THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, AND KATO, JJ.S.C.

CRIMINAL APPEAL NO. 35 OF 2002

1. **TWINOMUGISHA ALEX ALIAS TWINE]**
2. **PATRICK KWEZI] ::::::::::::::::::::::::::::APPELLANTS**
3. ***J*OHN SANYU KATURAMU]**

VERSUS

UGANDA::RESPONDENT

[An Appeal from the decision of the Court of Appeal of Uganda: Mukasa-Kikonyogo, DCJ, Engwau, and Twinomujuni, J.J.A, in Crim. App. No. 1 of 2001 dated U/7/2002]

JUDGMENT OF THE COURT

This is an appeal against the decision of the Court of Appeal which dismissed the appellants' appeals against their convictions for two murders of Prince Charles Kijanangoma and Stephen Kaganda alias Mulokole respectively and sentence of death passed on 12/9/01 by the High Court.

We shall hereinafter refer to Alex Twinomugisha alias Twine as A1, to Patrick Kwezi as A2 and to John Sanyu Katuramu as A3.

The background to this case is that A3 was appointed the Prime Minister (Muhikirwa) of Toro Kingdom, sometime in 1993 when Kingdoms were restored in Uganda. He was appointed by the late King Patrick Kaboyo Olimi II of Toro. Before the appointment he was a prominent businessman owning Give & Take Forex Bureau in Kampala, Shell Petrol Station Kampala, Voice of Toro (VOT) FM Radio in Fort Portal and Rwenkuba Farm in Kabarole District. When King Kaboyo died, he was succeeded by King Oyo, who was aged about 3 years. Not only did A3 retain the post of Prime Minister, but he also became one of the three Regents of Toro, entrusted with powers to run the Kingdom on behalf of the King till he becomes of age. However, there was a rift between some members of the royal family led by Princess Bagaya and Prince Kijanangoma on one hand and some of the Regents of the Kingdom, of whom A3 was a leading member, on the other. Opposing members of the royal family, led by Prince Kijanangoma, wanted A3 removed as both Regent and Prime Minister of the kingdom. There were also disputes relating to matters and control of the Toro Kingdom property, some of which went to court. One such dispute was the subject of a court case which was heard on 25th March, 1999 and in which A3 was a key witness. Prince Kijanangoma was gunned down in Fort Portal after the adjournment of that case.

However, on 23/3/99, before Prince Kijanangoma left Kampala for Fort Portal to attend court, he telephoned Karamagi, PW14, and told him that he was going to attend court in Fort Portal. He requested him to tell Mboijana James, PW19, that Katuramu, A3, was planning to kill him and that killers had been given Shs.6,000,000/= to finish him off. PW14 recorded the message and gave it to Mboijana, PW19, who admitted having received a note from Karamagi, informing him that A3 had hired killers to kill him.

However, Mboijana stated that although he had not taken the note seriously, two days later, he learnt that Prince Kijanangoma had been gunned down. It is important to note that when Prince Kijanangoma reached Fort Portal in the evening of 23/3/99, he was

disturbed and reported to Mugenyi, PW8, that A3 had hired killers to kill him. According to A1's confession it was on 23/3/99 when the killers, arrived in Fort Portal.

On 25/3/99 at about 9.00 p.m. the deceased, Prince Happy Kijanangoma, was in Palace View Bar in Fort Portal in the company of Ferri Babara, PW7, having drinks together with A1. At that time there was no electricity and so lit candles were being used to provide light at each table in the bar. As they drank, PW7 noticed a stranger enter the bar and whisper to A1. A1 thereafter went outside with the stranger. A few minutes later, A1 and the stranger returned and stood at the main door of the bar. A1 shot Prince Kijanangoma with a gun from about 5 metres away. Prince Kijanangoma died instantly. Thereafter, A1 and his companion left the bar but in the process they also shot dead the nightwatchman of the Palace View Bar, one Stephen Kaganda, alias Mulokole. During that attack, PW7 was also wounded. She left the bar through the rear door while screaming. She was picked up by soldiers who took her to Dr. Mairuka's Hospital in Fort Portal from where she was transferred to Mulago Hospital.

During the attack, Mugisha, PW1, was in the same bar and witnessed what happened but never identified A1. However, as a result of Police investigations; A1 was arrested at Kireka, Kampala, on 23/7/99, by Captain Kayanja, PW11, who took him to the Directorate of Military Intelligence (D.M.I.). Later, A1 was handed to CPS at Kampala. In a charge and caution statement, he confessed to have been hired by A2 to kill Prince Kijanangoma at a price of Shs.5,000,000/= plus Shs. 1,000,000/= for fuel. He was charged together with A2, Bob Weswala, Okumu Rombo Jimmy and A3 who is alleged to have masterminded and facilitated the plot to kill Prince Kijanangoma.

In his defence, A1 denied involvement in the murders of the deceased persons and advanced a defence of alibi that at the material time, he was in Nairobi and therefore could not have been involved in killing the deceased. A2 denied having participated in the murders of the two deceased persons. He stated that he was arrested in Kasese when he was in his sister's shop a year after the alleged murders. A3 denied having procured

people to kill Prince Charles Kijanangoma and stated that killing was not part of his business. He stated that those who testified against him did so because of the grudges against him on the grounds that either some of them had lost jobs in his companies while others wanted his job of Prime Minister in the Toro Kingdom.

A1, A2 and A3 were convicted by the trial Judge whilst the other co-accused were acquitted. The conviction of A1 was based on his confession, his identification at the scene of crime on 25/3/99 by Ferri Babaara, PW7 as well as his identification at the identification parade by Babaara, PW7. The convictions of A2 and A3 depended exclusively on circumstantial evidence. Their appeals to the Court of Appeal were dismissed with one Justice dissenting on the conviction of A3. The dissenting Justice found that the circumstantial evidence connecting A3 never ruled out any co-existing circumstances that would destroy the inference of innocence.

Each appellant has filed a separate Memorandum of Appeal in this appeal.

A1's Memorandum of Appeal was filed by Mr. Muguluma and contains 4 grounds, framed as follows:

1. The learned Justices of Appeal erred in fact and in law for having upheld the finding of the trial Judge that the charge and caution statement was voluntary and true and that it was properly recorded and was not a forgery and thus the Justices of Appeal arrived at a wrong conclusion.

2. That the learned Justices of Appeal erred in fact and in law for having upheld the finding that the appellant was identified by Babera, PW7 at the scene of the crime and at the identification parade in that the parade was properly conducted.

3. That the learned Justices of Appeal erred in fact and in law for having upheld the finding that the defence of alibi set up by the appellant was a forgery and that the learned Justices did not adequately consider evidence regarding such defence.

4. That the learned Justices of Appeal failed to evaluate and or did not adequately re-evaluate the evidence as a whole otherwise they would have come to a different conclusion.

Mr. Muguluma, counsel for A1 made the same arguments he had made before the Court of Appeal. A1's complaint was that the charge and caution statement was recorded by two officers. The first officer who only administered the caution never countersigned the portion containing the charge and caution after A1 had signed it. Instead, another officer Rwambarari, PW3, took over, read the charge and caution statement to the appellant and like the first, he did not countersign after A1's signature either. Mr. Muguluma criticised the procedure adopted by the officers who recorded the charge and caution statement. He contended that this procedure offended the procedure approved by this Court in *Asenua & Another V Uganda (S.C.) Cr. Appeal No. 1 of 1998 (unreported).* Another contention was that A1 never made the confession at all and that the purported signature of the appellant on the charge and caution statement was a forgery. Lastly, it was submitted that the alleged confession was not voluntary and that the learned trial Judge ignored evidence showing that it was obtained as a result of torture.

On the issue of identification of A1, at the scene of crime, Mr. Muguluma submitted that there were two eye witnesses to the shooting of Prince Kijanangoma, Mugisha, PWl, and Ferri Babara, PW7. Counsel contended that the trial Judge chose to ignore the evidence of Mugisha, PWl which was favourable to the appellant and preferred to believe the evidence of PW7 when both witnesses were at the scene.

Secondly, it was submitted by counsel for A1 that the conditions in the bar where the deceased was shot dead were not favourable for correct identification because there was no proper lighting in the bar and the light from candles was not enough.

Further, it was contended that the identification parade was not properly conducted because Ferri Babara, PW7, was taken to the parade by one Omoding, PW18, who was

one of the main investigating officers. It was contended that this contravened one of the rules in the case of *Ssesanga Stephen V Uganda Criminal Appeal No. 85 of 2000* (C.A).

On the defence of alibi, Mr. Muguluma complained that the prosecution failed to adduce evidence to rebut the appellant's defence to the effect that he was in Nairobi on the material day when Prince Kijanangoma was murdered. He criticised the trial Judge for taking it upon himself to summon a witness to rebut appellant's defence of alibi. He submitted that the trial Judge failed to evaluate the defence against the evidence of the Immigration Officer from Busia and consequently failed to reach the correct conclusion.

Mr. Ngolobe, Deputy Director of Public Prosecutions, for the respondent, submitted that the issue regarding confession was whether it was truthful, voluntary, and properly admitted. He submitted on the issue of admissibility of A1's confession that the learned trial Judge conducted a trial within trial and found that it was voluntarily made and was truthful. On the criticism that the statement was recorded by two police officers, he submitted that there was nothing wrong with it since both officers read the charge and caution statement to A1. He conceded that none of these officers countersigned, but argued that this was an irregularity which did not cause any miscarriage of justice and in any case, it was cured by the final signature at the end of the statement.

On the claim that A1's signature was a forgery and that the statement obtained through torture, he supported the Court of Appeal which upheld the trial judge's decision.

> *"The statement was so detailed that if it had been false it could not have fitted in with the rest of the prosecution evidence as it did. We are not convinced that the confession was obtained by torture or that it was not properly recorded or that it was a forgery....."*

Counsel further submitted that on the admission of the confession against A1, all that was required by the trial Judge was to warn himself of the danger of acting on that confession and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession was true. He submitted that in the instant case, the learned trial Judge looked for corroboration which he found in the evidence of

Ferri Babara, PW7, who clearly identified A1 at the scene of crime. In addition, PW7 identified A1 at the identification parade as the person who shot dead Prince Charles Kijanangoma and wounded her in the Palace View Bar.

On the issue of alibi, counsel submitted that this had been raised for the first time before the High Court when the 1st appellant was giving his defence but the trial Judge found that the documents he was seeking to rely on were forgeries.

Regarding the complaint that the court ought not to have summoned Immigration Officer at Busia to prove travel documents, learned Deputy DPP submitted that trial Judge had powers to summon any witness at any time in order to meet the ends of justice.

On the complaint that the investigating officer ought not to have been present at the identification parade, counsel submitted that there was no evidence to prove that the investigating officer was at the parade and that he interfered with the proceedings thereof. He, however, conceded that it was

improper for Omoding, who was the investigating officer, to take PW7 from C.I.D. headquarters to CPS where identification parade took place but contended that this did not prejudice the identification since he was not present at the identification parade.

He invited us to dismiss A1's appeal.

The case against A1 consisted of his confession. His confession was recorded on 14/10/99. In the charge and caution statement which was attacked, (we shall be coming to the attack later) he stated inter alia that he himself and three other men were hired by (A2) to go to Fort Portal and kill Escobar. Other prosecution evidence clarified that Escobar was Prince Charles Kijanangoma. A2 was to provide fuel worth Shs. 1,000,000/= and fee of Shs.5,000,000/= for killing Escobar. A1 and his friends went to Fort Portal where they

booked in Continental Hotel in false names on 22nd March, 1999 - These were A1, Silver Muhenda, Bob Smart and Fred who spent a few days together waiting for an opportunity to kill the deceased. The first opportunity was on 24/3/99 when the Prince was found drinking in Palace View Bar in Fort Portal, but the mission flopped because of the appearance on the scene of one Kajabago who was known to A1. On 25/3/99 the deceased returned to the same bar and was shot dead by A1 himself. His companion shot dead a night-guard, who was outside the bar. The two killers thereafter retreated to the farm of John Katuramu, (A3), at Rwenkuba. Earlier on Patrick Kwezi (A2), had shown the two killers the farm as a safe place for them to spend a night after the murder. The next day they were joined by Silver and Bob who brought Shs.4.7 million and fuel. The two (Sliver and Bob) were brought by a driver, whose name A1 did not know. When they found that the money paid was less than the sum agreed upon for the job, they forced the driver to drive them to Kampala and thereafter removed the vehicle from him in order to force Kwezi to pay them their full amount. On 27/3/99 at around 3.00 p.m. A2 paid the remaining amount after which the vehicle was handed to one George, a brother of A2.

A1 was identified by F. Babara, PW7 both at the scene of the crime and subsequently at the identification parade. There was other evidence corroborating the confession of A1. The other evidence was given by Milton Mwesige who found him at Rwenkuba farm and drove him to Kampala on 26/3/99. All this evidence must be considered against the total denial of the charge by A1 i.e. repudiation of the confession and his defence of alibi that he was not at the scene of crime.

We have carefully considered the submissions from both counsel on the first ground. These complaints raised before us were raised before the Court of Appeal. That court considered the issues of alibi and of the admissibility of the confession statement and it held inter alia,

We have carefully studied the evidence against the appellant on this matter. Along with it we have considered the appellant's defence of alibi The most important evidence against the 1st Appellant was his own confession. The learned trial Judge held a trial within trial before admitting the confession. He was satisfied that it was voluntarily made and it was

also true. He took pains to verify its truthfulness by testing it against all other evidence available including the defence of alibi The statement was so detailed that if it had been false, it could not have fitted in with the rest of the prosecution evidence as it did. We are not convinced that the confession was obtained by torture or that it was not properly recorded or that it was a forgery. We have no evidence before us to justify such an inference being made."

We agree with the above conclusions and therefore we do not find any merit in the complaint that the charge and caution statement was not voluntary and true.

On the complaint that it was not properly recorded, we agree that it was irregular for a police officer to record a charge and caution without countersigning after the signature of the suspect. It was irregular for the second officer to take over from where the first officer stopped without countersigning after he had read over the charge and caution to the suspect. Indeed it is quite irregular for the two officers to record one statement without satisfactory explanation. However, we think that failure by the recording officer to countersign after the charge and caution was read over to the suspect was cured by the recording officer's signature at the end of the suspect's statement. We do not think that the omission by the recording officers in this case to sign after charging and cautioning the suspect was fatal to the statement. Further, we agree with the Court of Appeal that there was no evidence to prove that the confession was a forgery.

On the issue of the identification of A1, we think that on the evidence of his confession alone, the trial Judge could justifiably have convicted A1 of the two offences of murder. However, there was other evidence which corroborated the confession. The evidence of Ferri Babara, PW7, was considered by the trial Judge, and the Court of Appeal agreed with the trial court, that PW7's evidence regarding her identification of A1 at the scene of crime was truthful. There was further evidence that on 24/3/99 she had met A1 in the same bar where she observed him, because he kept going in and out of the bar. PW7's evidence of having first seen A1 in Palace View Bar on 24/3/99 tallies with A1's confession when he stated that the plan to kill Prince Kijanangoma on 24/3/99 in Palace View Bar flopped, because he had found Kajabago who knew him in the bar during that

night. Therefore the complaint that PW7 could not properly have identified A1 cannot stand.

We therefore agree with the Court of Appeal's conclusion that A1 was properly identified as the person who pulled the trigger that released the bullets that killed Prince Kijanangoma at Palace View Bar in the evening of 25th March, 1999. Therefore grounds 1,2,3, and 4 must fail.

In our view, A1 was rightly convicted.

The prosecution case against A2 and A3 is mainly circumstantial. It is scattered in various testimonies of various witnesses. The main prosecution evidence which implicated A2 was especially given by Ernest Nkoba, PWl5, and Mwesige, a witness who was summoned by court. This evidence was confirmed by confession of A1.

Before discussing the other pieces of circumstantial evidence implicating A2 and A3, we think that it is proper to consider and resolve one common complaint which was raised on behalf of A2 and A3 that the Court of Appeal erred when it held that Ernest Nkoba, PW15, and Mweige were not accomplices.

A2's complaint in ground 3 of his Memorandum of Appeal was as follows:-

"(3) That the learned Justices of Appeal erred on the facts and in law in holding that Nkoba and Mwesige were not accomplices and that their evidence was sufficient as corroboration against the 2nd Appellant."

A3's complaint in ground 4 of his Memorandum of Appeal was:-

"(4) The majority of the learned Justices of Appeal made an error of mixed law and fact when they held that Ernest Nkoba and Milton Mwesige were not accomplices and consequently upheld the conviction of the 3rd appellant largely on their evidence."

Mr. Emesu, counsel for A2, submitted that the evidence of both Nkoba, PW15, and Milton Mwesige should not have been relied upon because both were accomplices. The former provided money and transport for the killers. Both of them were arrested and charged with the same offence, and it was contended that their evidence should not have been relied upon.

In his written submission, Mr. Tusasirwe, counsel for A3, submitted at length in support of ground 4 which complained that the Court of Appeal had erred in law and fact when it held that Nkoba, PW15 and Milton Mwesige were not accomplices and thereafter upheld the conviction of A3 in reliance upon their evidence. He submitted that from the testimonies of these two witnesses, it is clear that they were accomplices with whoever killed the deceased. Several authorities were cited defining accomplice - such authorities cited included *Davies V DPP (1954) AC 378, Nassolo Hadija V Uganda S.C Cr. Appeal No. 129 of 2000, Canisio c/o Walya V R [1956] 23 EACA 453*. In all these cases, there seems to be no accepted formal definition of an accomplice. In CURGON DICTIONARY OF LAW, PITMAN, 1957 at page 74, the definition known as the *Davies V DPP* definition describes an accomplice as either a person on trial for the offence in question, against whom evidence of complicity has been adduced or who has confessed to participating in the offence. This is a limited definition. Mr. Tusasirwe submitted that in *Nassolo case* (supra), our courts have adopted a more liberal view of accomplices, and have stated that even if a person is not charged for the offence, he may be treated as an accomplice for evidential purposes, if on the strength of the evidence - adduced at the trial, it emerges that he participated in the crime either as a principal offender or as an accessory before or after the fact.

Counsel submitted that these two witnesses, PW15 and Mwesige were at least accessories after the fact.

Mr. Ngolobe, Deputy Director of Public Prosecutions for the respondent, submitted that the Justices of Appeal dealt with the reservation which the learned trial Judge had expressed about the credibility of those two witnesses, presumably because they were in the first instance, initially arrested and charged for the same offence and secondly, because they appeared to have known more about the case than they cared to reveal. The

trial judge cautioned himself before receiving and accepting their evidence. He was, however, impressed by these two witnesses and accepted their evidence as reliable, giving detailed reasons in his judgment.

In upholding the conclusion of the trial judge, the Court of Appeal stated:

> *"We find no reasons whatsoever to hold that these two witnesses were accomplices. It is true that they did certain things on the orders of their powerful master, like assisting people they apparently did not know, with money, fuel and other services, which people turned out to be killers. However, there is no evidence whatsoever, to show that Nkoba and Mwesige knew at the time that they were helping killers. In our view, they did not do any more than any employee would do in obedience to master's lawful order."*

We agree with these conclusions.

Consequently, we find that Nkoba, PWl5 and Milton Mwesige were not accomplices. Ground 3 in respect of A2 and ground 4 in respect of A3 must fail.

We now deal with A2's appeal. Six grounds were filed by Mr. Emesu of Emesu & Co. Advocates on behalf of A2, namely:

1. That the learned Justices of Appeal erred in fact and in law and misdirected themselves in upholding the trial Judge's reliance on the 1st Appellant's retracted confession to base his conviction of the 2nd Appellant with the murder of the two deceased.

2. The learned Justices of Appeal erred in fact and in law in evaluating the evidence on record and they erred in upholding the finding of the trial Judge on the credibility of the prosecution witnesses bearing on the guilt of the 2nd appellant.

3. That the learned Justices of Appeal erred on the facts and in law in holding that Nkoba and Mwesige were not accomplices and that their evidence was sufficient as corroboration against the 2nd Appellant.

4. That the learned Justices of Appeal erred on the facts and in law in holding that circumstantial evidence on record sufficiently proved the guilt of the 2nd appellant with the murder of the two deceased beyond reasonable doubt.

5. That the learned Justices of Appeal erred in rejecting the 2nd appellant's defence.

6. That the above errors occasioned a miscarriage of justice to the 2nd appellant.

Mr. Emesu, counsel for A2, argued all the grounds together. We have already disposed of ground 3. Mr. Ngolobe, D/DPP argued them in the same order. Mr. Emesu submitted that the conviction of A2 which was upheld by the Court of Appeal had been based on pieces of circumstantial evidence and the confession of A1 which implicated A2. Counsel submitted that the lower courts never verified how the pieces of circumstantial evidence were corroborated by A1's confession in implicating A2. Further, counsel submitted that the evidence of Ernest Nkoba, PWl5, who provided money and transport for the killers and who was arrested and charged with the same offence should not have been accepted and acted upon. In effect, one of the pieces of circumstantial evidence that was relied upon by the lower courts was that on A3's instructions, PW15 surrendered one of the vehicles belonging to Voice of Toro (VOT) to A2 on 21/3/99, because A3 wanted A2 to do some work for him. A2 retained that vehicle from that date until it was found abandoned outside VOT offices in the morning of 26/3/99 after the murder of Prince Charles Kijanangoma. A2 never went back to PWl5. He was next seen by Milton Mwesige on 27/3/99 at the Saloon of Silver in Kampala. A2 then transported Mwesige to Uganda House where A3 was expected, but was not there. Later, Mwesige was taken to A3's residence at Mbuya where he found A2. After explaining to A3 how the vehicle had been grabbed by people he transported from Fort Portal to Rwenkuba Farm, A3 assured

Mwesige that if it was taken by the people who were with Silver that vehicle would be returned to Fort Portal by A2. He provided Shs.50,000/= for Mwesige's transport by public means. A2 thereafter drove Mwesige to the Taxi Park in the evening.

Clearly, we must state that once the confession of A1 is accepted as true as we did and the evidence of Nkoba,PW15 and of Milton Mwesige is equally accepted as truthful as we did, the guilt of A2 is established. From the confession of A1, A2, Silver, Fred and A1 met in a bar at Nsambya, just opposite the Total Petrol Station on 21/3/99 and discussed the plot to kill a certain person in Fort Portal who was code named Escobar. The price agreed upon for killing that person was shs. 5,000,000/=. Fuel money was agreed at shs. 1,000,000/=. A2 was the person to provide the money. After the meeting, A2 travelled to Fort Portal and was able to secure a vehicle from PW15. The evidence has shown that, the vehicle which was handed to A2 by PW15 was not returned to him. It was found abandoned outside VOT offices in the morning of 26/3/99 after the murder of Prince Kijanangoma. This conduct is inconsistent with the innocence of A2,

We think that A2's abandonment of the vehicle outside VOT office at night and his disappearance from Fort Portal after Prince Kijanangoma was shot dead marked the end of the job assigned to him by A3. We believe and accept A1's confession that it was A2 who had hired the killers to do the job and that he was the one who led Fred, one of the killers, to Rwenkuba Farm after killing the Prince. We further believe that, the presence of Fred and Alex at Rwenkuba Farm on 26 March, 1999 after Prince Kijannangoma was gunned down the previous night was corroborated by Milton Mwesige who found both on the farm. Mwesige next met A2 at Silver's Saloon in the morning of 27th March, 1999 after which he drove him (Mwesige) to the Uganda House to meet A3. However, later Mwesige was taken to A3's residence at Mbuya where he again found A2. After A3 had assured Mwesige that the vehicle was safe if it had been taken by people who were with Silver, A3 gave him (Mwesige) shs.50,000/= for his transport to Fort Portal. After that A2 drove and dropped Mwesige at the Taxi Park in the evening of 27/3/99 and disappeared never to be seen till he was sighted and arrested in Kasese one year later.

We are satisfied that there was ample evidence to justify the conviction of A2. Therefore grounds 1,2, 4,5 and 6 must fail. In the result, A2 was rightly convicted.

We now turn to the appeal of A3. Ten grounds of appeal were filed on his behalf by Mr. Tusasirwe of M/s Tusasirwe & Co. Advocates, to wit:

1. The learned Justices of Appeal made an error of mixed law and fact when they accepted and upheld the confession of the 1st appellant, a co-accused person and used the same to confirm the conviction of the 3rd Appellant.

2. The majority of the learned Justices of Appeal made an error of mixed law and fact when they failed to subject material evidence to fresh scrutiny and thereby confirmed the conviction of the 3rd appellant in disregard of the inconsistencies and contradictions in the prosecution evidence.

3. The majority of the Justices of Appeal made an error of mixed law and fact when they upheld the conviction of the appellant on the basis of evidence which the trial Judge had found unreliable and/or had not considered and relied on when convicting the 3rd appellant.

4. The majority of the learned Justices of Appeal made an error of mixed law and fact when they held that Ernest Nkoba and Milton Mwesige were not accomplices and consequently upheld the conviction of the 3rd appellant largely on their evidence.

5. The majority of the learned Justices of Appeal erred in law when they misapplied the law relating to circumstantial evidence to uphold the finding that the 3rd appellant participated in the murder of the deceased persons thereby wrongly convicting the 3rd appellant.

6. The majority of the learned Justices of Appeal erred in law when they upheld the conviction of the 3rd appellant by the trial Judge who himself stated that after looking at the evidence as a whole, he was left in doubt as to the 3rd appellant's guilt or innocence.

7. The majority of the learned Justices of Appeal erred in law when they shifted the burden of proof to the 3rd appellant and applied a higher standard of proof than is stipulated by law and wrongly reached the conclusion that the 3rd appellant's guilt was proved beyond reasonable doubt.

8. The majority of the learned Justices of Appeal made an error of mixed law and fact when they upheld the conviction of the 3rd appellant on the basis of the prosecution evidence in isolation and disregard of the 3rd appellant's defences,

9. The majority of the learned Justices of Appeal made an error of mixed law and fact when they made findings of fact and law not founded on the evidence on record.

10. The learned Justices of Appeal made an error of mixed law and fact by upholding the decision of the lower court when the trial Judge did not properly address the assessors on the law and evidence to enable them give him a sound opinion.

We have already disposed of ground 4 of his appeal. The prosecution evidence which implicates him was the evidence of Nkoba, PWl5, Milton Mwesige together with A1's confession which we have already dealt with whilst discussing A1's and A2's appeals. Other evidence is circumstantial as found in the conduct of A1, A2, Silver and A3 himself.

On ground one, Mr. Tusasirwe, Counsel for A3 submitted that the majority of the Justices of Appeal used A1's confession, a co-accused, to confirm the conviction of A3 on both counts. He contended that this was clear from the following passage from their judgment:

> *"The prosecution case against Patrick Kwezi and John Sanyu Katuramu is largely circumstantial. It is scattered in various testimonies of the prosecution*

and other witnesses. The main evidence is the confession of the Ist appellant as corroborated by several prosecution witnesses-."

Counsel further submitted that the Justices of Appeal accepted without criticism the evidence of Francis Mugenyi, PW8, that the deceased told him before his death that Katuramu A3 had paid shs.6,000,000/= for people to kill him. He contended that the Justices of Appeal did not find that this kind of evidence was hearsay. Counsel further submitted that since the justices chose to accept A1's confession, then they were not entitled to disregard part of the confession where the alleged motive to kill Escobar whom the court finds is Happy Kijanangoma is given thus:

> *"The person to be killed was code named Escobar. I was told that this Escobar had one time laid an ambush to Kwezi and his brother, George, along Fort Portal Mutende road where he wanted to kill them but they survived Now the two wanted to revenge to this character, Escobar."*

Mr. Ngolobe Deputy DPP conceded quite rightly in our view, that A1's confession could only lend credence to other evidence against A2 and A3. He submitted that there was evidence against both A2 and A3. We agree with his submissions that in addition to A1's confession, the evidence of Nkoba, PW15 fully implicated A3 in facilitation of the murder of the deceased persons. According to that evidence, when A2 arrived in Fort Portal, he went to PW15 and requested for the telephone. After he had talked to A3, he handed the receiver to Pwl5. A3 instructed PW15 to release a company vehicle to A2, because he (A3) wanted A2 to do work for him. A3 further directed Pwl5 to provide some money and fuel to A2. PW15 complied with the directives of A3, the boss of VOT. Early in the morning of 26/3/99 after Prince Kijanangoma had been gunned down the previous night, A3 called PWl5 to his residence and directed him to get 300,000/= and give it to his visitors who were at the VOT offices. Secondly, he directed him that Milton Mwesige, the driver of VOT should take his (A3's) visitors to Rwenkuba farm. When Mwesige went to pick the visitors, he found that one of them was Silver Muhenda, whom he knew as a

person hailing from the same place with him. It should be noted that according to A1's confession Silver Muhenda was the person who connected Patrick Kwezi to A1 at Nsambya, just opposite the Total Petrol Station when the plot to kill Escobar was first hatched.

Further the evidence of Mwesige showed that when he reported to A3 in Kampala on 27/3/99 that his vehicle had been robbed from him by people he had picked from Fort Portal and taken to Rwenkuba farm, A3 told him that if those people were with Silver, then the vehicle is safe. This clearly associates A3 with the murderers of the deceased. On top of Mwesige's evidence, Edward Luyonga, PW21, proves that A3 frustrated the Police from 22 tracing Motor vehicle Reg.725 UCB. It is clear that the conviction of A3 was not based solely on A1's confession. The Justices of Appeal treated the rest of the prosecution evidence as circumstantial evidence corroborating A1's confession and connecting A3 with the crime. Further, we think that although the evidence of Francis Mugenyi, PW8, and Karamagi, PWl4 appears to be hearsay, that evidence was admissible under section 30(a) of the Evidence Act as report which Prince Kijanangoma made to these two witnesses relates to his death.

Section 30(a) states that:

> *"Statements, written or oral of relevant facts made by a person who is dead, are themselves admissible in the following cases:-*
>
> *a) When the statement is made by a person as to the cause of his death or which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not at the time when they were made under expectation of death"*

The East African Court of Appeal dealt with some what similar case in *R V Kabateleine c/o Nchwamba (1946) 13 EACA 164,* where the deceased, two days before she had been burned to death in her house, had told the headman that the accused was threatening to burn her house because he said, she had caused the death of his father by witchcraft. The Court of Appeal held that this was not *"a general expression indicating fear or suspicion"* but *"one directly related to the occasion of death"* and that it was therefore admissible.

In the result, we agree with the Court of Appeal that the evidence of Francis Mugenyi was admissible.

In our view, the Justices of Appeal were correct when they said,

> *"We hold the view that the evidence of the two witnesses (Nkoba and Mwesige) is very important for its role in corroborating the confession of A1 and also in connecting A2 and A3 with the crime."*

We have held that these witnesses were not accomplices. Therefore their evidence was admissible and it fully corroborated A1's confession and also connected A2 and A3 with the crime.

In the result, ground one must fail.

Grounds 2 and 3 of A3's appeal were argued together. These grounds are set out on pages 18 and 19 of this judgment. We therefore do not need to reproduce them here. Mr. Tusasirwe counsel for A3 filed a long written submission dealing with these grounds. He submitted that although the Justices of Appeal took note of their duty as a first appellate court to reevaluate the whole evidence on record and subject it to exhaustive scrutiny and come independently to its own conclusion as to whether the findings of the trial court can be supported as was stated in *Pandya V R [1957] EA 336* see *Ruwala V R [1957] EA 570 and Bogere Moses & Anor V Uganda SC Cr. Appeal* No 1 of 1997, they did so as a formality and merely accepted the findings of the trial judge without scrutinizing the evidence on which those findings were supposedly based. Counsel submitted that as far as the evidence seeking to prove that A3 participated in the murder of the deceased of procuring the killers was concerned, the prosecution evidence was riddled with contradictions and inconsistencies.

He submitted that the law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness.

See *Alfred Tajar V Uganda EACA Cr. Appeal No.167 of 1969* (unreported) see also *Sarapio Tinkamalirwe V Uganda Sc.Cr.Appeal No.27/1989.*

Counsel submitted that this court is therefore bound to scrutinise the evidence and come to its own conclusion. See *Henry Kifamunte V Uganda SC. Cr. Appeal No. 10/97.* He submitted that the prosecution evidence that sought to prove that A3 procured the murder of the deceased was that of PW15, Mwesige. Edward Luyonga, PW21, Joseph Sunday Baba PW19, SSP Omoding PW18, James Mboijana PW19, SS P Bivagara, PW20 and Francis Mugenyi, Pw8. He contended that the Justices of Appeal never scrutinised the conduct of the above witnesses in order to determine whether A3 procured the murder of the deceased.

Mr. Ngolobe D/DPP submitted that the Justices of Appeal properly reappraised the whole evidence on record and came to their own conclusion. On the question of inconsistencies and discrepancies, he submitted that although PW15 stated that he had withdrawn shs300,000= from the bank, the evidence showed that shs200,000/= was withdrawn from the bank. However, he contended that since shs 300,000/= was given out by PWl5, to A3 's visitors, he could have got shs 100,000/= from the office. He submitted that the amount issued was a matter of details but not substance - which could be due to lapse of time.

We wish to point out that our decision in *Kifamuntu case (supra)* is not authority for the view that we are bound to scrutinise evidence and come to our own conclusion. In our view, the Justices of Appeal rightly re-appraised the prosecution evidence along side that of A3 before making their conclusions on each ground. On contradictions and inconsistencies, we would refer to the following passage to show that in their judgment the Justices of Appeal considered contradictions in the evidence of Nkoba, PW15 and Mwesige and held that:-

"We do not agree with counsel that the evidence of the two witnesses destroyed each other or was destroyed by their previous statements on the subject There were minor discrepancies in their evidence which did not go to the root of their credibility. There is for example the matter whether the Shs.300,000/= Ernest Nkoba gave to associates of killers was all from the bank or not There is, however, evidence that Shs.200,000/= was withdrawn from the bank that day and that Shs.300,000/= was paid out Whatever the source was, the fact remained that Shs.300,000/= was paid out to the companions of the killers on the order of A3. There is also the matter of discrepancy as to how many times Milton Mwesige went to Rwenkuba Farm on the morning after the murder and whether he returned to Fort Portal that day or not We think and agree with Mr. Ngolobe that the evidence of Mwesige on the matter was more detailed than that of Nkoba and the discrepancy is on details rather than substance. We think that a witness who has given evidence in court in a convincing manner and is subjected to vigorous cross-examination may be a credible witness despite the fact that he/she may have previously signed a different version of the story outside the court The impression the witness makes on the court overrides other considerations when assessing the credibility of that witness. We hold, in agreement with the learned trial Judge, that Ernest Nkoba and Mwesige are credible witnesses and their evidence not only corroborated the confession of A1 but it also implicated A3."

What the learned Justices of Appeal said in the last nine lines of the above passage of their judgement suggests that the evidence of a witness in court which is inconsistent with a statement he/she had previously made should be preferred to the previous statement. If that is what the learned Justices of Appeal meant we are unable, with respect to agree with that view. The credibility of a witness should always be considered in the light of a previous inconsistent statement he/she has made if any. Nevertheless, we agree with their conclusion that Ernest Nkoba and Mwesige appeared to be credible witnesses, and that A1's confession lends support to their evidence. We think that the Court of Appeal did re-evaluate the evidence touching on A3's procurement of killers of the deceased. They considered the confession of A1, the evidence of PW15 and how upon A3's directives, he handed a motor car, belonging to VOT to A2, to enable the latter to do some work for him. He handed him money for fuel. Since 21/3/99 the vehicle was found abandoned by

A2 outside VOT offices on 26/3/99 - The learned Justices of Appeal considered the evidence of Mwesige at length, evidence of Edward Luyonga, PW21, evidence of Mugenyi, PW8 and A3's conduct and concluded that A3 financed the plan to kill the Prince, coordinated it and took all the steps to destroy all evidence that could have led to the discovery of the culprits early enough. Further, we think that the inconsistencies and contradictions in the evidence of Francis Mugenyi, PW8 and his Police statement which counsel for A3 raised, were raised for the first time before this court. They were never raised before either the trial court or the Court of Appeal. Therefore, the lower courts cannot be criticised as having been in error for not resolving those contradictions and inconsistencies which were never raised before them for determination. In the result, this complaint has no merit. Consequently grounds 2 and 3 must fail.

On ground 5, Counsel for A3 submitted that the learned Justices of Appeal did not properly apply the principles of law relating to circumstantial evidence and in so doing, they sustained erroneous conclusion reached by the trial judge on the basis of circumstantial evidence. Counsel submitted that the Justices of Appeal did not properly apply the principles of law laid down in the case of *Simon Musoke V R 1958 EA 775 where the East African Court of Appeal stated:*

> *"In a case depending exclusively an circumstantial evidence, the judge must find, before deciding upon a conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt"*

The counsel submitted that according to the case of *Teper V R 2 [1952] A C 480* at page 489 which was cited with approval in the case of *Simon Musoke V R (Supra). "It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*

In the instant case counsel submitted that because Prince Kijanangoma had made many enemies who could have had motive to kill him and therefore it would not be safe to base A3's conviction on circumstantial evidence in the instant case. He submitted that the court must be convinced beyond reasonable doubt that all other possibilities have been ruled out. He further submitted that according to A1's confession, Prince Kijanangoma had tried to kill A2 and his brother, George, in an ambush. Why could they (George and A2) not have been responsible for his death, trying to revenge?

On the issue of links, counsel submitted that there was no evidence to corroborate that PW15 gave a vehicle to A2 on instruction of A3. The evidence came only from PW15. If the vehicle had been given to him by PW15, how could he have abandoned it outside the offices of PW15. Even on second link, the evidence came from PW15. On giving shs.300,000/= to A3's visitors, Mwesige does not say he saw money being given to A3's visitors. On the issue of vehicle 725 UBC disappearing from the roads in Uganda, there was no evidence that Police looked for it and failed to get it. In conclusion, counsel submitted that if the link existed after the alleged offence was committed, then the person is only guilty of accessory after the fact which is much lesser offence than the actual offence charged.

Mr. Ngolobe submitted that all the links of circumstantial evidence which the Court of Appeal accepted proved that A3 participated in the murder of Prince Kijanangoma.

The following passage from the judgment of the Court of Appeal shows the care with which the Court received the evidence against A3.

> *"From the evidence adduced by the prosecution it is easy to infer that he (A3) had a motive to kill Prince Kijanangoma. The Prince had become a thorn in his neck, he had published a very serious allegation, including murder of late King Kaboyo Olimi II and adultery with Queen mother against A3 and went as far as purporting to dismiss him from his various jobs/posts within the Kingdom. He was busy mobilising members of the royal clan of the Kingdom to remove him from the leadership of the Kingdom. All this, however, does not amount to*

evidence that A3 planned or masterminded the death of the Prince. He may have wished it but that is not enough "

After the above statement the Justices of Appeal listed 5 links of circumstantial evidence upon which it concluded that A3 participated in the murder of Prince Kijanangoma.

The first link which the Justices considered was in the evidence of Ernest Nkoba. PW15, who was then the Manager of Voice of Toro (VOT) owned by A3. When A2 arrived in Fort Portal a few days before the murder of the deceased, he reported to PW15 and asked to be allowed to speak to A3 on the office telephone. After he had spoken to him, A2 handed the receiver of the telephone to PW15. A3 instructed PW15 on telephone to give a vehicle, fuel and money to A2, as he wanted him (2) to do some work for him. A2 used the vehicle for some days. When Prince Kijanagoma was gunned down during the night of 25/3/99, that vehicle was found abandoned outside the VOT office. A2 was no where to be seen in Fort Portal.

The second link was that on the morning, following the murder of Prince Kijanagoma, A3 who was in Fort Portal called PW15 to his house at 7.30 a.m. and gave him two orders

1. To get shs.300,000/= from the funds of VOT and give it to his (A3's) visitors whom he would find at the offices of VOT.

2. To direct his official driver, Milton Mwesige, to take his, A3's, visitors to his farm at Rwenkuba farm.

According to PW15, A3's orders were complied with. From the confession of A1, the evidence of Mwesige and Nkoba, PW15, we now know A3's visitors were Silver Muhenda and Bob Smart, the original conspirators in the murder of deceased prince. From the confession of A1, A1 and Fred were then hiding at Rwenkuba farm after committing the murders, the previous night.

The third link relates to the involvement of vehicle No 725 UBC, Toyota Corolla, the property of VOT, which Mwesige used to take A3's visitors to Rwenkuba farm on 26/3/99

after the murder of Prince Kijanagoma. These visitors forced Mwesige to take them to Kampala. On reaching Kampala, one of the visitors grabbed the vehicle and took it away. When Mwesige reported to A3 on 27/3/99 what appeared to him to be robbery, A3 calmly told him, *"if the vehicle is with Silver, then it is Ok."* He gave shs.50,000/-to Mwesige for his transport back to Fort Portal by public means. In this connection, the following is what the Court of Appeal said;

> *"In our view, A3 must have known Silver and his group were in Fort Portal. He must have approved the mission and that explains why he agreed to leave his company vehicle with Silver/Bob for a while longer after the execution of the Fort Portal mission. It is also significant to note that on 27/3/99 Mwesige found Kwezi, A2, at A3's home in Mbuya "*

We must say that this can only be an inference drawn by the majority learned Justices of Appeal from other relevant evidence. After the above conclusion on the 3 **rd** link, the Justices of Appeal proceeded to deal with the 4**th** link and stated:

> *"The fourth link is the way M/V Reg. No 725 UBC disappeared from Uganda roads a few weeks after the murder of Prince Kijanangoma. Edward Luyonga PW21, was in 1999 a Manager of Give and Take Forex Bureau, one of A3's companies in Kampala. As a Manager, he used to drive M/V Reg No 725 UCB before it was transferred to Voice of Toro in Fort Portal. He used to live in Bukoto where Give and Take Forex Bureau had a housing estate for its staff. He lived upstairs of a block where the company's Chief Mechanic Babu Singh, was resident downstairs. One week after the death of Prince Kijanagoma, he saw the vehicle being driven by A3's driver, one Kawesa Ramathan. He drove it to the company's housing estate and handed it to Babu Singh the company mechanic. The vehicle appeared to have mechanical defect as it had a broken exhaust pipe and was making a lot of noise. It was parked in one of the garages.*

As the evidence of Luyonga ,PW21, is long, we shall briefly summarise it. His evidence was that on the following Saturday as he drove to the office, he heard Radio Simba from his car radio announcing that the same vehicle was wanted by Police. That the car was used by people who murdered Prince Kijanangoma. When he reached the office he went back to check whether this was the car in the garage. He found it was the vehicle Police

wanted. He tried to contact A3 on telephone. He could not get him. He tried to contact Chris Katuruma, he could not get him. At 1 pm he got Chris Katuruma and reported to him. When he finally saw A3 and told him about the radio announcement, A3 wondered how the car he was using at the time Kijanangoma was killed be the car the murderers of Kijanangoma used.

A3 contacted the Police at Jinja Road Police Station. However, at 1 am a vehicle came to Bukoto housing estate of the Give and Take Forex Bureau. He woke up and through the window, he saw A3 and two men come out of a Ford Escort car which used to belong to late King Kaboyo. He saw Babu Singh open the garage. One of the men entered the garage. He heard noise from the rear of the Ford Escort. He could hear noise from the garage where 725 UBC was parked. He saw one man squatting and removing the rear number plates from Ford Escort car. There was security light which enabled him to see what was going on. He saw A3 pacing about. He saw number plates of Ford Escort removed from the front - The number plates from the Ford Escort were taken inside. After about an hour, one man drove the 725 UBC out. A3 entered the vehicle and it was driven out without lights on. The 3 men drove 725 UBC bearing the number plates of Fort Estate. The Ford Escort remained outside without number plates.

> On Sunday, he saw the Ford Escort parked outside without number plates. At 9,30 am he we went to church. When he returned from the church at 1 pm, he found Ford Escort gone.

The Court of Appeal re-appraised the evidence relating to A3's handling of the suspected vehicle, its connection to the murder and considered the criticism of the trial judge by Mr. Ayigihugu, counsel for A3, in the Court of Appeal. The Court of Appeal considered A3's unsworn evidence relating to the suspected vehicle, the manner A3 took not only to disguise its identity but also to ensure that it totally disappeared. The majority Justices of Appeal then upheld the decision of the trial Judge, who believed the evidence of Luyonga, PW21, and rejected that of A3 and concluded that Luyonga's evidence led to the inevitable conclusion that A3 had cause to desire the disappearance of M/V 725 UBC in connection with the murder of Prince Kijanangoma.

At the time he gave evidence, Luyonga, PW21, had been dismissed from his employment in Give and Take Forex Bureau, one of A3's companies. He was owed unpaid salaries about which he had written in vain. We think that in accepting PW21's evidence regarding how A3 handled the Motor Vehicle 725 UBC, the trial and the majority of the Justices of Appeal did not show that they took this into account. Nevertheless, we agree with the conclusion of the majority of Justices of Appeal that PW21's evidence incriminated A3. We are therefore not persuaded by Mr. Tusasirwe's criticism of the evidence of PW21 that he over dramatised it. The majority Justices of Appeal linked A3 to the murder of the deceased because of A3's failure to actively participate in consoling the royal family and the arrangement for and final burial of the Prince. With respect, we do not attach much importance on this link. This is speculation which has no sound basis.

Considering the conflicts that existed between certain members of the Toro royal family, the deceased, including Princess Bagaya, and A3, it would have required extra courage for A3 to remain and mix comfortably with members of the royal family. Consequently, we think that his failure to remain in Fort Portal and be with the bereaved people cannot by itself alone lead to the inference that he participated in the murder of Prince Kijanangoma. We think that legally he had no onus to explain why he never remained in Fort Portal and be with the bereaved people of the Kingdom.

The last link of A3 with the murder of Prince Kijanangoma which the majority Justices of Appeal found was in the evidence of Joseph Sunday Babu, PW22. He was a former employee of Give and Take Forex Bureau and at the time of his testimony in May, 2001, he had been dismissed from the company. He testified that in early 2001 before his dismissal, he drove one Chris Katuramu to Luzira Prison to see his brother, A3. He had already done so before for about eight times. On this occasion, they found there a businessman called Dembe who also had gone to see A3. This witness heard A3 give instructions to Dembe and Chris Katuramu to do all they could to see that Babara Ferri, PW7, and Milton Mwesige disappear and if need be, money should be used to achieve this objective. That was before the two people gave their evidence at the trial.

We realised from Sunday Babu, PW22's evidence that he was dismissed from Give and Take Forex Bureau on 2nd February, 2001. According to his evidence by the time he was dismissed, he had already visited Luzira Prison with Chris Katuramu when he heard A3 give out instructions to Dembe and Chris Katuramu as earlier stated. That was on 2/4/2001 before Ferri Babara, PW7, and Mwesige who testified in court on 4th April, 2001 and 16th July, 2001 respectively. We respectfully agree with the majority Justices of Appeal that the reason why A3 wanted the two witnesses to disappear is because they would give evidence which would incriminate him.

Mr Tusasirwe submitted that in effect the Justices of Appeal conceded that none of the above pieces of circumstantial evidence conclusively damn A3. They then take the rather strange route of bundling it all together and then find that taken as a whole, the scattered incidents some of which are of the court's own invention, collectively prove the case against A3. He contended that there was nothing to show that A3 conceived a plan to assassinate the deceased. There was no proof of him paying a cent to the supposed assassins or even being in touch with them. There was nothing to show that he coordinated their movements or even knew of those movements. In other words, there was no scintilla of proof of procurement. On the available evidence, we are not persuaded by these arguments. We agree with the Justices of Appeal who held that:

> *"We would agree that considered in isolation, these incidents separately do not prove any murder charges against A3. However, considered together alongside the events that started in Nsambya on Sunday 21st March, 1999 up-to the Thursday 25th March, 1999 when the deceased was gunned down and onwards to the day in early April, 1999 when M/v Reg. No. 725 UBC disappeared and up-to October, 1999 when A3 was arrested, there is no doubt left in our mind that A3 conceived the plan to kill the Prince, he financed it, coordinated it and took all the steps to destroy all evidence that could have led to the discovery of the culprits early enough."*

Therefore ground 5 must fail. The conclusions on ground 5 would really dispose of A3's appeal. We shall, however, consider briefly the other grounds.

Grounds 6 and 7 were argued together. Mr. Tusasirwe submitted that the prosecution did not prove its case against A3 beyond reasonable doubt. He contended that the evidence for and against A3 through which the connection could only have been implied was the alleged phone - call by PW15, the payment which he (PW15) clearly did in his own right; the sending of men, whom PW15 referred to as his, to Rwenkuba farm, their stay at Rwenkuba farm, A3's knowledge whereof was never established, their alleged use of a vehicle which they were given by PW15 himself, their stopping at 3rd appellant's Petrol station in Kampala in his absence, their supposed association with Kwezi who as a relative had every reason to be in A3's premises, but who was never shown to have had contact with A3, other than through the statement of PW15.

Counsel contended that against all logic, the learned trial judge convicted A3 on the basis of A1's confession that was seemingly inadmissible as corroborated by PW1 5, a former prime suspect and an obvious accomplice to the alleged killers and even accepted as truthful witness like Baba and Mwesige.

Counsel criticised the Justices of Appeal for having adopted more or less the same approach the trial judge had taken - by accepting wholesale the evidence of PW15, Mwesige, Sunday, Mugenyi and Luyonga. The Justices of Appeal thereafter, found that given their evidence, the 3rd appellant therefore must have had hatred against the Prince and although many others also hated him, A3 must be the one who killed the Prince. That being so, his defence must therefore be a lie.

Finally, he contended that the learned trial judge made the most disjointed and shocking statement on the whole record, when he stated:

> *"After looking at the evidence as a whole I am left in doubt that the prosecution have proved their case against the accused beyond reasonable doubt Since he*

procured the texts of the Prince he is equally responsible for the death of the night watchman."

Last it be thought that the judge meant that he was left in no doubt, perusal of the original record will show that he was dead serious, yet the first finding which is actually the logical finding given the evidence, should have had the result of acquitting the appellant

We have perused the judgment of the Court of Appeal and nowhere in the judgment did the court resolve the complaint raised in ground 6. However, we think that whether the sentence conveys what the judge meant to say or whether it was a typographical error can be gathered from reading the preceding paragraph to that sentence and the conclusion of that paragraph.

After the learned trial Judge had considered the evidence of Luyonga, PW21, regarding radio announcement that M/v Reg. No. 725 UBC was wanted by police as having been used by people who were suspected to have murdered Prince Kijanangoma - and how Luyonga (PW21) had seen Kawesa bring that vehicle and pack it in one of the garages of their company's estate at Bukoto and how Luyonga (PW21) stated that he later saw A3 supervise the removal of the registration number plates from that vehicle and replace them with the number plates from Ford Escort car which used to belong to late King Kaboyo Olimi. This was after midnight on the date in question. We have already referred to the evidence of PW21, in this judgment. After he had considered the above evidence, he considered the evidence of Milton Mwesige who drove the vehicle back from Fort Portal and handed it to Kawesa Ramathan, the driver of A3. He thereafter considered the evidence of SSP Magoola, PW22, who stated that at that time, he was stationed at Jinja Road Police Station and that A3 rang him in connection with the vehicle in question. Thereafter, the learned trial Judge referred to A3's statement from the dock where he stated:

"It is true when an announcement was made on one of the F.M. Radio station alleging involvement of that vehicle UBC 725 in the murder of Happy

Kijanangoma I quickly rang the police because I knew the person who was using the vehicle and where it was stationed at the time."

The learned trial Judge then stated:

"This bold assertion of fact when tested against the background of the evidence of Nkoba, Mwesige and Luyonga coupled with the fact that the vehicle disappeared from the roads of Uganda, the message it conveys rings loud and clear. Is it reasonable to suppose that A3 was not aware of what was going on?'

After stating that A3 had told a lot of lies and falsehoods in his dock statement and citing the case of *Rex V Erunasani Sekono & Another (1947)* 14 EACA 74 and explaining the relevancy of the case, he concluded thus:

"after looking at the evidence as a whole I am left in doubt that the prosecution have proved their case against the accused (A3) beyond reasonable doubt" Since he (A3) procured the death of the Prince he is equally responsible for the death of the night watchman who was killed in the process of liquidating the Prince. I am in complete agreement with the assessors that I find him (A3) guilty of the charges on each count and accordingly convict him as charged"

Clearly, the phrase *"after looking at the evidence as a whole I am left in doubt"* does not convey what the Judge meant to say in view of his reasoning prior to the phrase and after the phrase/sentence. The phrase that fits and conveys what the Judge meant to say is: *after looking at the evidence as a whole. I am left in no doubt*. In fact the Judge meant to say that *"after looking at the evidence as a whole, I am left in no doubt that the prosecution have proved their case against the accused beyond reasonable doubt."* And in fact that was his conclusion. Therefore, ground six must fail.

We think that the complaint in ground 7 has already been resolved in the course of resolving ground 6 and when we were discussing ground 5 which dealt with whether or not A3 participated in the murder of the deceased persons. We shall therefore not go into the matter again. In the result, this ground fails.

On ground 8 of A3's appeal Mr. Tusasirwe submitted that the law on the need to consider the evidence of both sides was clearly laid down in *Abdu*

Ngobi V Uganda S.C. Cr. Appeal No.10 of 1991 where this court stated that:

> *"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not*
> *taken until all the evidence has been considered----------the proper approach is to consider the strength and weakness of each side, weigh the evidence as a whole, applying the burden of proof as always resting upon the prosecution and decide whether the defence has raised a reasonable doubt"*

He submitted that the High Court in the instant case came to its decision virtually without considering the defence case save to declare him a liar.

Counsel submitted that the Justices of Appeal did not improve the matter. In one paragraph, they summarised what appellant stated in his unsworn statement as follows:

> *"The defence of A3 was a total denial of the offence. He said he was not in the business of killing, because it did not make commercial sense. He stated that most prosecution witnesses had fabricated evidence against him due to grudge either being former employees who fell out with him or official (sic) in Toro Kingdom or who hated him because of his position in the Kingdom."*

It is true that both the trial judge and the Justices of Appeal never seriously considered the defence of A3, which was a total denial of the offence. He then stated that most of the prosecution witnesses had fabricated evidence against him due to grudges either being former employees who fell out with him in

Toro Kingdom or who hated him because they had been dismissed from employment in his companies.

We wish to reiterate what we stated in *Abdu Ngobi V Uganda (supra)* and *Suleiman Katusabe V Uganda S.C. Cr. Appeal No. 7 of 1991 (unreported) that:*

"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that final decision is not taken
until all the evidence has been considered----------
The proper approach is to consider the strength and weakness of each side with the evidence as a whole, apply the burden of proof as always resting upon the prosecution and decide whether the defence has raised a reasonable doubt in the prosecution case."

We note that in the instant case A3's denial of the offence was considered against the prosecution evidence and we think that the lower courts had to determine whether the evidence by prosecution witnesses proved that despite the denial, and the allegation of grudges the prosecution evidence was overwhelming.

On the evidence of A3's witness, Rev. Kyalimpa vis-a vis the evidence of Francis Mugenyi, about threats by A3 in the meeting held at Muchwa, the court never based its decision on the threats of A3. So failure to address that discrepancy was not fatal.

The Justices of Appeal never considered specifically the evidence of Tinkasimire, DW1 about how only Shs.200,000/= was withdrawn from the bank on the date in question, but that issue of inconsistencies and contradictions regarding that amount was addressed by both courts and resolved. We have already dealt with it in this judgment. The defence which A3 raised was that shs.50,000/= which he gave to Mwesige was not to assist him in his journey back to Fort Portal after the vehicle was grabbed from him by A3's visitors who had forced him to drive them to Kampala.

We think that A3 did not deny giving Shs.50,000/=. He denied giving money to him because his visitors had forced him to drive them to Kampala and had thereafter grabbed the vehicle from him. His defence was that he gave the money on a humanitarian ground because Mwesige had a sick sister in Kampala.

We think that when A1's confession is considered together with Nkoba, PW15's evidence, it becomes clear that Mwesige was forced to drive to Kampala on 26/3/99 by A3's visitors whom he had transported from Fort Portal to Rwenkuba Farm and who thereafter forced him to take them to Kampala. When Mwesige became stranded he reported to A3 who gave him Shs.50,000/= for his transport back. We think that Mwesige's evidence would be preferable to A3's defence.

On the whole, although some of the defence evidence was not seriously considered, no injustice was caused since the general denial of A3, that he had nothing to do with murders, was disproved by the prosecution evidence which the courts below found to be overwhelming and we agree. In the result, ground 8 must fail.

On ground 9 of A3's appeal Mr. Tusasirwe, counsel submitted that the appellate court like the trial court was not entitled to put forward theories not canvassed in evidence or counsel's speeches. See *Justine Nankya V Uganda S.C. Cr. Appeal No.24 of 1995 (unreported).* Counsel submitted that there were examples of serious speculation and conjecture on the part of the court and introduction of factual findings not founded on evidence which prejudiced A3. An example of this, was the so-called the 5th link which came from its own imagination to the effect that A3 did not assist the young King in making burial arrangements but instead rushed to Kampala on 26 March 1999 and that he did not remain behind and stay with his bereaved people.

We resolved this complaint when we were discussing the 5 link of A3's participation in the murder of Prince Kijanagoma. In any evident, we think that the circumstantial evidence linking A3's participation in the murders of the deceased persons is so overwhelming that the error complained of in this ground is not sufficient to alter the finding. In the result, this ground must fail.

Ground 10 of A3's appeal complained that the Justices of Appeal erred in law and fact when they found that the trial judge properly addressed the assessors on the law and evidence to enable them give a sound opinion. Counsel for A3 cited *Godfrey Tinkamalirwe V Uganda* [1988-1990] HCB 5 where this court stated that:

> *"under section 81(1) of the Trial on indictment Decree (TID) the trial Judge is required at the close of the case of both sides to summarise the law and the evidence in the case to the assessors. Needless to say, he must do so correctly and impartially, leaving the assessors free to farm their opinion independently. The summing up must not leave room for a reasonable man to think that the Judge did favour one side unfairly at the expense of the other of some people left the Court thinking that the Judge was biased, they could lose confidence in the Court as a custodian of justice."*

With respect, we think that this ground is not maintainable, because it was not raised before the Court of Appeal and considered by the Justices of Appeal. Therefore, it is erroneous to criticise the learned Justices of Appeal as having erred when the complaint was not raised before them for consideration. In any case, the learned trial Judge correctly and impartially directed the assessors on the law and evidence. For instance, on one issue he directed the assessors as follows:-

> *The accused, A3, gave a statement from the dock.. He was fully entitled to do this and no adverse views can be taken on this. His defence was a general categorical denial of any involvement in the crime. He dinied any dealing with Kwezi (A2). If you believe the evidence of Ernest Nkoba (PW15) that Kwezi (A2) talked to A3 on phone from PW15's office and that A3 instructed PW15 to give A2 a vehicle to use on his (A3's) errand, then here, A3 told a calculated and deliberate lie.*

Clearly, the direction to the assessors by the learned trial judge left no room for any one to think that the judge favoured one side unfairly at the expense of the other. In the result, ground 10 must fail.

For the foregoing reasons, A3's appeal has no merit. It must fail.

In the result, the appeals by all the three appellants must fail. They are accordingly dismissed.

Dated at Mengo this 21st day of May 2003.

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

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

A . N . KAROKORA
JUSTICE OF THE SUPREME COURT

PROF. G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

C . M . KATO
JUSTICE OF THE SUPREME COURT