THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, AND MULENGA, JJ.S.C.)

CRIMINAL APPEAL NO. 20 OF 2000

B E T W E E N

OKWONGA ANTHONY: ::: : : ::: : : : : : : : : APPELLANT

AND

UGANDA: :::::: :::::: :::::: RESPONDENT

(Appeal from the judgment of the Court of Appeal (Manyindo, DCJ, Berko and Twinomujuniu, JJ.A.) dated 23.3.2000 in Court of Appeal Criminal Appeal No. 1 of 1998 arising out of the High Court of Uganda at Arua (Rubhy Opio Aweri, Ag. Judge, Judgment dated 30.4.99 in Criminal Session Case No. 207 of 1998).

JUDGMENT OF THE COURT

This is a second appeal. It is against the decision of the Court of Appeal dated 23.3.2000 upholding the judgment of the High Court which convicted the appellant and sentenced him to death and to terms of imprisonment for certain offences.

In the High Court the appellant was indicted on four counts and convicted on three of them. In court I, he was charged and convicted of murder of Veneranda Pinyanga, contrary to section 183 of the Penal Code Act and was sentenced to death. In count II he was charged and convicted of kidnapping with intent to murder Jurodano Onen, contrary to section 235(a) of Penal Code Act and was sentenced to 15 years imprisonment. In count III, he was charged with aggravated robbery contrary to sections 272 and 273(2) of the Penal Code Act and he was acquitted. In count IV, he was charged and convicted of attempted murder of Acelma Giriker, contrary to section 197 (a) of Penal Code Act.

He was sentenced to 15 years imprisonment. The imprisonment sentences in counts II and IV were suspended.

The particulars of the offence in each of the counts were that the appellant with other persons, still at large committed the offences on the 3rd day of June 1980 at Angal village, Nyaravur Division, Nebbi District.

The prosecution evidence as accepted by the trial court and the Court of Appeal was as follows:

The appellant in 1980 was an Under Secretary in the Ministry of Internal Affairs, in Kampala. He had a house and a farm at Angal village, Nyaravur division, Nebbi District. He was well known to the prosecution witnesses. During the night of 2nd June, 1980, the appellant's home was attacked by unknown people who shot at his house with a gun. The appellant reported the incident to Nebbi Police Station, but was advised to report to the Army. The appellant suspected Jurodano Onen, the victim in court II, to have been among the people who attacked his house. In the morning of 3rd June, 1980, the appellant went in his motor car, a Mercedes Benz, to the home of Jurodano Onen, looking for him. He was seen by Clouds Opoka (PW3) . The appellant was armed with a pistol. When he did not find Jurodano Onen there, he proceeded to the home of Jurodan Onen's mother, Acelma Giriker (PW4), looking for Jurodano Onen and inquired where Jurodano was. When the appellant did not get satisfactory answers from Acelma, he shot her with a pistol in the arm. The appellant also shot Acelman's daughter, Veneranda Pinyanga, in the groin, as a

result of which he died shortly after wards.

Celestino Okumu (PW7), a brother of Jurodan Onen, witnessed the incidents at Acelma's home. The

appellant continued to look for Jurodan Onen. Madalena Neguwon (PW5), saw her husband, Jurodan Onen, being arrested by men who alleged that they had been sent by the appellant. Jurodano Onen was taken sheto Angal football ground. Celestimo Okumu saw the appellant at the football ground together with other people torturing Jurodano Onen who was later put in the boot of the appellant's car and was driven away. There was general panic in the village, and Jurodano Onen's relatives went into hiding. The body of Veneranda was buried three days afterwards by Lawrence Okello Wange (PW6) and other porters on the instructions of the brothers of Angal Catholic Mission. Opoka Clouds (PW3), a brother of Jurodano, emerged out of hiding afterwards and reported the incident to Nebbi Police Station, where he was arrested instead, and handed over to the Army. He spent two months in military barracks before being released. The prosecution did not adduce any police evidence concerning investigation of the case and arrest of the appellant.

In his sworn defence, the appellant set up an alibi. He testified that on 2nd June, he was in Kampala carrying on his duties in the Ministry of Internal Affairs. He was in Angal on 30/6/80, when his home was attacked. He reported the matter to the military authorities who carried out their investigations without him. He saw the people gathered at Angela football ground and heard that Jurodano Onen had been arrested, but he never went there. The charges against him had been politically motivated by his opponents in order to prevent him from contesting Nebbi District Local Council Chairmanship elections. The appellant called his neighbour, Kanutu Kakusa (DW1) in support of his defence. DWl's evidence was to the effect that the appellant's home was attacked and that military personnel investigated the incident. The learned trial judge accepted the prosecution evidence, and rejected the defence, convicting the appellant with the results we have already referred to.

The appellant's appeals against conviction and sentences of imprisonment to the Court of Appeal were rejected by that Court. Hence, this appeal.

Ten grounds were set out in the Memorandum of Appeal. Mr. Remy Kasule, the appellant's learned counsel, abandoned the second ground, and argued the rest in the order in which they were set out in the memorandum. We shall deal with them in the same order.

The first ground is that their Lordships of the Court of Appeal erred in law when they held that PWl was properly declared a hostile witness by the trial judge and that no injustice was caused to the appellant by such declaration. Mr. Kasule's submission under this ground is that the trial court's record does not show whether the statement made by Celestino Avunga (PWl) was shown to the witness; whether the trial judge looked at, and studied, the statement and resolved that it was a departure from the witness' evidence in court; and whether it was pointed out to PWl that his evidence was different from his police statement. In the circumstances, counsel contended, the learned trial judge had no basis for declaring PWl a hostile witness for the prosecution.

The record of the trial court shows that PWl gave some evidence in examination-in-chief, led by the prosecuting State Attorney, Mr. Wagona. When it appeared to the learned State Attorney that PWl's evidence was different from what he had said to the police in a statement recorded from him (PWl), the State Attorney decided to treat him as a hostile witness. According to the court record he then applied to tender PW1's statement to the police as follows:

> ***"Wagona*. I *am tendering this document in exhibit. The purpose is that its contents are to be compared with what he has stated in connection* with a view of *applying that he be treated as* a *hostile witness so that subsequently his evidence is expunged from the record then I would proceed with other witnesses. The reason is that the story recorded from him is* a *complete reverse of what the***

witness tendering of PW1's police statement as an' exhibit. From then on the court record reads as follows:

*"**Mr. Wagona**: - While prosecution is free to choose which witness to testify, the prosecution relies on the recorded statement. It is on that basis that the accused was basically charged and greatly inconvenienced if on that basis an accused is charged and the witness comes to court and tells a different story then it becomes a serious matter in which case one wonders why the witness has suddenly changed. You need to have the same on record for comparison. No injustice will be occasioned. So the prosecution has lost interest in him not because he is telling a story unpalatable to the state but because that story is a reverse of what he told the police. It cannot therefore be relied upon by the prosecution or even the court. You first look at the statement to justify you declaring him hostile.*

Court: - In my view the tendering of this statement is merely for the purpose of comparison to enable court declare the witness hostile. It is not for any use against any party. I therefore see no harm in the proposal by the learned State Attorney.

"Wagona: - I apply that this witness be declared hostile on the ground that his police statement is complete reversal of his testimony.

Piwang: - The matters put to the court was known to the witness. He stated that the police had asked him about some incidents in Panyimur. As a matter of fact he said he did not see the accused. The prosecution does not like that part. The witness is not hostile. If the prosecution does not use him, I leave it to the discretion of the court.

Court: - In my view a hostile witness is determined when his testimony is contrary to his statement. This is the position here. I am therefore declaring this witness hostile. The prosecution can therefore continue to

The appellant's defence counsel, Mr. Piwang, objec

X X as if cross-examining him".

The first ground of appeal is similar to the first ground of appeal in the court below except that there the appellant also criticized the learned trial judge for treating PW2 as a hostile witness.

Mr. Kasule also represented the appellant in that court. The arguments he made there are similar to the ones he has now made in this court. The Court of Appeal dealt with the matter in the relevant part of its judgment as follows:

"The Evidence Act provides:

"S.152. The court may in its discretion, permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party.

***153. The credit of* a *witness may be impeached in the following ways by the adverse party, or with the consent of court, by the party who calls* him -**

(i) by proof of former statements inconsistent* with any *part of his evidence which* is *liable to be contradicted.

(ii) ....."

In *Sankar's Law of Evidence* (supra) at p.1318 the learned author writes:

> ***"A hostile witness is one who from the manner in which he gives evidence (within which is included the fact that he is willing to go back upon previous statement made by him) shows that he is not desirous of telling the truth [Penchanan vs R.34* C.W.*N. 526: A1930, C.276: 51 C.L.J. 203].***

> ***"The matter as to whether permission should or should not be given to cross examine one's witness however hostile he may appear to be, is eminently one in the discretion of the trial judge and his decision except in very exceptional circumstances is not open to appeal*** (emphasis is ours).

Before *allowing a witness to be declared hostile it would have been usual for a judge to look into the statement made before the investigating officer to see whether the witness was actually resiling from the position taken during the investigation". It is clear from the legal authorities quoted above that it is within the discretion of the trial court* to *allow the prosecution to cross examine - its own witness. When the court allows the. prosecution to cross examine its own witness, the trial judge must look at the police statement and determine whether the witness is departing from it. In this case, the prosecution applied to treat PWl hostile and the learned trial judge ruled as follows:*

> **"*In my* view a *hostile witness* is determined *when his testimony is contrary to his statement. This is the position here: I am therefore declaring this witness hostile."***

This ruling of the judge clearly shows that he looked at PWl's police statement and found that it contradicted his testimony in court. We appreciate

that the ideal procedure would have been for the prosecution to tender in evidence the police statement as an exhibit, or for the learned trial judge to record parts of the police statement which were contradictory to PW1's testimony in court. In our view PWl was properly declared a hostile witness . . . We find that there was no injustice caused to the appellant by reason of PWl being declared a hostile witness . . . Ground 1 therefore fails".

We are satisfied that the learned Justices of Appeal correctly applied the relevant law to the facts of this case, and rightly upheld the learned trial judge's declaration of PWl as a hostile witness. The learned prosecuting State Attorney did in fact apply to tender PW1's police statement in evidence. The defence counsel objected to its admission but in the end left it to discretion of the court. The learned trial judge ruled in favour of admission of the statement in evidence.

However, there is no indication why the statement was not admitted in evidence and marked as an exhibit. Be that as it may, we think that no prejudice was caused to the appellant by non-admission of the statement. The appellant was represented by counsel at his trial. As the trial **court.** record shows his defence counsel apparently appreciated and followed the departure of the witness' testimony as explained to the court by the learned prosecuting State Attorney. The learned defence counsel did not ask that the statement be shown or explained to the witness personally. What is important is that the learned trial judge looked at the statement for purposes of comparing it with the witness' testimony, and found that the witness' evidence was a departure from his statement.

It is up to a party calling a witness to apply that he or she be declared hostile. The opposite party does not have to agree though it may oppose the application. It is for the trial court, in its discretion to declare a witness hostile and allow the party calling him/her to cross-examine the witness. In the circumstances, with respect, we do not

find any merit in Mr. Kasule's arguments in this regard. The first ground of appeal must, therefore, fail.

The third ground of appeal is that their Lordships of the Court of Appeal erred in law in holding that Exhibits Dl, D2, D3 and D4 were not properly admitted in evidence and were therefore,, rightly not considered by the trial judge. In his submission under this ground, Mr. Kasule indicated that Exhibit Dl was a statement which the Police had recorded from Opoka Clouds (PW3), D2 was a Police statement by Acelma Ciriker (PW4); D3 was the Police statement of Madalena Negumu (PW5) , and D4, was a Police statement of Celestino Okumu (PW7). These statements were admitted in evidence by consent. In the Court of Appeal, it was argued for the appellant that as there were discrepancies between the confession statement and the prosecution witnesses' evidence in Court, the witnesses' veracity should have been discredited. Yet the Court of Appeal held that because the witnesses denied they made the statements, the statements could not be used to contradict their evidence. That was an error by the Learned Justices of Appeal, Mr. Kasule argued.

In his reply, Mr. Wamasebu, Principal State Attorney, submitted that, strictly speaking, the Police statements were not exhibits. They were received for identification purposes only.

exhibits. They were received for identification purposes only. They were not proved by the Police Officers who recorded the statements, as should have been done. Consequently it was correct to ignore them. Learned Counsel relied on the cases of *Des Raj Sharma -vs- Reginam (1953), 19, EACA, 310;* and *Kontar Singh Bharaj and Another -vs- Reginam 1953) 22, EACA, 134.* In any case, the Principal State Attorney submitted, the discrepancies between the Police statements of the witnesses and their evidence were minor. He did not point out the minor discrepancies. Consequently the contention that the discrepancies were minor does deserve our attention.

What happened about the Police statements of the four prosecution witnesses at the trial appears to be as follows:

First, PW3's statement, Exhibit D1. PW3 was cross-examined by the learned defence counsel, Piwang. The relevant part of the record runs as follows:

"Piwang: We are ready to proceed with cross-examination. XX - Piwang:

I made my statement to Police in 1994. That was my first statement.

I made a second statement because Police went to me at home.
No action was taken in 1994.

I was told that the Policeman who went to me that my first statement had got lost.

I know that policeman who told me of the loss. He is called Mr. Olodi.

He (Olodi) did not tell me how the statement got lost.

The first statement I made was from Nebbi Police Station.
I did not know about giving number in cases in Police. I was not given a number. I am a butcher."

Thereafter a lengthy cross-examination followed.

He was not cross-examined any more about his police statement until after the end of the cross-examination, when the record reads:

"Piwang*: I *wish to tender this Police statement of witness as defence exhibit.

W*egona*: ***No objection.***

Court: Police statement admitted in evidence as defence exhibit D1."

We must observe here that the Police statement about which PW3 was cross-examined does not appear to have been identified by him. Even if it was shown to him for that purpose, it appears that he denied that it was the one recorded from him.

According to PW3, he made two statements. The first one at the Police Station in 1994 and a subsequent one at home. He does not say when the latter one was recorded; nor whether that was what became Exhibit D.1. Exhibit D.1 was recorded on 25-04-97, the date it bears. The Police Officer who recorded Exhibit D.1 was not called to prove that it was a statement recorded from PW3. Although the statement was admitted in evidence as an exhibit, it appears to have been marked as such more for identification than as an exhibit in evidence.

Acelma Giriker (PW4), was also cross-examined about her statement to the Police. Presumably the statement is Exhibit D2, for, there is nothing from her to indicate that it was. D2 was recorded on 29-04-97, at Ata-West Village, Pamura Village, not at Bono as PW4 implied in cross-examination. The record runs as follows:

"XX - *Piwang*:

Yes I made* my *statement when the Policeman came to my home.

I cannot remember the date Policeman came.

In 1997, I was in Panyimur in a place called Bono. Bono is within Nebbi District. Bono is far from Angal.
I cannot remember reporting to the Police.

The Police came to my home twice. That day he came at 10.00 a.m.

I did not tell the police that I saw Okwonga with another man.

The Policeman could have added that statement about seeing Okwonga and another man.

My statement was not read back to me. I signed it (thumb-mark)."

Further on in cross-examination she said:

I told Police the dying declaration of the deceased. I do not know why it was not recorded in my statement.

" - I was shot as I was running away from Okwonga.
The bullet got the back of the arm/palm. It was me who ran about three steps and I was shot. It was not Okwonga who moved three steps behind. The Policeman lied there. Okwonga that day was putting on a uniform. I did not know what uniform it was I did not state that the accused was in civilian clothes. "

PW4 thus denied that the statement was read back to her although she thumb-marked it. She said that the Police Officer who recorded the statement could have added in it something she did not say. The Police Officer recorded what was a lie. In view of what PW4 alleged in cross-examination, the Police Officer who recorded the statement should have been called to prove that he recorded what PW4 told him and that he/she read back the statement to the witness (if he

did), and that the witness signed the statement to confirm what was recorded from her. In the absence of such Police evidence it was impossible to pin down PW4 that the statement was a correct record of what the Police had recorded from her.

Madalena Negumu (PW5) was the wife of Opoka Clouds, PW3. Her cross-examination by Mr. Piwang about her statement to the police, it appears, was very scanty. Parts of the relevant record reads.

" - ***Yes I heard the gun shots while at Celestino's place. I heard the gun shots with my ears. I was not told by Celestino. The Police misquoted me."***

In further cross-examination she said:

" - **I** ***can't recall when I made the statement. I think 1997. The statement was recorded from our home."***

When PW5 said that the Police misquoted her, it appears she was thereby implying that the Police recorded what was different from what she had said. In the circumstances, it was necessary to call as a witness the Police Officer who recorded the statement from PW5 to say that he/she recorded what PW3 said. No police evidence was adduced to that effect.

Celestino Okumu (PW7) was also cross-examined about his statement to the Police. The statement is presumably D4 because the witness apparently was not asked to identify the statement he was talking about. The relevant record in this connection runs as follows:

" - ***Yes I made Police statement.***

I made statement at Opoka's home.

They found me I had already taken some drinks but all the same I made I wrote my statement.

The Police demanded that I give my statement so I could not tell them to allow me to sober up first. I had to comply and make my statement.

I have told Court that I had taken Waragi at that time. But what I have told Court is the truth.

Waragi can make you forget. Waragi is bad.

If you drank yesterday', you could not forget now because waragi could have evaporated. But that day we were drinking when they came for our statements. "

PW7 apparently was drunk when his Police statement was recorded. He needed to sober up before he made his statement, but he was not allowed to do so. He had to make a statement to the Police. It appears that this witness's statement could not be relied on because he made it when he was drunk. This is what he implied in his answers in cross-examination. He may or may not have lied about his having been drunk at the material time. The Police Officer who recorded the statement would have said in what state of drunkardness or sobriety PW7 was when the statement was recorded from him. The Police Officer was not called.

In view of what transpired in the trial court and submissions made to the Court of Appeal regarding the statements recorded by the Police from these witnesses in relation to their evidence in court, the learned Justices of Appeal had this to say:

"On ***contradictions between the witnesses' testimony in Court, and their Police statements, learned State Attorney submitted that statements were denied by the witnesses, and the defence did not prove that the witnesses actually made those statements. The State Attorney relied on - Ojede s/o Odyek - vs- JR. (1962) EA 494, in which it was held by the Court of Appeal for Eastern Africa*** **that where** ***a witness challenges his/her Police statement, it must be proved strictly by calling a Police Officer who recorded it if it is to be used to discredit him or her.***

In his judgment the learned trial judge did not consider the witnesses' Police statements and rightly so in our view, as they were not properly admitted in evidence. **We** ***do not agree with Mr. Kasule's submission that since the State Attorney did not object when the defence tendered Exhibits D1, D2, D3, and D4 in evidence, the learned trial judge should have considered these statements.***

The witnesses denied making these statements. For example, Celestino Okumu (PW7) said that he had consumed Waragi and the Police did not allow him time to sober up before recording his statement. Acelma testified that she told the Police about the dying declaration but they did not record it. In such circumstances, it was absolutely necessary to call the Police who recorded the statements. The duty to call the Police was neither on the prosecution nor on the court, as Mr. Kasule suggested. The appellant was represented by Counsel and the prosecution had fulfilled its duty by availing the defence the Police statements. See - Thairu s/o Muharo (1954) EACA, l87, and Amisi & Others -vs- Uganda (1970) EA. 662. "

In the case of *Ojede s/o Odyek* vs *R (1962) E.A. 494* the appellant was convicted of murder on circumstantial evidence. At the trial, a statement made by a defence witness to the Police was without proper proof put in evidence and used to discredit the witness. There was no note on the record that she had

identified the document and at the trial the witness had refused to admit part of the contents of the statement and challenged its interpretation. On appeal, it was held; (i) as the witness was illiterate, the statement had been recorded in another language through an interpreter and the witness had patently challenged both the contents and interpretation of the statement, strict proof was called for if it was to be used to discredit her evidence; (ii) the respondent should have called the recording officer to prove the statement but the failure to do so had occasioned no miscarriage of justice since there was creditable evidence from other witnesses.

In - *Kantar Singh Bharaj and Another* -vs- R*egi*nam *(1953) 20, EACA 134* ***the*** trial Magistrate at the appellant's trial, refused to allow the defence to cross-examine a prosecution witness A on a statement made by him to a Police Officer B. On the first appeal the Supreme Court of Kenya held that in virtue of section 145 of the Indian Evidence. Act (the equivalent of our section 153 of our Evidence Act) the trial Magistrate was wrong in doing so. There were only two unimportant discrepancies between A's statement and his evidence before the Magistrate. On further appeal it was held, inter alia, that where it is sought to cross-examine a witness, on a previous statement, with a view to discrediting him, the proper procedure to be followed, and the effect of such cross-examination is as follows:

> ***''When*** **the** ***witness gives his evidence, the defence should call for the earlier statement recorded by the Police. The defence are entitled to see*** **this statement** ***and to cross-examine the witness on any appropriate discrepancies. The person who recorded the earlier statement should then be called to prove and put in as an exhibit the statement. But that does not make what is said in the statement substantive evidence at the trial. Its only purpose and value is to show that on a previous occasion, the witness has said something different from what he has said in evidence at the trial, which fact may lead the court to feel that his evidence at the trial is unworthy of belief. "***

We agree with the procedures laid down in - ***Ojede s/o Odyek*** (supra) and ***Kontar Singh Bharaj*** (supra) on how a previous statement by a witness should be handled in a trial court to discredit the witness' credibility in court. The decisions are applicable to the instant case and yet such procedures were not followed.

In ***Des Raj Sharma -vs- Reginam*** *(1953) 20 EACA 310* it was held that there is a distinction between exhibits and articles marked for identification; the term *"exhibit"* should be confined to articles which have been formally proved and admitted in evidence. We agree with that view. In this connection, see also: ***Sydney Golder & Others*** *(1961) 45, Cr. App. Report, 5;* ***Balala*** *(1914) EA 402;* and ***Amer*** **v** ***Rep.*** *(1972) EA 324.*

In the instant case, the prosecution witnesses' statements to the Police, D1, D2, D3 and D4, were admitted in evidence, though with consent, without having been proved by the Police Officer (or Officers) who recorded them from the witnesses. Since the makers of the statements denied that the statements reflected what they had told the Police, it was necessary to call the Police Officers to prove the statements not withstanding the admission in evidence of the statements without objection by the prosecution. The only way to disprove the witnesses' allegation of incorrect recording of their statements was to adduce evidence of rebuttal by the statements. If it was proved that the statements were correctly recorded, then they could be used to discredit the evidence in Court of persons who made the statements. Only the Police Officers who had recorded the statements could do so.

In the circumstances, we are unable to fault the learned Justices of Appeal in the conclusion they made in the passages of their judgment to which we have referred under the consideration of this ground of appeal. The ground of appeal must fail.

The fourth ground of appeal is that the learned Justices of Appeal erred in law in holding that all inconsistencies and contradictions in the prosecution case were not intended to deceive the Court but were due to lapse of time.

In his submission under this ground of appeal, Mr. Kasule listed certain contradictions and referred to some which were indicated before the Court of Appeal. He then contended that the Court of Appeal acknowledged that the learned trial judge had considered only two, not all the, contradictions in the prosecution evidence. But it too, did not look at each inconsistency or contradiction one by one, although it agreed with the learned trial judge that the contradictions were minor and did not go to the root of the case.

The learned Counsel's contention that there were inconsistencies or contradictions within the prosecution evidence is, indeed, correct. For instance, at the trial, Acelma (PW4) said that the appellant went to her home alone. She did not see anybody else with the appellant, but Celestino Okumu (PW7) said that the appellant went there with another person whom he did not know before. Acelma Giriker (PW4) also said that the appellant's car was parked at her home, but Okumu said that the car was parked at the junction to Acelma's house. The learned counsel also submitted that Acelma did not say that she saw Celestino at her home although he testified that he was there and witnessed the appellant shoot Veneranda dead and shoot Acelma's hand.

In cross-examination, Celestino said that Acelma told lies if she said that he (Celestino) was not at her place. He was, indeed, at her home and greeted her. He then suggested that may be she said so due to her age, and that she was half deaf and forgot a lot and she did not see very well. The record does not show that Acelma was asked whether Celestino was present at her home at the material time. We think therefore, that it is not fair to accuse her for having said that Celestino was not present. It is not the same as if Celestino's presence was

put to her and she denied it. Her failure to say that Celestino was present does not necessarily mean that she said Celestino was not there.

Another contradiction Mr. Kasule referred to is that Acelma said that the appellant was not in uniform, but Okumu said that he was. With respect there was no such contradiction. In cross-examination PW4 said:

" - Okwonga, that day was putting on uniform.
I do not know what uniform was.
I did not state that the accused was in civilian clothes."

In cross-examination, PW7 said:

" - Okwonga had uniform. He was in Prisons Uniform, dressed like those who bring prisoners)."

Mr. Kasule contended that two other contradictions which the Court of Appeal did not address concerned distances between the various places where the appellant was alleged to have committed the offences. The other regards the date of the incidents. Whereas the prosecution said that the appellant committed the offences on 03-06-80, the appellant said in his sworn testimony that on 03-06-80, he was in Kampala. It was on 30-06-80, that he was in Angal. With respect, we do not see any contradictions. According to the prosecution witnesses, all the incidents happened in Angal Village. There is no evidence to show that there were long distances between the scenes of the incidents. Regarding the date of the incidents, all the prosecution witnesses gave the 03-06-80, as the material date. The learned trial judge believed them and rejected the appellant's claim that he was not in Angal on 03- 06-80. The learned Justices of Appeal agreed with the learned trial judge's findings, inter alia, that the appellant was at Angal on the morning of 03-06-80, committing the offences.

Mr. Wamasebu, in his reply, contended that the Court of Appeal did not consider only two inconsistencies as argued by Mr. Kasule. It considered all the inconsistencies and found that they were not major or intended to deceive the court. This was consistent with the learned trial judge's finding. With regard to the date of the incidents, Mr. Wamasebu contended that the Court of Appeal was correct to accept the date of 03-06-80, because the sequence of events tallied with that date. More importantly the Court of Appeal found that the appellant, by his own evidence, put himself in the vicinity of the crimes.
In any case, the issue of date was not one of major consideration at the trial.

In his judgment, as we understand it, the learned trial judge considered and resolved as minor the following contradictions.

i) **wh*ether th****e*** ***appellant shot Acelma as she*** **was runn*ing o*****r*** ***she was shot while facing: the appellant;***

ii) Contrary to Celestino's evidence, Acelma did not mention his presence at her home at the material time;

iii) Whether the appellant went alone or with another person to Acel**ma's*** ***home;***

iv) Whether PW3 went with a Parish Chief or alone with Acelima to report to the Police; and

v) Whether the appellant parked his car at Acelima's home or at the junction to her home."

The learned trial judge prefaced his consideration of the contradictions by saying:

*"**There were some contradictions in the testimonies of prosecution witnesses. In my view, they were minor. For instance, there is contradiction whether** . . . . ' '*

This, with respect, does not mean that he considered only two, contradictions. He appears to have considered all the contradiction in the prosecution evidence.

The Court of Appeal dealt with the contradictions as follows:

"In his judgment the learned trial judge considered some of the contradictions, whether Acelma (PW4) was shot while running away or while facing the appellant; whether the car was parked at Acelma's home or by the roadside and the fact that Acelma did not mention the presence of Celestino Okumu at her home. He found that these contradictions were minor and did not go to the root of the case and could be explained away by forgetfulness due to lapse of memory. The judge also directed himself on the law of dying declarations; that is evidence of the weakest kind and so requires corroboration. We agreed with the Judge's findings and directions. The appellant was well known to all the prosecution witnesses and the offences were committed in broad day light. The witnesses testified 19 years after the incident. We are of the opinion that the inconsistencies and contradictions which were in their evidence were not intended to deceive the court but were due to lapse of memory. The time and places in our view are not material. The appellant was moving in a motor vehicle and according to the indictment all the offences were committed at Angal Village. The appellant was at Angal Village on the morning of 03-06-80, committing the offences. The learned trial judge properly directed himself on the law of dying declarations. He was right in our view to find corroboration in the evidence of Celestino Okumu (PWl) as he found him to be a truthful witness."

In the light of the evidence available on the record and the findings of the learned trial judge we agree with the conclusions of the learned Justices of Appeal regarding contradictions and inconsistencies in the evidence of the prosecution witnesses. The fourth ground of appeal must fail.

The fifth ground of appeal is that the Court of Appeal erred in law in holding that failure by the prosecution to call the Police Officers who investigated the case or arrested the appellant did not weaken the prosecution case. In his submission under this ground Mr. Kasule said that it was common ground that the appellant was tried 18 years after the crimes in this case were committed, and that no investigating and arresting Police Officers were called as witnesses. Contrary to the prosecution case the appellant's defence was that on the morning after the attack on his house, there was a military operation in Angal. After the attack, his sister - in - law saw someone running away from the appellant's home, who resembled Jurodamo Onen, the subject of count II. Under these circumstances, Mr. Kasule contended, it was vital for the prosecution to call the investigating Police Officer to testify about the events soon after the incidents and about 17 years later. The learned counsel relied on - ***Bogere Moses and Another* -vs-** ***Uganda, Criminal Appeal No.* 197 *(SCU)*** (unreported).

In his submission in reply, Mr. Wamasebu said that at the trial, the prosecuting State Attorney sought adjournments to call Police witnesses. Mr. Wamasebu conceded that Police investigating Officers would have clarified certain matters in the case had they given evidence. He contended, however, that failure to adduce evidence from them was not fatal to the prosecution case.

At the trial of the case, Mr. Wagona the prosecuting State Attorney, sought and was granted adjournments on 31-03-99, and on 01-04-99. The purpose of the adjournments was to call prosecution Police witnesses who had been expected to come but did not turn up. Thereafter, the trial record reads:

"<u>Wagona:</u> I have failed to serve the witnesses I had intended to call. These were the Police Officers who participated in inquiring and arresting and interrogating the accused. They are believed to be in Gulu. On two occasions they have failed to turn up. I have decided to dispense with them and now close the prosecution case."

The effect of failure by the prosecution to call Police investigating and arresting Officers to give relevant evidence at a trial was considered by this court in - ***Bogere Moses and Another -vs- Uganda Criminal Appeal No. 1/97 (SCU)*** (unreported) , in which the court referred with approval to what ***Sir Udo Udoma, CJ said in - Rwaneka -vs- Uganda (1967) EA, 768 at page 771.***

"Generally speaking, Criminal Prosecutions are matters of great concern to the State; and such trial must be completely within the control of the Police and the Director of Public Prosecutions. It is the duty of the Prosecutors to make certain that Police Officers who had investigated and charged an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals."

This Court also followed its own earlier decision in - ***Alfred Bumbo and Others -vs- Uganda, Criminal Appeal No. 28/94 (SCU)*** (unreported), in which it had said:

"While it is desirable that the evidence of a Police investigating Officer and of arrest of an accused person by the Police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would

not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether Police evidence is essential, in addition, to prove the charges."

We agree with the Court's view in - **Rwoneka -vs- Uganda** (supra); and in - **Alfred Bumbo and Others -vs- Uganda** (supra).

At the trial, the prosecution made efforts to have investigating and/or arresting Police Officers come to give evidence but were unsuccessful. The trial was adjourned twice for that purpose. As the Police Officers were said to be in Gulu, only about two Districts away from the venue of the trial, may be the efforts would have been successful if more diligence was applied. However, be that as it may, our view is that the absence of Police evidence was not fatal to the appellant's conviction as there was other evidence to support the conviction. The fifth ground of appeal must, therefore, fail.

The sixth ground of appeal is that the learned Justices of Appeal erred in law when having held that the trial Judge considered the prosecution case in isolation of the defence proceeded to hold that the appellant was properly convicted and no prejudice was caused to him.

The sixth ground of appeal is similar to ground four in the appeal to the Court of Appeal, which was that the learned trial Court erred in law and in fact when he considered the case for the prosecution in isolation of the defence case, finding the appellant guilty before considering his defence. The arguments there were also similar.

As we understand this ground and the relevant arguments there appear to be two different aspects of this ground of appeal. One is to the effect that the learned Justices of Appeal erred by upholding the learned trial judge for first accepting the prosecution evidence in isolation and then considering the appellant's defence to see whether it rebutted the prosecution. The other is to the effect that

the learned Justices of Appeal also agreed with the learned trial Judge for accepting the prosecution evidence and finding the prosecution case proved beyond reasonable doubt before considering the contradictions and discrepancies in the prosecution evidence.

Under this ground Mr. Kasule confined his attack to the learned judge's finding that the appellant had shot and killed Veneranda, the victim, in the first count, and the Court of Appeal's handling of that finding. He submitted that the learned trial Judge found that it was the appellant who had shot the deceased, Veneranda, before the considering his defence of alibi.

According to Mr. Kasule, the trial Court's judgment shows that the learned trial judge convicted the appellant without considering the latter's defence of alibi and the evidence of Karutu Kakusa ((DW2). Further, that the learned trial judge first considered all the evidence in support of the prosecution case and then dealt with discrepancies in the prosecution evidence. Consequently, the prosecution case was considered in isolation of the defence case and the evidence of DW2. The Court of Appeal agreed with what the learned trial judge did did. In addition, it did not consider the defence of alibi or any other defence evidence.

The learned counsel relied on - ***Suleiman Katusabe -vs- Uganda Criminal Appeal No. 7 of 1991, (S.C.U)*** (unreported), which was cited with approval by this Court in **- *Bogere Moses & Another -vs- Uganda* (supra).**

Mr. Wamasebu conceded that the learned trial judge fell into the error pointed out by Mr. Kasule, but submitted that the Court of Appeal as the first appellate court looked at the evidence as a whole and found that there was sufficient evidence to support the finding that the appellant shot and killed Veneranda.

We are troubled by the manner in which the learned trial judge appears to have dealt with the appellant's alibi before finding him guilty on count I. His manner of approach would appear to be contrary to what this Court said in - ***Kifamunte Henry*** **-vs-** ***Uganda Cr. Appeal No. 10/97 (SCU)*** (unreported) and in - ***Bogere Moses & Ano*****ther - vs-** ***Uganda, Cr. Appl. No. 1/97 (SCU)*** **(unreported) .**

In his judgment, the learned trial judge reviewed in detail the evidence of each and every prosecution witness and the appellant's evidence of his alibi. When considering the evidence before him regarding count I, he said:

> ***"The fourth and most crucial issue now is whether it was the accused person who was responsible for the killing of the deceased. The prosecution relied normally on the evidence of Acelma (PW4) and Celestino Okurno (PW7) . The evidence of Acelma (PW4) was to the effect that the accused went to her home and asked her where Jurodano was. She told him that Jurodano could be at his (Jurodano's) home at Nyaravur. The accused had a pistol. The accused shot her hand (palm) with that pistol as she ran away. After running away she (PW4) heard the deceased yelling and making an alarm. "Why has Okwonga killed me." The circumstance that it was accused who was seen at the home of Acelma with a gun; that the accused attacked Acelma and shot her on the arm as she was running away and that as she was coming back she heard the deceased cry in the name of the accused "why has Okwonga killed me" all go to show that it was the accused who must have shot the deceased."***
>
> ***The evidence of Acelma was corroborated by that of Celestino Okumu (PW7) who was an eye witness. He stated that he saw the accused person at the home of Acelma (PW4) . The accused went in a car. He had a pistol. Accused asked Acelma where Jurodano was. The accused looked very angry/gloomy. The accused then shot Acelma on the arm. By then the deceased was inside the house. When the deceased came out, the accused shot her in the groin. The above evidence is also fortified by the dying declaration of the deceased. When Acelma (PW4) returned home, soon after being shot by the accused, she found the deceased lying in a pool of blood. The deceased was not yet dead. She (deceased) was crying repeatedly "why has Okwonga killed me.***
> ***In the instant case, I find that corroboration is provided in the evidence of Celestino (PW7) who was an eye witness who saw the accused shot both Acelma (PW4) and the deceased.***
>
> ***<u>The defence relied on the defence of alibi and went ahead to deny any involvement in this offence. I did warn the assessor that where an alibi is raised it is the duty of the prosecution to disprove it. The duty of the accused person is merely to raise it. The disproving- it is upon the prosecution as it is</u>***

not the duty of the accused person to prove or disprove his innocence and/or guilt.

In the instant case, I was convinced by the evidence of Acelma (PW4) and Celestino Okumu (PW7) who did see the accused as he went to the scene of the crime and shot the deceased. The accused was placed at the scene of the crime. I shall discuss the issue of contradiction and discrepancies raised in this case after considering all other counts. Suffice it that I am satisfied that the prosecution did prove beyond reasonable doubt that the accused was the one who had killed the deceased. I do not agree with the gentleman assessor that the accused was not properly put at the scene of the crime. I shall discuss the discrepancies and contradiction which he relied upon in due course. (the underlining is ours)

In their judgment, the learned Justices of Appeal agreed with the appellant's criticism of the learned trial judge that he considered the prosecution case in isolation of the defence and found the appellant guilty before considering the defence, which procedure was fundamentally wrong. With respect, our view is that such criticism of the learned trial judge is not justified, because the passage of his judgment to which we have just referred above appears to indicate that he considered the appellant's defence of alibi together with prosecution evidence before concluding thus: ***"Suffice it that I am satisfied that the prosecution did prove beyond reasonable doubt that the accused was the one who killed the deceased. I do not agree with the gentleman assessor that the appellant was not properly- put at the scene of the crime. "***

This is especially so, we think,' because the learned trial judge was well aware of the appellant's alibi, the evidence regarding which he had reviewed in detail. May be it was a regrettable style that he did not say more in his consideration of the appellant's defence of alibi.

It is also evident that he did not say expressly why he disbelieved the appellant's alibi and believed the prosecution evidence, but this was implied in what he said in regard to the evidence of Acelma (PW4) and Okumu (PW7).

In any case, we think, that even if the learned trial judge committed the kind of errors criticized by this court in - ***Kifamunte Henry -vs- Uganda*** (supra)**,** they were cured by the Court of Appeal's re-evaluation of the evidence in this case as a whole and making its own conclusions.

The Court of Appeal dealt with the matter this way:

> ***"Submitting on ground six and ten together, the learned Counsel for the appellant contended that the appellant's alibi was not considered by the court. Relying on Bogere and Another (supra) Mr. Kasule submitted that the learned trial judge should have given reasons why he believed the prosecution evidence and not the appellant's alibi.***
>
> ***We appreciate Counsel's argument. However, we are satisfied that the prosecution evidence put the appellant on the scene of crime at the material time. Acelma (PW4) and Celestino (PW7) saw the appellant torturing Jurodano Onen and putting his body in the boot of his car. This as we said before was during broad day light. The appellant's alibi was that he was in Kampala on 3rd June 1980, when the offences he was alleged to have committed took place. He was at his home in Angal on 30th June 1980 when his house was attacked. He reported to Nebbi Police Station and on advice of the police, reported to the Military- Unit at Pakwach. The military police carried on their investigations without him. He saw people at Angal Foot ball pitch and heard that Jurodano Onen had been arrested. In cross-examination theappellant testified that his sister, Agatha, who answered his alarm, saw someone like Jurodano Onen running away from the appellant's***

home. We find that by this evidence, the appellant put himself at the scene of crime on the day Jurodano Onen was kidnapped. The appellant was a prominent figure in the area and the prosecution witnesses knew him well. We do not accept Mr. Kasule's contention that the witnesses implicated him in the four offences nineteen years ago on political grounds. Had the learned trial judge considered all available evidence, he would have concluded, as we do, that the appellant's alibi was a pack of lies. It is remarkable that the evidence of Celestino Okumu (PWl) showed that there was a meeting in which the appellant admitted the offences in question and he even promised to settle the matter with him. Celestino Okumu was not challenged on these matters in cross-examination. Grounds 6 and 10 fail."

The above passage shows that the Court of Appeal complied with its duty provided for in rule 29 of the Court of Appeal Rules, which states:

"29(1) On any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the Court may —

(a) re-appraise the evidence and draw inferences of fact.

(b)......"

Where these provisions have been applied, this court has interpreted it to mean that on a first appeal from a conviction by a judge, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. As the first appellate court, the Court of Appeal has a duty to rehear the case and to reconsider the material evidence before the trial Judge. It must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See - ***Pandya -vs- R (1951) EA 336; Ruwala -vs- R (1951) EA 510; Okeno -vs- Republic (1912) EA 32; Kifamunte Henry -vs- Uganda. Cr. App. No. 10***

of 1991. (SCU) (unreported) and ***Bogere and Another -vs- Uganda*** (supra), and the more recent case of *Odong Justine* -vs- *Uganda Cr. App. No. 13/2000 (SCU)* (unreported).

At the risk of repetition, but for the sake of clarity, this court put it this way in the case of - ***Bogere Moses*** (supra)**:**

> ***"As a first appellate court, the Court of Appeal has power to take into consideration, evidence lawfully adduced at the trial but overlooked in the judgment of the trial court and to base its own decision on it. In doing so however, the appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses, and should, where available on record, be guided by impression of the trial judge on the manner and demeanor of witnesses. What is more, care must be taken not only to scrutinize and re-evaluate the evidence as a whole, but also to be satisfied that the trial judge had erred in failing to take the evidence into consideration."***

In the instant case, we are satisfied that as the first appellate court, the Court of Appeal re-evaluated the evidence in the case as a whole. It re-evaluated the evidence of the various prosecution witnesses and that of the appellant about his alibi, concluding that his alibi was a pack of lies. It then found that the prosecution evidence and the appellant's evidence put him at the scene of crime.

Both the learned trial judge and the Court of Appeal held, in effect, that the alibi was unsustainable because the prosecution evidence and the appellant's own evidence put him at the scene of crime. What then amounts to an accused person being put at the scene of crime? In ***Bogere Moses*** **(**supra), this court answered the question as follows:

> ***"We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such a***

proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone. Where the prosecution adduces evidence shoving that the accused person was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time. It is incumbent on the court to evaluate both versions judiciously and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and hold that because of that acceptance, per se the other version is unsustainable."

What this court said in - ***Bogere Moses and Another*** **-vs-** ***Uganda*** (supra) and ***Suleiman Katusabe -vs- Uganda,*** (supra) is still good law.

We have already referred to the contradictions and inconsistencies in the prosecution case, which the learned trial judge considered and resolved as minor. After considering them, he ended his judgment by holding that the prosecution had proved its case against the appellant beyond reasonable doubt. He said:

"On **the** ***one hand I found the prosecution truthful. PW7 especially gave a very detailed account of the incident to the extent that when this matter flared up in the district, the accused proposed a meeting with the elders to negotiate for blood compensation but later on failed to turn up on the scheduled date. All in all I find that the prosecution has proved the case against the accused beyond reasonable doubt in count 1, 2, and 4 ".***

This passage of the judgment of the learned trial judge clearly shows that he reached the conclusion that the offences had been proved against the appellant on the three counts after considering the inconsistencies and contradictions in the prosecution and defence evidence, and resolving that they were minor. About contradictions, the Court of Appeal said, inter alia:

> **"We agree with the *submissions of counsel that the appellant* was *convicted on counts I, II and IV and acquitted on count III before the contradictions* were *considered. This being a first appellate court, the appellant is entitled to have this Court's* own *consideration and re-evaluation of the evidence as a whole.* We have *the duty to re-evaluate the evidence which was before the trial court and make up our mind, bearing in mind that we did not have a chance to see the witnesses. See - Kifamunte* Henry -vs- *Uganda Cr. App. No. 10/97 (unreported.* We *find that there is sufficient evidence that the appellant was seen in broad day light by PW4 and PWl committing the offences with which he was convicted. As we said earlier, the contradictions in their evidence are* minor. Had *the learned trial judge considered the evidence in the proper manner, he would have come to the same conclusion. As we have pointed out already, there were no major contradictions. "***

We are satisfied that the Court of Appeal came to the right decision in this regard, and no miscarriage of justice was occasioned to the appellant.

In the circumstances, ground six must fail.

The seventh ground of appeal is that their Lordships of the Court of Appeal erred in law when they held that the appellant's alibi was a park of lies and that the prosecution evidence put the appellant at the scene of crime at the material time. Mr. Kasule did not argue this ground. What we said in consideration of ground six disposes of this ground as well. We do not see any merit in it. It must also fail.

Ground eight of the appeal is that the Court of Appeal erred in holding that the misdirection of the trial judge as to the burden of proof was of no effect and did not cause a miscarriage of justice. Mr. Kasule did not argue this ground of appeal, either. Nor did he show to us how the trial judge shifted the burden of proof. Again, in view of what we said discussing ground six, we do not think, strictly speaking, that there was a misdirection by the Court of Appeal on the

burden of proof. There was no shift of the burden of proof. In any case, even if there was such a shift, in view of the Court of Appeal's re-evaluation of the evidence in the case as a whole and making its own finding that the prosecution had proved the three charges against the appellant beyond reasonable doubt, no miscarriage of justice was thereby occasioned. Ground eight of appeal must therefore, fail.

Ground nine of the appeal is that the Court of Appeal erred in law when, having held that the proceeding of the trial was irregular, failed to hold that the irregularity nullified the trial. The complaint in this ground of appeal is related to the learned Justices of Appeal's comment at the end of their judgment as follows:

> **"Before we take leave of this case, we wish to comment on one matter. During the trial of this case, when PWl was being cross-examined, one of the gentlemen assessors sought leave of the trial judge to leave because his child was sick. The judge dispensed with his attendance and continued the trial with only one assessor. The procedure was irregular. The trial judge should have adjourned the trial for a while to enable the assessor attend to his sick child and then return. In case the gentleman assessor was unable to return, the judge should have selected another assessor to replace him because PWl was a hostile witness and his evidence was of no effect in the case. No other witness had testified at that stage. "**

Mr. Kasule contended that in the circumstances, the Court of Appeal should have nullified the trial. He relied on - Mug*isha Jose*ph -vs- Uganda Cr. App. *No. 12 of 1984 (CAU)* (unreported; and - Abudu *Komakech* -vs- *Uganda, Cr. App. No. 1/88.*(unreported). In the instant case, learned counsel contended, the irregularity was not curable.

In reply, Mr. Wamasebu submitted that this matter was not raised as an issue in the Court of Appeal, which expressed its view per incuriam. In any case, the learned Principal State Attorney submitted, under section 67(1) of the Trial on

Indictment Decree 1971, the High Court has discretion to continue with a trial in the presence of one assessor if the second assessor is prevented from continuing with the trial for sufficient reasons. In the instant case, therefore, the absence of one assessor during most of the trial did not render the trial a nullity. Mr. Wamasebu contended that the instant case is distinguishable from the case of - **Abudu *Komakech -vs- Uganda*** (supra).

Section 67(1) of the TID provides:

> ***"67(1). If, in the course of a trial before the . High Court, at any time before the verdict, any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed* with *the ai*d of *the* other *assessors."***

In the case of - *Mugisha Joseph -vs- Uganda, Cr. Appeal No. 123/84 (CAU)* (unreported), the appellant was with another convicted of murdering three persons in Masindi District in 1979, and sentenced to death. He appealed to this Court on the grounds, inter alia, that the learned trial judge erred in proceeding with the trial with only one assessor, thus rendering the trial a nullity. What happened at the trial was that when the first prosecution witness came to testify after the lunch adjournment one of the assessors could not continue to sit. It was not clear what exactly happened. The record on that point read:

> **"Court*:* *One* of *the assessors i*s *una*ble *t*o s*it.* W*e shall proceed* with *one assessor."***

Thereafter the trial continued although with only one assessor. Counsel for the appellant Mr. Buyondo contended that the trial was a nullity in view of the

provision of section 3(1) of the Trial on Indictment Decree, which states as follows:

> ***"3(1). Save as provided by any other written law, all trials before the High Court shall be with the aid of assessors, the number of whom shall be two or more as the Court thinks fit."***

He also referred to section 67(1) of the T.I.D. and submitted that the provisions of section 67(1) applies only when the court is sitting with three or more assessors. In that case if one of them is unable to continue sitting, then the other two assessors would suffice.

For the state, it was submitted by Mr. Zindonda, Senior State Attorney, that it was quite in order for the High Court to continue with one assessor. He referred to - ***Obura -vs- Uganda Cr. App. No. 1/81 (CAU)*** (unreported) , and ***Kashaija & 2 Others -vs- Uganda Cr. App. No. 131/16, (1977)HCB. 50.*** The Court then said:

> **"With *respect we think Mr. Buyondo misconstrued the provision of section 67(1) of* the *Trial* on *Indictment Decree which provides as follows:***
>
> **"If *in the course of a trial before the High Court at any time before the verdict; any assessor is for sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors."***

In - ***Kashaija & 2 Others* -vs- *Uganda* (supra),** the High Court had sat, as usual, with two assessors. During the course of the trial, one assessor absented himself, and the learned trial judge ordered the trial to proceed with the remaining assessor. On appeal, it was argued for the appellant that what had

happened was an incurable irregularity because under section 67(1) of the Trial on Indictment Decree, where an assessor absents himself the trial must proceed "w*ith the aid of other assessors."* It was argued there, as it was argued by Mr. Buyondo in M*ugish*a *Joseph* (supra) , that the word *"assessors"* is in the plural, and means that there must always be more than one assessor.

The then Court of Appeal for East Africa did not agree. It held that by section 3 of the Interpretation Decree 1976, expressions in the plural includes singular and it therefore followed that the word *"Assessors"* at the end of section 67(1) of the Trial on Indictment Decree must be construed as meaning *"Assessor"* as the case may be.

We agree with that interpretation, which was followed by the Court of Appeal of Uganda in ***Obura -vs- Uganda*** (supra) and in ***Mugisha Joseph.***

In - ***Mugisha Joseph*** (supra). Counsel for the appellant did not raise the question whether there was sufficient cause for the absence of the second assessor. So the point did not fall for decision. It would seem however, that the learned trial judge in that case was satisfied that the assessor was unable to continue to sit.

In the instant case, our view is that although the prudent course would have been for the trial judge to start the hearing afresh with new assessors because the trial had not gone far, the learned trial judge was entitled under section €7(1) of the Trial on Indictment Decree, to proceed with one assessor. We agree with what the court said in - ***Mugisha Joseph*** **-vs-** ***Uganda*** (supra) , and in - ***Kashaija & 2 Others*** **-vs-** ***Uganda*** (supra), and in - **Obura -vs- Uganda** *(supra).* Those decisions are applicable to the instant case.

The case of - ***Abudu Komakech*** **-vs-** ***Uganda*** (supra), is distinguishable from the instant case because although two assessors were sworn in before the commencement of the trial one of them had disappeared when the trial commenced. At his own instance, another person who had not been sworn in as

an assessor sat in his place as an assessor. When the learned trial judge realized what had happened, he discharged the ***'imposter,'*** assessor, so to speak, and continued with one assessor until the end of the trial. In effect, therefore, the trial in that case never commenced with two assessors. Consequently, this court upheld the argument on appeal that the trial was a nullity. That was not the case in the instant case.

In the instant case the trial started with two assessors, and when the second assessor did not come back after the learned trial judge had permitted him to go and attend to his sick child, the learned trial judge was entitled to continue the trial with the aid of the remaining one assessor under the provisions of section 67(1) of the T.I.D. In the circumstances, we find no merit in ground nine of appeal. It must, therefore, fail.

Ground ten is that the Court of Appeal erred when it held that the suspended sentences of 15 years imprisonment on convictions of kidnapping and attempted murder were not harsh and excessive. This ground appeals against severity of 15 years imprisonment. Under section 6(3) of the Judicature Statute, 1993 such an appeal should not have been brought to this Court. The ground of appeal is therefore, incompetent. We do not have to consider it.

We are satisfied that the appellant was rightly convicted. There was ample evidence to support the convictions on the three counts of the indictment, namely, counts I, II and IV.

The convictions are accordingly upheld.

In the result the appeal must fail. It is accordingly dismissed.

Dated at Mengo this 10th Day of January 2002.

B. J. ODOKI

CHIEF JUSTICE

A. H. O. ODER.
JUSTICE OF THE SUPREME COURT.

J. N. MULENGA
JUSTICE OF THE SUPREME COURT

J. W. N. TSEKOOKO.
JUSTICE OF THE SUPREME COURT.

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT