

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**AT MBARARA**

**CRIMINAL APPEAL NO. 0021 OF 2008**

*(Appeal from the Judgment and Order of acquittal by Hon.  
Justice P. K Mugamba in Criminal Session Case No. 145  
of 2007 delivered on 8<sup>th</sup> May 2008 at Mbarara.)*

UGANDA ..... APPELLANT

VS

**1. NAKIBULLE HAWA**

**2. KAGORO ISSA.....RESPONDENT**

**Coram: Mr. Hon. Justice Kenneth Kakuru, JA**

**Mr. Hon. Justice Byabakama Mugenyi, Simon, JA**

**Mr. Hon. Justice Alphonse C. Owiny-Dollo, JA**

**JUDGMENT OF THE COURT.**

This is an appeal from the decision of Hon. P.K Mugamba, J (as he then was) delivered on 8<sup>th</sup> May 2008, whereby he acquitted the respondents of murder contrary to **Sections 188 and 189 of the Penal Code Act** and ordered their release forthwith.

The appellant, being dissatisfied with the acquittal, appealed to this Court on the following grounds;

- 1. The learned trial Judge erred in law and fact when he considered the defence evidence in isolation of the prosecution evidence.***
- 2. The learned trial Judge erred in law and fact when he held that the prosecution had failed to prove common intention therefore failed to prove participation of the respondents.***

**Appearance.**

At the hearing of this appeal the appellant was represented by Ms. Barbra Masinde, Senior State Attorney while Ms Matovu Sumaya appeared for the respondents on state brief.

The respondents were not in Court although service upon them was effected through electronic and print media. The Court had ordered that the respondents be served by way of substituted service when they failed to appear in Court at the first hearing. At the adjourned hearing, learned counsel for the respondents informed Court she had not been in touch with

the respondents and therefore had no instructions on how to proceed with the appeal. She applied to Court to step down from the appeal and Court granted the request.

Upon application by counsel for the appellant, Court ordered that the hearing proceeds in the absence of the respondents under **Rule 73(9) of the Rules of this Court.**

### **Brief Background;**

The appellants together with two others were tried for the murder of Matovu Jamada (deceased herein) whose body was discovered in a bush at Nkonkonjeru Cell, Biharwe on the 25-5-2006. The body had been stuffed in a sack with the hands tied with a rope at the back and had another rope around the neck. The 1<sup>st</sup> respondent was arrested and tried on the evidence that the deceased was last seen in her company as they headed to her home on the 23-5-2006. The 2<sup>nd</sup> respondent's trial was on evidence of disclosure by his sister (PW10) to the effect he had confessed to her he participated in killing the deceased. The 2<sup>nd</sup> respondent led the police to the very spot where the body had earlier been discovered.

In the charge and caution statement that was admitted in evidence, the 2<sup>nd</sup> respondent admitted holding the legs of the deceased while the 1<sup>st</sup> respondent and others strangled him. The learned trial Judge found the prosecution had failed to prove the case beyond reasonable doubt and acquitted the four accused including the respondents herein.

### **Appellants Case.**

Ms. Masinde argued both grounds together. She submitted that there was sufficient evidence to prove both respondents had participated in the murder of the deceased, contrary to the findings of the trial Judge. The evidence included the 2<sup>nd</sup> respondent's charge and caution statement where he admitted holding the deceased's legs as he was "kicking to die," while the others strangled him. Counsel pointed out that the confession statement was corroborated by the testimony of PW10, who had told Court that her brother (2<sup>nd</sup> respondent) had revealed to her about the plan to kill the deceased and also informed her after they had executed the plan.

Counsel also referred to the evidence of PW9, who practises "witchcraft" who told Court that PW10 came to him seeking traditional means of preventing the arrest of the 2<sup>nd</sup> respondent. The other evidence was of PW6, a Police officer who testified that the 2<sup>nd</sup> respondent led him and others to the very spot where the deceased's body was earlier discovered, a distance of about 8 miles from the home of the 1<sup>st</sup> respondent where the killing took place.

As for the 1<sup>st</sup> respondent, counsel submitted that the evidence of PW1 and PW2 clearly revealed that the deceased was lured from his place of work by the 1<sup>st</sup> respondent and was last seen moving with her to her home in Nkonkonjeru cell. Counsel asserted that the totality of

this evidence rendered the respondent's respective alibi untrue and that they had shared a common intention in the murder of the deceased. Counsel contended that had the learned trial Judge carefully evaluated the evidence, he would not have come to the finding that he did. Counsel prayed Court to allow the appeal, set aside the acquittal, enter a conviction and determine the appropriate sentence.

### **Resolution by the Court**

We have heard the submissions of counsel for the appellant. We have also carefully studied the court record. As a first appellate Court, we are required to re- appraise all the evidence adduced at the trial and to make our own inferences on all issues of law and fact:- See **Rule 30(1) of the Rules of this Court; Pandya vs Uganda, Criminal Appeal No.1 of 1997** and **Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997.**

We shall therefore proceed to do so.

The prosecution had the burden in this case to prove beyond reasonable doubt all the ingredients of the offence of murder. These were clearly set out by the learned Judge as follows;

- (i) The death of the deceased,**
- (ii) Death was unlawfully caused,**
- (iii) Malice aforethought,**
- (iv) Participation.**

The appellant's complaint is not on the findings of the trial Judge with regard to the first three ingredients. Indeed, upon our evaluation of the evidence, we are satisfied that the said ingredients were proved beyond reasonable doubt as correctly found by the trial Judge. The complaint in the instant appeal is that the trial Judge erred in holding that participation was not proved by the prosecution. The evidence adduced by the prosecution to prove participation was basically circumstantial. The other piece of evidence was the charge and caution statement of the 2<sup>nd</sup> respondent which the trial Judge found did not amount to a confession.

The tests to be applied when dealing with circumstantial evidence have been set out in a number of decisions and were re-stated by the Supreme Court in the case of **Janet Mureeba and 2 others vs Uganda, Criminal Appeal No. 13 of 2003** (unreported) as follows;

*“ There are many decided cases which set out tests to be applied in relying*

*on circumstantial evidence. Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused. In R vs Kipkering Arap Koske and another [1949] 16 E.A.C.A 135, it was stated that in order to justify, on circumstantial evidence, the 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 guilt. That statement of law was approved by the E.A Court of Appeal in Simon Musoke vs R [1958] E.A 715 [and see Bogere Charles case [supra].*

In the case of **Teper vs R [1952] AC 480** at page 489, which was cited with approval in **Simon Musoke vs R** (supra), the Court held;

*“ It is also necessary, before drawing the inference of the accused’s guilt from circumstantial evidence, to be sure that there are no co-existing circumstances that would weaken or destroy the inference. ”*

We shall now examine the circumstantial evidence on record.

Umaru Semambo (PW2) testified that he was a *boda-boda* operator and he knew the 1<sup>st</sup> respondent well. On the 23-5- 2006 she gave him an assignment to pick one Jamada from a place commonly referred to as “five miles”. She gave him directions where to find him and instructed PW2 to deliver him at Kamukuzi Petrol Station. The time was about 11:00am. He duly complied by picking the said Jamada. After delivering him at the Petrol Station he rang her and was paid shs. 5000/- by Majwara Joseph (PW1), a pump attendant at the station.

The testimony of PW1 was to the effect that on the 23-5-2006, he was at the petrol station when the 1<sup>st</sup> respondent gave him shs. 5000/- with instructions to pay PW2 after he had delivered her visitor at the station. Shortly after, PW2 arrived carrying a man on his motorcycle. He paid PW2 the money the 1<sup>st</sup> respondent had left with him. The 1<sup>st</sup> respondent returned and moved with the visitor towards Nkokonjeru.

The evidence of Mansuru Gayi (PW3) was to the effect that he was working for the deceased in his video show room at “five miles”. On the 23-5-2006, between 10am and 11am, a *boda-boda* rider came and stated he was sent by someone to pick Jamada (deceased). The latter left with the *boda-boda* cyclist but did not return.

The testimony of Luwanguza Saad (PW4) was to the effect that on the 22<sup>nd</sup>-5-2006, at about 6pm, he was at Ruti when he received a call on his mobile phone and the caller identified herself as Haawa. The caller stated she wanted to talk to Jamada. PW4 informed her that

Jamada was at a different place, but she insisted that he goes to where Jamada was and his (PW4) money would be refunded. He did so whereupon the deceased talked to the caller on PW4's phone.

Mwajuma Namatovu (PW10) testified that she was informed by her brother (2<sup>nd</sup> respondent) about a plot to kill someone. She stated:

***“During May 2006 A2 came and said there was a woman in London whose names I did not get from him. He said the woman sent money to her son called Moses. He said the money was later to be given to Hawa so that her brother-in-law could be killed. I did not know the names of the in-law to be killed.....Shortly after A2 came and said they had carried out the issues of the London woman.....”***

PW10 further testified that she consulted PW9 for medicine to prevent the arrest of the 2<sup>nd</sup> respondent. This was corroborated by PW9. In cross-examination, PW10 stated categorically that;

***“My brother confessed he had killed a person. ”***

PW6 testified that he arrested the 2<sup>nd</sup> respondent from Kakoba at the home of PW6. He stated:

***“I went and arrested him. He led me to Biharwe where they had dumped the body. He confessed involvement. He led me to the very place where we had earlier retrieved the body. We went to the scene about a week after we recovered the body. ”***

In cross-examination, PW6 stated he arrested the 2<sup>nd</sup> respondent on 4-6-2006. The testimony of D/AIP Mugisha Jackson (PW8) was to the effect that he recorded the 2<sup>nd</sup> respondent's charge and caution statement on 5-6-2006. (PE9). On page 2 the statement reads:

***“When I reached Nkonkonjeru at Kamida's home, I got the door of the house half Closed. I then heard someone inside talking in Ruganda that “MUNJAGAZA KI” meaning what do you want from me. I then pushed the door open to enter inside the house. I got there Hawa with another brown man whom I didn't know and they were handling a man seated on Hawa's bed with a rope in his neck and the two were strangling him. When I asked Hawa what the problem was, she replied me that I should come and assist them. That man was a deadly person. I went and handled the legs of that wrong person. This man was kicking to die. After about two minutes, I became scared, went and got my bicycle and rode to Kiyanja. ”***

In his defence, the 2<sup>nd</sup> respondent denied killing the deceased and that he did not know the 1<sup>st</sup> respondent or Mwachuma (PW10) who claimed to be his cousin. The bulk of his testimony relayed a series of beatings he was subjected to by Mugabi (PW5) and others following his arrest on 4-6- 2006. The beatings culminated into being compelled to make and sign a Police statement. He stated in re-examination that:

***“I made the statement because I was forced to make it. ”***

We note that the aspect of the repeated beatings by PW5 and others was not raised during cross-examination of PW5. Further, there is evidence the 2<sup>nd</sup> respondent was examined on 8-6-2006 by Dr. Byaruhanga on PF 24 (PE3) and his findings were that the 2<sup>nd</sup> respondent had no fresh injuries on his body. If it were believable that the 2<sup>nd</sup> respondent was assaulted with sticks by over ten people on six different occasions, he would have sustained some injuries on his body which could not have escaped PW1's attention during examination. We are therefore inclined to find the claim by the 2<sup>nd</sup> respondent that he was assaulted was an afterthought and not believable.

In his consideration of the 2<sup>nd</sup> respondent's statement (PE9), the learned trial Judge stated as follows:

***“ In the extra judicial statement of A2, he said he found A1 with an identified brown man holding a man seated on A1 's bed with a rope in his neck. All A2 says he did was to hold the legs of the man who was “kicking to die”. What I note from the above statement is that A2 arrived at the scene and found the man in issue already being strangled and that A2's role was to assist hold the dying man. In Criminal Appeal No. 27 of 1995 (unreported) the Supreme Court in Mohamed Mukasa and another Vs Uganda had this to say:***

***“..... if the accused makes a full confession and “tars himself with the same brush” and the statement is sufficient by itself to justify the conviction of the maker of the offence for which he is being tried jointly with the other accused, the statement may be taken into consideration or as evidence against the co-accused.***

***The extra judicial statement does not show that A2 unequivocally admitted having committed the offence. He found, according to him, the offence already committed. The value of A2's extra judicial statement therefore is limited when it was to implicate A1, a co-accused”.***

With great respect to the learned trial Judge, his finding that the statement was not an unequivocal admission of commission of the offence is at variance with the contents of the

statement. Firstly, the statement revealed that as the 2<sup>nd</sup> respondent approached the door to the house, he heard someone asking “*what do you want from me.*” Secondly, the 2<sup>nd</sup> respondent pushed the door open and found a man with a rope around his neck seated on the 1<sup>st</sup> respondent’s bed. Thirdly, when he was asked to lend a hand, the 2<sup>nd</sup> respondent held the man’s legs. Fourthly, the statement that the man was kicking to die indicated that he was still alive at the time the 2<sup>nd</sup> respondent joined and assisted the others who were squeezing life out of him.

In our considered view, the 2<sup>nd</sup> respondent associated himself with the others in the perpetuation of the unlawful act, he having noticed that they were strangling a person. It is immaterial that he found the others already in the act or that he merely held the legs. He would have been taken to have disassociated himself from their act if he had declined to heed to their request and fled from the scene. He did not; instead he became a willing participant by joining the others. Further, his subsequent conduct of participating in the disposal of the body some 8-10 miles from the scene, was another manifestation of him having shared a common intention with the others in commission of the offence.

It is now settled that an unlawful common intention does not imply a pre-agreed plan. Common intention may be inferred from presence of the accused persons, their actions and omission of any of them to disassociate him/her from the assault. See **R-V Tibulayenka & others (1943) 10 EACA 51; Wanjiro Wamiro vs R (1955)22 EACA 521 and PC Ismail Kisegerwa and another vs Uganda, Court of Appeal Criminal Appeal No. 6 of 1978 (unreported)**

In the instant case, we find that the confession statement of the 2<sup>nd</sup> respondent amounted to unequivocal admission of having participated in the commission of the offence and that he acted in concert with the others.

Having evaluated the evidence, we are satisfied that the confession statement was corroborated in material particulars. In the first place, the statement revealed that the man was being strangled. The post-mortem report (PEI) shows the cause of death of Jamada Matovu (deceased) was neurogenic shock following spinal cord injury due to manual strangulation. Further, the statement revealed that there was a rope around the man’s neck. Indeed, the body of the deceased was discovered with a rope around the neck. The other critical factor we wish to consider is the identity of the man/victim mentioned in the confession statement. The evidence of PW5 and PW6 was that the 2<sup>nd</sup> respondent led them to the spot in the bush where the body of the deceased in this case had earlier been recovered. There is no doubt, therefore, the man/victim talked about in the 2<sup>nd</sup> respondent’s statement was none other than the deceased in this case.



The statement implicated the 1<sup>st</sup> respondent in the killing of the deceased. In **Anyango and others vs R [1968] E.A 239, the East African Court of Appeal** stated as follows:

*“ If it is a confession and implicates a co-accused, it may, in a joint trial, be taken into consideration against that co-accused. It is, however, not only accomplice evidence but evidence of the “weakest kind” ( Anyuma S/o Owora & another vs R [1953] 20 E.A.C.A 218); and can only be used as lending assurance to other evidence against the co-accused. (Gopa S/o Didamebanya & others vs R [1953] 20 E.A.CA318.*

In the matter before us, the evidence of Umaru Semambo (PW2), which we have summarised herein, was to the effect that he dropped the deceased at the Petrol Station after 11:00am. The evidence of Majwara Joseph (PWI) was that the 1<sup>st</sup> respondent came for the deceased at the Petrol station and they took the direction to her home. He was not seen again thereafter. According to the confession statement of the 2<sup>nd</sup> respondent, it was around 1:00pm when he found the man being strangled in the 1<sup>st</sup> respondent’s home.

In her defence, the 1<sup>st</sup> respondent stated she was friends with the deceased but denied instructing PW2 to pick him from his home. She further denied having known P.W2. We note that during cross-examination of PW2, it was not suggested that the 1<sup>st</sup> respondent could not have instructed him to pick the deceased since he (PW2) was a stranger to her. In that context, the 1<sup>st</sup> respondent’s denial is an afterthought and therefore untrue.

The incontrovertible evidence of PW1 and PW2 established the fact that the 1<sup>st</sup> respondent lured the deceased to the Petrol Station where she picked him and moved with him towards her home. In effect, she was the last person to be seen with the deceased while he was still alive. In those circumstances, the 2<sup>nd</sup> respondent’s confession statement lent assurance to the inference that the 1<sup>st</sup> respondent participated in the murder of the deceased.

Having carefully evaluated the evidence, we are satisfied that there were no co-existing circumstances that would weaken the inference that both respondents were responsible for the death of the deceased and that, in so doing, they shared a common intention. We therefore find merit in this appeal and it is allowed. We hereby set aside the acquittal of both respondents and enter a conviction of murder contrary to **Sections 188 and 189 of the Penal Code Act.**

We order for the immediate arrest of both respondents and that a warrant of arrest be issued for that purpose and it be published in print media within 14 days from the date hereof.

We further order that, upon arrest, the respondents be produced before a Judge of the High Court at Mbarara or at the High Court Criminal Division Kampala for sentencing.

**DATED AT MBARARA THIS 22<sup>nd</sup> day of December 2016**

**HON. JUSTICE KENNETH KAKURU,**

**JUSTICE OF APPEAL**

**HON. JUSTICE BYABAKAMA MUGENYI SIMON,**

**JUSTICE OF APPEAL**

**HON. JUSTICE ALFONSE C. OWINY-DOLLO**

**JUSTICE OF APPEAL**