interrogation the two suspects revealed that Kasirye Joseph had been killed, his head and private parts cut off and handed over**

to Kato Kajubi Godfrey, the accused. The accused gave Umaru Kateregga (PW3) a sum of shs.360,000/= and further promised to pay to Umaru Kateregga (PW3) a sum of shs.15 million.

Kateregga Umaru (PW3) directed the Police to the swamp where the remaining parts of the body were dumped. Police recovered the same and a post-mortem report on the deceased was done by Dr. Bawakanya Mayanja Police Form 48B was admitted in evidence marked Exhibit P.1. The cause of death was that the deceased's head, neck and genitalia were completely cut off with a sharp object.

Kateregga Umaru (PW3) and Mariam Nabukeera (PW4) stated that Kato Kajubi Godfrey came to their home in a vehicle. Indeed tyre marks of a vehicle were seen at the home of Kateregga Umaru (PW3).

A search at the home of Kateregga Umaru (PW3) led to recovery of a ten litre jerican which the deceased had gone with. Also recovered were blood stained clothes of Kateregga Umaru (PW3).

Computer print outs for the mobile phone numbers of Kato Kajubi Godfrey (077-2-700921) and Umaru Kateregga (PW3) (0772-717631) indicate that on that day, before, during and after killing of the deceased there was communication between the two. The print out further shows that Kato Kajubi Godfrey was in the vicinity of the crime on the day in question. Kato Kajubi Godfrey was arrested. The charge sheet was amended and Kato Kajubi Godfrey was added as the third accused on the charge of murder. He was taken to court and also remanded in prison."

[3] <u>THE MEMORANDUM OF APPEAL</u>

The appeal is based on the following grounds:-

"1. The learned trial judge erred in law and fact in failing to put the respondent on his defence on the basis of the evidence on record.

2. The learned trial judge erred in law and fact and misdirected himself in approaching a submission of no case to answer as if he was considering whether the case was proved beyond reasonable doubt.

3. The learned trial judge erred in law and fact in that he did not properly evaluate the evidence on record.

4. The learned trial judge erred in law and fact in using the extra-judicial statement of PW4 Mariam Nabukeera, to discredit her evidence, without the statement having been properly proved.

5. The learned trial judge erred in law and fact and misdirected himself in his analysis and treatment of the evidence of telephone calls involving PW3 Kateregga Umaru with the respondent and with third parties.

6. The learned trial judge erred and misdirected himself in his evaluation and analysis of the narration of PW3 Kateregga Umaru regarding the killing of Kasirye Joseph.

7. The learned trial judge erred in law and fact in rejecting the evidence of PW3 and PW4 without evaluating and considering all the evidence as a whole and in thereby not looking for corroboration.

8. The learned trial judge erred in law and fact in finding that there are major contradictions in the prosecution evidence in matters that go to the very root of the case, without considering and evaluating all the evidence as a whole.

9. The learned trial judge further erred in law and fact in holding that the prosecution evidence is so manifestly unreliable that no reasonable tribunal can safely convict the accused on it if no explanation is offered by him."

[4] REPRESENTATION

At the trial of the appeal, the appellant was represented by Ms Jane Okuo Kajura, a Principal State Attorney in the Directorate of Public Prosecutions, assisted by Mr. Andrew Odit, a Principal State Attorney in the same Directorate. The respondent was represented by Mr. Macdosman Kabega of M/s Tumusiime, Kabega & Co. Advocates.

[5] ARGUMENTS OF COUNSEL

(a) The Appellant:

Learned counsel for the appellant elected to argue grounds 1, 3 & 7 of the Memorandum of Appeal together, grounds 2, 4, 5 and 6 separately and grounds 8 and 9 together.

Grounds 1, 3 and & 7

The gist of these grounds of appeal is that the learned trial judge failed to evaluate the evidence properly as a result of which he came to a wrong conclusion. Ms Okuo Kajura submitted that there were a lot of evidence adduced which the trail judge failed to consider. PW3 and PW4 were consistent throughout in their evidence that on the night of 27th October 2008, the respondent came to their home after midnight in a vehicle. Both of them testifies that the deceased was killed by the respondent and his companion known as Steven. This killing took place in their own house and in their presence. The respondent took away the mutilated body of the deceased and threw it in a swamp in presence of PW3. This evidence was corroborated by a lot of other evidence which was not considered by the trial judge. For example, on the morning after the murder, the vehicle which PW3 and PW4 said had brought the respondent, left tyre marks which many witnesses saw that morning and testified to. The evidence of PW1 and PW2 gave evidence corroborating the evidence of PW3 and

PW4 on this point. The trial judge did not at all comment on that evidence.

The other piece of evidence which was not considered was the conduct of the respondent after the murder. The respondent disappeared from his homes and all his known places of work for a whole month after which he surrendered himself to the police. The murder was given the widest of publicity in media and photographs of the respondent were appearing daily in connection with the murder but he remained in hiding for a whole month. Police searched all his residences. His known telephone numbers were called but they were always switched off. According to counsel this was not conduct of an innocent man. She cited the case the LAW OF EVIDENCE by Chief Justice M. Movir to support her argument. Yet, the trial judge did not consider or even mention that evidence at all.

Ms. Kajura submitted that another piece of evidence which was ignored was that PW3 and PW4 testified that when they protested against the killing of the deceased at their home, the respondent pulled a pistol and threatened to kill them. The piece of evidence is corroborated by evidence of the police witnesses who searched the home of the respondent and found a short gun and a revolver. That evidence lends credence to the evidence of PW3 and PW4. Yet, the trial judge did not consider or mention that evidence.

The other corroborative evidence, according to appellants counsel is that there was evidence of PW15 who gave evidence showing that at all material times, including the day and night of the murder, the respondent was in telephone communication with PW3. That evidence also proved that the respondent was around the scene of crime thus placing him at the scene of crime in Masaka. Yet the trial judge stated that the evidence of PW3 and PW4 was not reliable without considering the evidence on phone communication which lends credence to the evidence of PW3 and PW4.

Ms Kajura gave one more piece of evidence which she said the trial judge ignored but yet it corroborated the evidence of PW3 and PW4. PW3 had testified that the motive of the killing the deceased was in order to remove some body parts. It was significant that when the deceased's body was found the day after the murder, certain parts of the body were missing and up to this day, they have never been recovered. For all these reasons, counsel invited us to hold that the trial judge failed to evaluate the evidence properly which led him to hold that the evidence of PW3 and PW4 was not credible whereas their evidence was corroborated in many material particulars.

Grounds 2, 4, 5, and 6

These grounds of appeal were argued by Mr. Odit. These grounds too deal in part with evaluation of evidence. Mr. Odit sharply criticised the trial judge for using an extra judicial statement of PW4 to come to the conclusion that her evidence and that of PW3 were discredited in cross-examination. During cross-examination PW4 denied the contents of that document and stated that she did not tell the magistrate what was being read to her. The statement was admitted in evidence through her testimony by the defence without calling the testimony of the person who had recorded the same. In Mr. Odit's view, it was a serious error for the court to rely on a document which was not properly admitted in evidence especially when almost all its contents were denied. This grave error led to the holding by court that the evidence of PW3 and PW4 was not credible which was highly prejudicial to the appellant's case.

Mr. Odit was also highly critical of the way the trial judge handled the evidence of telephone communications between the respondent and PW3. Though the evidence showed that before, during and after the death of the deceased, PW3 was in telephone communication with the respondent and that the respondent was telephoning from locations near the scene of crime, the trial judge underplayed the importance of that evidence and did not at all consider it in its proper context. That evidence tendered not only

to show that the respondent had opportunity to commit the crime but corroborated the evidence of PW3 and PW4 that on the fateful night, the respondent came to their home. According to counsel, it was amazing that the trial judge chose not attach any value to the evidence of telephone communications.

Mr. Odit found fault with the trial judge for holding that the evidence of PW3 and PW4 was worthless basing himself on an erroneous finding that the two had contradicted themselves without pointing out in which way. The judge relied on speculation and wrongly and unjustifiably demanded corroboration after wrongly assuming that PW3 and PW4 were accomplices whereas they were not proved to be. In his view, the trial court dealt with the matter as if it was looking for proof beyond reasonable doubt which was not required at that stage of the proceedings. He called upon us to evaluate the evidence and to hold that the prosecution had made out a prema facie case against the respondent.

Finally, counsel for the appellant concluded their arguments by criticising the holding by the court that the prosecution had failed to establish a prema facie case. He submitted that the holding was due to the fact that the trial judge mistook the requirements of a prema facie case and demanded a standard of proof which is only required when the court is determining the question of proof beyond reasonable doubt. He said that the way the court handled the issue of accomplice evidence was premature and led to a miscarriage of justice. We were invited to reconsider all the evidence and come to the conclusion that the state had made out a case for the respondent to answer. Their prayer was that we should quash the acquittal and put the respondent on his defence and in the alternative order for a retrial before another trial judge.

(b) <u>The Respondent:</u>

Mr. Kabega who argued the appeal for the respondent entirely agreed with the finding of the trial judge that the respondent had no case to answer.

Grounds 1, 3 and 7

These are the grounds which complain that the trial judge did not evaluate the evidence. He did not agree with this contention. He addressed specific examples:-

(i) Though it was submitted that the trial court did not consider the evidence of a car having been to the home of PW3 that fateful night, the prosecution did not prove that the tyre marks at the scene belonged to the a car owned by the respondent. Therefore the evidence was not significant and the court did not have to dwell on the matter.

(ii) It was submitted that the court did not consider the matter of missing body parts. Yet it was conceded by the prosecution that there was no evidence to corroborate PW3's evidence on who took the missing parts. The trial judge considered the evidence and found it not credible at all.

(iii) Regarding the conduct of the respondent after the discovery of the body of the deceased, Mr. Kabega submitted that the state did not adduce any evidence that the respondent was wanted by the police. He submitted that under the law of evidence, evidence that a suspect had absconded after a crime was committed forms a tiny part of the evidence necessary to prove the crime against the suspect.

(iv) Regarding the evidence that a rifle and revolver were found in the home of the respondent, Mr. Kabega contended that those items were never produced in court for the respondent to identify them. In his view, the attack on the trial judge that he did not consider that evidence was unjustified because he considered it at page 49 to 51 of the Ruling.

(v) As to the motive of the killing which it was alleged was not considered, counsel stated that in our law, motive is not a necessary ingredient to be proved against an accused. The trial judge was therefore justified to ignore it.

(vi) As to whether the ruling of No Case to Answer was made at the right time, counsel submitted that the court was right to hold that PW3 and PW4 were accomplices as this was necessary to determine their credibility and whether their evidence needed corroboration or not. In his view, the trial judge was right to hold that the two witnesses were accomplices as prosecuting counsel conceded that indeed they were accomplices. The judge was right to so hold.

Ground No.2

Mr. Kabega attacked appellants counsel's submission that the finding of a prema facie case was premature. He contended that the evidence of the key witnesses, PW3 and PW4 was unreliable and contradicted their police statements that no reasonable tribunal would have relied on it to convict the respondent. He was right at that stage to hold that there was no case to answer and to acquit the respondent.

Ground No.6

Counsel submitted that the witness PW3 had shown to court that he was a great liar. He admitted to court that he had lied to make a living, that he told the police lies and he lied on what transpired on the evening of the murder of the deceased. In his view, his evidence was contradicted by the more reliable evidence of PW1 and PW2. The court did not rely on speculation but on evidence that PW3 could not be relied upon.

Ground No.4

Counsel for the respondent attacked the submission by the appellant that the trial judge had used a statement made by PW4 to discredit her and her husbands (PW3's) evidence. He pointed out that the witness had under cross examination admitted that she made a statement to a magistrate, that she signed it and she identified her signature thereon. When he asked to tender the document through PW4, counsel for the prosecution said that he had no objection. Therefore the trial court was right in admitting the statement and using it to discredit PW3 and PW4.

In conclusion, Mr. Kabega submitted once the court found that the evidence of PW3 and PW4 was completely discredited, that they were accomplices and that their evidence was not corroborated, then the court was entitled to hold, as it did , that there was no prema facie case made out against the respondent and to acquit him. He prayed that we uphold the findings of the trial court.

[6] CONSIDERATION OF THE MERITS OF THE APPEAL.

(a) Evaluation of Evidence.

Just like learned counsel did, we find it convenient to deal with the grounds 1, 3 and 7 of the appeal together. They raise a number of issues which are crucial to the determination of this appeal, namely:-

(i) Whether the key prosecution witnesses PW3 and PW4 were accomplices or not.

(ii) Whether their evidence required corroboration.

(iii) Whether the learned trial judge evaluated the evidence properly to the standard required when deciding whether a prema facie case has been made out or not.

We start with whether PW3 and PW4 were accomplices. It is significant to note that right from the start of the trial of this case in the High Court,

the record shows that the court, the defence counsel and to a certain extent the prosecution counsel assumed that PW3 and PW4 were accomplices and they were treated as accomplices throughout the trial. This had a significant effect on reaching the conclusion that their evidence was worthless and that no reasonable tribunal could rely on it. The trial judge stated:-

"On the submission of the learned Principal State Attorney that the prosecution relies mainly on the evidence of Kateregga Umaru (PW3) as corroborated by Nabukeera (PW4), I refer to the holding of LORD READING, CJ in <u>R V BASKERVILE (Supra</u> that one accomplice's evidence is not corroboration of the testimony of another accomplice.

SARKAR ON EVIDENCE, 14th Edn, 1993 Chap. IX of WITNESSES at p.1924 gave the principal reasons for holding that accomplice evidence is untrustworthy. Two of them are:
(1) Because an accomplice is likely to swear falsely in order to shift guilt from himself; and
(2) Because an accomplice being a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath.

I find them so manifestly unreliable that no reasonable court can safely convict on their evidence. Kateregga Umaru (PW3) has been shown to have deliberately lied to court in narrating to court the circumstances of the actual murder of Joseph Kasirye, the deceased. It is the law that if the principal prosecution witnesses have been shown to be most unreliable then a submission of No case to answer may succeed. See: <u>Uganda v Katabazi Manuel (Supra)</u>

In the instant case, this court has found that there are major contradictions in the evidence given by the prosecution witnesses

on matters which go to the very root of the case. It has been shown that the principal witnesses intended to tell and actually told court deliberate lies about the actual killing of Kasirye Joseph. In law this court is entitled to reject the evidence of those witnesses. It is my view that the prosecution evidence is so manifestly unreliable that no reasonable tribunal can safely convict the accused on it if no explanation is offered by him.

The prosecution has failed to make out a case sufficiently to require the accused person to enter on a defence. I find that the accused has no case to answer."

Once it was assumed from the beginning that PW3 and PW4 were accomplices, it was easy to conclude that they were liars, immoral and that their evidence was worthless. It is therefore necessary to examine whether the two key prosecution witnesses were actually accomplices. The Eighth Edition of Black's Law Dictionary defines the word as follows:-

"Accomplice (is) a person who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory."

The author explains that though the definition treats this term as including an accessory before the fact, not all authorities treat the term as including an accessory after the fact. According to him:-

"There is some authority for using the word 'accomplice' to include all principals and all accessories, but the preferred usage is to include all principals and accessories before the fact but to exclude accessories after the fact. If this limitation is adopted, the word 'accomplice' will embrace all perpetrators, abettors and inciters."

The Supreme Court of Uganda has had occasion to discuss the meaning of 'accomplice' in the case of **Nasolo v Uganda [2003] 1 EA 181 (SCU).** In this case, the appellant was convicted of murder. He unsuccessfully appealed to the Court of Appeal and finally to the Supreme Court. We consider it necessary to produce here below the full summary of the facts of that case as captured by the Editor of the Report:-

"The prosecution case as accepted by the trial court was that at the material time, Nalunkuma Fina (PW1), a girl of about 11 years, was employed as a baby-sitter, by Bitijuma Nalugwa (PW3) and her husband, Hassani Mugisha (PW4). The baby was Sadat Byarugaba (the deceased). He was six months old at the time. With the knowledge of PW3, PW1 went with the baby to the home of the appellant to play with other children. At the appellant's home, PW1 placed the child to sit in a basin in the compound while she played with other children nearby. At one point during their play, PW1 left briefly to return to PW3's home. As she was leaving, she saw the appellant seated near where the deceased had been seated. When PW1 returned to the appellant's home, she did not see both the deceased and the appellant. She went to the toilet (a pit latrine) and met the appellant at the door coming out of the toilet. The appellant said to PW1 that she (appellant) had thrown the deceased into the toilet, and warned PW1 that she (appellant) had thrown the deceased into the toilet, and warned PW1 not to tell anyone or else the father of the deceased who was a soldier would shoot her(PW1).

PW1 apparently feared, and heeded the warning. She did not reveal what had happened to anyone, including the parents of the deceased, until she was arrested and detained by the police. When PW3 realized that her baby was missing, she asked the appellant if she knew where the baby was. The appellant denied the whereabouts of the baby.

A search for the deceased was made. During the search, the appellant informed the search team not to bother searching in the toilet because there was nothing in it; she had only thrown in it her old red plate. The search team found the body of the deceased in the pit latrine, dressed in a red dress. Medical evidence revealed the cause of his death to be aspiration pneumonia. The appellant was arrested, charged with and tried for the murder of the deceased. She denied the charge. Her defence was an alibi to the effect that she was not at the scene of the crime at the material time.

Initially, the appellant had been arrested with four other persons including PW1 who were originally charged in the Magistrate's Court for committal to trial in the High Court. However, the charges against the four save the appellant, were withdrawn before their committal. At a later date during the hearing of the committal proceedings, the prosecution applied for a warrant of arrest against PW1 since only the appellant was present in court and per instructions, the prosecution was to commit PW1 and the appellant. The appellant was accordingly committed to stand trial at the High Court whereas no further mention of PW1 was made on the record until she came to testify on behalf of the prosecution.

At the appeal in the Supreme Court, one of the grounds upon which the appellant relied was that the reliance and acceptance by the court of the evidence of PW1 without withdrawing the charge against her was an error of law and fact. It was also contended that PW1 was a self-confessed liar and an accomplice whose evidence should have been disbelieved."

The Supreme Court held:-

"In a criminal trial a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an

accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial.

However, even in absence of such confession or conviction, a court may find, on strength of the evidence before it at the trial, that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit, or incited the commission of the offence under trial, he would be regard as an accomplice. See <u>Khetem v R [1956] ea 563; and Watete and others v Uganda (supra)</u>"

Coming to the instant case, PW3 Umaru Kateregga and his wife PW4 Mariam Nabukeera were the first suspects of the murder of the deceased Joseph Kasirye. They never at any time confessed voluntarily to the killing of the deceased. There is a lot of credible evidence on record that an attempt was made by the police to make them confess to the crime but they consistently refused until they accepted to 'confess' after a lot of beatings in order to escape being killed. They were forced to sign documents of confession which they repudiated at the trial of the respondent. PW3 showed the court, and the trial judge acknowledge the fact, that he had been severely beaten, almost all of his toe nails were removed under torture. He rejected the claim that he had made any confession before the police. What is strange is that though he admitted making an extra judicial statement before a magistrate, that statement never saw the light of the day. The obvious conclusion is that if it had been exhibited, it would have proved adverse to all those who asserted that he was an accomplice and established his consistency with to what he told the court on oath.

The same thing applies to PW4 Mariam Nabukeera. She refused to confess to the police under torture. It was later claimed that she had confessed before a magistrate. Though she agreed, she denied the contents of all she was alleged to have confessed. Later on, the court and the defence used the statement to discredit her evidence though the maker of

her alleged confession was never called in evidence even when the witness had totally repudiated its contents. The strange thing about this trial is that when you read the full record of the trial, including the Ruling of the Court, you get the feeling that it was PW3 and PW4 who were being tried. It does not at all look like a trial of the respondent.

Secondly, though PW3 and PW4 were originally charged with the respondent, the prosecution for some reason withdraw the charges against them and elected to use them as witnesses. We have no idea whether they have ever been charged again but at the time of the ruling of the court on no case to answer, they had not yet been charged with any offence.

Thirdly, they have never been convicted or pleaded guilty to the murder of Joseph Kasirye. It is difficult to tell why the court treated them and 'tried' them as if they had murdered Joseph Kasirye. Apparently, the learned trial judge believed that PW3 and PW4 had participated in the killing of Joseph Kasirye because of the evidence of one Kasirye Paul (PW2). Here below, we reproduce from page 46 of the Ruling how that evidence affected the thinking of the trial judge:-

> **"It is my view that the version of the killing of Kasirye Joseph introduced by the evidence of Kasirye Paul (PW2) which shows a blood stained ten litre jerican and blood on Kateregga's clothes is parallel to and cannot be reconciled with the version narrated to court by Kateregga Umaru (PW3). The evidence of discovery of a blood stained ten litre jerican and blood stained clothes belonging to Kateregga has proved that Kateregga Umaru (PW3) deliberately told court lies when he vividly narrated how one Stephen, acting on Kajubi's instructions, actually cut off Kasirye's head and private parts, and how Kajubi assisted Stephen to lift the trunk of Kasirye so that blood could drain into a basin."**

Paul Kasirye PW2 testified that the morning after the murder of Joseph Kasirye, he saw police and L.C. Officials recover a blood stained ten litre

jerican and blood stained clothes belonging to Kateregga from the house of Kateregga. We have carefully examined the record of proceedings covering the evidence of all prosecution witnesses. Nobody else mention this blood stained 10 litre jerican and clothes from the house of Umaru Kateregga. Even all the L.C. Officials, neighbours and police who visited the scene do not make mention of the recovery of these two items from the house of Umaru Kateregga. In fact they were all unanimous that though Kateregga's home was searched, nothing incriminating was found in his home. Nothing at all.

The evidence of PW2 Kasirye Paul on this matter is on page 27 of the proceedings. This is what he said in examination in chief:-

> **"The villagers suggested that we go to Kateregga's home to search. We came with the Chairman, Secretary for Defence, Kateregga, his wife and villagers to Kateregga's home. The Secretary for Defence and the Chairman L.C.I searched <u>Kateregga's home but found nothing.</u> The Chairman took Kateregga and his wife to Kako Police Post. I went to the Police Post. Police interrogated them. The police decided to take Kateregga back to his home. The wife remained at the post. The police searched Kateregga's home. <u>Nothing was recovered.</u> We took Kateregga back to Kako. I went back home."**

Under cross-examination the witness was asked about the search of Kateregga's home the morning after the murder. He said:-

> **"Incriminating items had been found in the house. I saw the jerican and blood stained clothes which had been found in Kateregga's house. The jerican belonged to Kateregga. It confirmed to me that Kateregga had killed the deceased. I suspect Kateregga and his wife were running away because of that. I agree that Kateregga is a killer."**

It should be noted that PW2 Paulo Kasirye never told anyone else about the recovery of the blood stained jerican and the clothes. Nobody who visited the house of PW3 and PW4 testified about those items. PW2 forgot that he had denied their existence under examination in chief. He only purported to remember them in cross examination. This is the witness on whose evidence court relied to hold that PW3 and PW4 had deliberately lied to it while he (PW2) was at the same time telling lies to the same court. Even the trial judge noted on record that this witness was being evasive under cross-examination. It is amazing as to how PW2 Kasirye Paul's false evidence about blood stained items could be relied on to discredit the evidence of PW3 and PW4.

In order to lend credence to the testimony of PW2 Kasirye Paul, the learned trial judge cited the prosecution's summary of evidence and the evidence of PW11 Andrew Kizimula Mubiru as follows:-

"The prosecutions summary of the case contained the following statements:-

> ***'A search at the home of A1 led to recovery of a ten litre jerican which the deceased had gone with. Also recovered were blood stained clothes of A1.'***

Andrew Kizimula Mubiru (PW11) testified as follows:-

> ***'Another request was received on 1st December 2008. It was received from Masaka Police Station. It was delivered by D/C Nyanzi. 5 exhibits were submitted. …….. 5th exhibit was an old yellow 10 litre jerican labelled Exhibit MD5 (F.2018/08). The request was to examine whether it contained human blood outside the sprout adjacent to the inside cut point and if the DNA matched with KB. All these exhibits were examined and the results are contained in a report submitted.'***

This evidence supports the evidence of Kasirye Paul (PW2) that a blood stained 10 litre jerican was recovered. In my view the evidence of Kasirye Paul (PW2) introduces another version of the

killing of Kasirye Joseph. That version which shows blood on a ten litre jerican and on Kateregga's clothes cannot be reconciled with the version narrated to court by Kateregga (PW3).

If, according to Kateregga (PW3), a lot of care was taken to collect blood from Kasirye's body, where did the blood on the ten litre jerican and on Kateregga's clothes come from?"

We have two comments about this unjustified attempt to clean the tainted evidence of Kasirye Paul (PW2).

First, the contents of the prosecutions summary of the case quoted above do not constitute evidence in a Court of Law. They are not given on oath and the marker did not testify to give opportunity to the adverse party to cross examine him/her. They cannot be used to support or discredit evidence received on oath.

Second, Andrew Mubiru (PW11) is a Government Analyst who examiners exhibits presented to him by the police. He claims in his evidence that he received exhibit MD5 (F2028/08) from D/C Rashid Nyanzi (PW16) who was one of the police officer investigating the instant murder case. The exhibit is said to be **"an old yellow 10 litre jerican."** He was requested to examine whether it contained human blood. The learned trial court did not reveal in his ruling what the results of the examination were. However, whatever the results were, we have carefully studied the evidence of PW16 Rashid Nyanzi. He visited the house of PW3 and PW4. He does not testify that he saw or collected a 10 litre yellow jerican stained with blood or any shirts stained with blood. We went further and perused the police statement of Rashid Nyanzi which he recorded on 5/11/2008. No where does he say that he saw or collected or took to PW11 Andrew Kizimula Mubiru a yellow 10 litre jerican for blood testing. He, Mubiru (PW11) must have examined an exhibit in another case, but not the case of **Uganda vs Kato Kajubi Godfrey.** Therefore, if the learned trial judge had

evaluated that evidence properly, he could not have used it to support the obviously fake evidence of Paul Kasirye (PW2).

Many witnesses visited the home of Umaru Kateregga (PW3) within two days of the murder of Joseph Kasirye. They include PW1 Matia Mulondo, PW5 PC Kyeyune Eddie, PW6 Matovu Gerald Ssalongo, PW7 Mugwanya Joseph, PW10 D/IP Etyang, PW13 D/SP Rugamayo Christopher, to emotion but a few. None of them mentioned seeing, collecting or otherwise dealing with a blood stained yellow jerican or a blood stained shirt belonging to PW3 Kateregga Umaru. It is true that the witness PW3 Kateregga Umaru told court that he sometimes told lies in order to make a living. He admitted that he told the respondent lies that he had supernatural powers, which he did not have in order to make money from him. It was also admitted that PW3 being a native "doctor" had to tell a lot of lies in order to make a living. All this, however, does not mean that he was incapable of telling the truth under oath. This and the fact that the trial judge, with respect, unfairly and unreasonably assumed that PW3 and PW4 were accomplices, led him to wrongly conclude that they were incapable of telling the truth on oath. We hold that PW3 Umaru Kateregga and PW4 Mariam Nabukeera were not proved to be accomplices and their evidence did not need corroboration. Nevertheless, it was adequately corroborated.

(b) <u>Corroboration:</u>

There was a lot of evidence from the evidence of PW3 and PW4 which corroborated each other. There was also evidence tending to show that the two witnesses told the truth to court.

(i) PW3 told of how he met the respondent. He told of how the respondent took him to most of his homes in Kampala and Masaka. He also showed him most of his businesses. During the investigation of the case after the killing of the deceased, PW3 was able to take the police to most of those places in Kampala and Masaka. It was never suggested that he took them to a wrong destination.

(ii) He was able to establish in court that the respondent had bought him a phone. The print out of the phone number and that of the respondent's telephone number revealed that the two were constantly calling each other and this went on till the morning after the murder of the deceased. The same print out puts the respondent at the scene of murder in that they show clearly that he was in Masaka that fateful night.

(iii) The witness Umaru Kateregga narrated in detail how the deceased had met his death at the hands of the respondent and his friend called Stephen. This had taken place in his own house. The evidence was corroborated by that of his wife PW4. The evidence was never contradicted. The respondent was never given opportunity to rebut the powerful testimony of PW3 and PW4 against him.

(iv) While PW3 and PW4 were trying to give testimony to tell the court who killed Kasirye Joseph, the two were never given a fair chance as they were the ones being constantly harassed by the defence and the court under cross-examination. The prosecution did nothing to plead for their protection.

(v) The relevance of the fact that the respondent disappeared from all his known addresses and telephone contacts for a month after the murder of Joseph Kasirye was totally ignored by the trial court. All his known telephone numbers were switched off for one month! Yet it was a significant and a relevant factor.

(vi) PW3 and PW4 testified that the respondent whom they alleged killed the deceased came to their home at around 1 p.m. They said they were at their home with the deceased. They said the respondent was travelling in his car. They had previously told the L.C. Officials and the people who gathered to answer an alarm following the disappearance of the deceased that the killer had come in a car. When his home was visited, fresh tyre marks were clearly visible. Though there was no conclusive proof independent of their evidence that the tyre marks belonged to a vehicle driven by the respondent, this evidence

tended to show that a stranger to the village visited in the middle of the night in which Joseph Kasirye disappeared. This made it highly probable that the respondent who was on telephone calling from locations in Masaka actually visited PW3 that night.

It is also consistent with their evidence that the body of the deceased was removed from the home of PW3 in the respondent's vehicle and was damped in a swamp in their neighbourhood. It is PW3 who took the police to the scene where the body of the deceased was recovered without a head and sexual parts.

(vii) The L.C. Officials, the villagers and others who gave evidence testified that from the outset, the two witnesses PW3 and PW4 denied the killing of the deceased. They never heard them admit that they had killed the deceased. It is some police witnesses who claimed that the two had confessed. This corroborated the evidence of PW3 and PW4 that they never confessed to the crime and only signed alleged confessions to escape severe beating by the police at Kako Police Post and Masaka Police Station.

(viii) PW3 and PW4 testified that shortly before the respondent and one Steven cut off the head of the deceased, they tried to protest the attempt to kill the child. However, at that point, the respondent pulled out of his pocket a revolver which he pointed at them and warned them that he could shoot them if they tried to stop him. Days later, when the police searched the homes of the respondent, a revolver and a short gun were recovered which corroborated their testimony that the respondent pulled a revolver at the scene of crime and threatened to shoot them.

All in all, we find that if the trial judge had not at all times laboured under the impression that the two key prosecution witnesses were accomplices, which they were not, he would have found it irresistible to find that the prosecution had established the prema facie case against the respondent as required by law.

(c) Meaning of Prima Facie Case

As we are all aware, the learned trial judge acquitted the respondent on the grounds that the prosecution had failed to establish a prima facie case against the respondent. The appellant has submitted before us that the High Court imposed a higher burden of proof than that required to establish a prema facie case. In the view of the appellant, the trial judge considered matters as if he was finally deciding whether the prosecution had proved the guilt of the respondent beyond reasonable doubt. We were invited to re-evaluate the evidence and hold that the prosecution had established a prima facie case. So, what is the meaning of prima facie case?

Fortunately for us there are many decided East African authorities on this matter. One of the most famous ones is **Fred Sabahashi vs Uganda, Criminal Appeal No.23 of 1993 (SC).** This decision was cited to the trial judge in this instant case. The supreme Court stated:

"In the Practice Note (1962) ALL ER 448, Lord Parker stated

> ***'A submission that there is no case to answer may properly be made and upheld; (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."***

Lord Parker continued and gave the test of a prima facie case:

> ***'If however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable***

tribunal might convict on the evidence so far laid before it, there is a case to answer.'

A definition of a prima facie case was given by Sir Newhan Worley D, in Ramalal T. Bhatt v R (1957) E.A 332 ABR 335, as follows:

'It may not be easy to define what is meant by a prima facie case, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.'"

Lord Paker concluded thus –

"It is clear from the above two authorities that the test of a prima facie case is objective and that a prima facie case is made out if a reasonable tribunal might convict on the evidence so far adduced. Although the court is not required at this stage to decide whether the evidence is worth of credit or whether if believed is weighty enough to prove the case conclusively, a mere scintilla of evidence can never be enough nor any amount of worthless discredited evidence. But it must be emphasised that a prima facie case does not mean a case proved beyond reasonable doubt; <u>Wilbiro v R. (1960) E.A. 184."</u>

A submission of no case can only be properly made and upheld,

(a) When there has been no evidence to prove an essential element in the alleged offence.

(b) When the evidence adduced by the prosecution has been so badly discredited as a result of cross-examination or is manifestly unreliable that no reasonable tribunal could safely convict on it.

On the latter requirement, we have discussed at length whether the prosecution evidence was discredited or was manifestly unreliable that no tribunal could

convict on it. We have shown that the learned trial judge right from the beginning of he trial wrongly assumed that the two key prosecution witnesses were accomplices and could not be expected to tell the truth even on oath. He also held that their evidence lacked corroboration. We disagreed with the learned trial judge and we have held that the two prosecution witnesses i.e. PW3 and PW4 were not accomplices and therefore their evidence did not require any corroboration. The evidence of PW2 Kasirye Paul which was used to hold that their evidence was not credible was itself incredibly false. The so called confession statement of PW4 was wrongly admitted in evidence without calling the person who recorded it to prove it. Since it was totally disowned by PW4, it cannot be used to discredit her evidence unless it had been properly admitted in evidence.

This means that the evidence of PW3 and PW4 was neither discredited nor was it worthless. At the same time, we have shown that there is on record plenty of evidence which corroborates their evidence. We hold that the evidence of PW3 and PW4 was credible and the accused should have been given opportunity to explain himself.

(d) Proof of Ingredients of the offence:

We now consider whether the prosecution had proved the four ingredients of murder to the degree required to establish a prema facie case. On page 9 to 18 of the ruling, the learned trial judge considered this matter and found that the prosecution had proved the three ingredients of murder as follows:-

(i) That the deceased Joseph Kasirye was killed on the nigh of 27th October 2008.

(ii) That the killing was unlawful.

(iii) That the killing was done with malice aforethought.

The court, however, found that the 4th element of murder, namely the participation of the accused (respondent) was not proved to the required

standard mainly because the evidence of PW3 and PW4 which implicated the respondent was declared to be worthless, because the witnesses were held to be accomplices,. We have now held that they were not accomplices and their evidence together with other circumstantial evidence corroborating their testimony heavily implicated the respondent.

We hold that the prosecution did prove all the four elements of murder to the degree required to establish a prema facie case against the respondent. The respondent should have been called upon to answer a pram facie case.

In light of this finding, we have considered whether we should order the respondent to be put on his defence before the trial judge or before another judge. We have rejected the first option as not being feasible. We do not think it is fair to the parties and to the trial judge to order him to continue with the trial. He seems to have taken certain fundamental positions on various matters in the trial that may be too late to revise now. We do understand the awkward situation he may find himself in being human, like all human beings are.

We do not consider it feasible either, to order that the trial continues before another judge. It is not practicable to expect another judge to continue a case of this magnitude on the evidence of 22 witnesses he/she neither saw nor heard in the witness box in court.

This case shocked the entire nation. It is in the interest of the respondent and the people of Uganda that a just solution be found. At the risk of an amount of delayed justice, we think the only viable resolution of the conflict between justice and impunity is to order that there be a retrial in the High Court of Uganda before another judge.

In the result, this appeal succeeds. We order a retrial of the indictment in the High Court as soon as is practicable but bearing in mind that delayed justice is injustice or a denial of it.

Dated at Kampala this…***23rd*** ...day of …***November***….2010.

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Hon. Justice A. Twinomujuni

JUSITCE OF APPEAL.

……

Hon. Justice S.B.K. Kavuma

JUSTICE OF APPEAL.

……

Hon. Justice .A.S. Nshimye

JUSITCE OF APEAL.