

UGANDA / JUDGMENT

Wamukota Stephen v Uganda

(Criminal Appeal No. 128 of 2001)

[2004] UGCA 20 (2 April 2004)

[2004] UGCA 20

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Appeal No. 128 of 2001

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\par IN THE COURT OF APPEAL OF UGANDA

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\b\i\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 HON. MR. JUSTICE S. G.
ENGWAU,JA

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

\par HON. LADY JUSTICE C. K. BYAMUGISHA,JA

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APPEAL NO.128 OF 2001

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\par }{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 WAMUKOTA
STEPHEN::::::::::::::::::::::::::::::::APPELLANT

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\par UGANDA::::::::::::::::::::::::::::::::RESPONDENT

\par

\par }{\b\i\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 (Appeal against
conviction and sentence of the High Court of Uganda at Mbale}
{\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Maniraguha J)}

\b\i\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 dated 18/05/2001 in HCCSC
No.21 of 1999)

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\par }{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 JUDGMENT OF
THE COURT

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\par }{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 The appellant herein,
Stephen Wamukota, was charged with two counts of murder contrary to }
{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 sections 188 }

\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 and}
{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 189}
{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 of the }

\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Penal Code Act ({
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Cap. 120 Laws of Uganda)(hereinafter called the Act). It was alleged in the particulars of the
indictment in the first count that on or about the 12}
{\lang2057\langfe1033\super\langnp2057\insrsid15946289\charrsid6772774 th}

\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 day of February, 1998 at Sono
village, Bumbo in the District of Mbale, the appellant together with others still at large murdered
one }

\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Matayo Nambale.

\par }\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 In the second count, it was alleged that the appellant together with others still at large on the same date, the same village murdered one }

\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Chairo Andore.

\par }\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 On arraignment, the appellant denied both counts.

\par The facts that led to the prosecution of the appellant as found and accepted by the trial Judge are that on the night of 12}

{\lang2057\langfe1033\super\langnp2057\insrsid15946289\charrsid6772774 th}{

\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 February 1998 a group of seven people, namely the appellant Wamukota Stephen, Tom Wafula, Musa Boyo, Sabulaon Butala Moses Makoy

e and Wanyonyi John went to the home of the late Chairo Andore at about midnight. They had already arrested Nambale Matayo whom they had tied three piece popularly known as }

{\i\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 kandoya.}{

\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 The seven people were armed with sticks, which they used to assault the de

ceased. They took them away. The following day, Chairo's body was discovered about 100 metres from his home and that of Nambale was also found in his sorghum garden which was about 120 metres from Chairo's home. The matter was reported to the police who a

rrested the appellant. For reasons that were not explained by the prosecution, the rest of the suspects were not apprehended.

\par

\par The prosecution called a total of four witnesses to prove the indictment. The appellant was the only witness and in his defence

he totally denied the indictment. The learned trial Judge rejected his defence. However, he found that the prosecution failed to prove malice afore thought. He acquitted him of murder and convicted him of manslaughter. He sentenced him to 8 years impriso

nment on both counts and the sentences to run concurrently. His appeal to this court is against the convictions and the sentences imposed by the trial court.

\par The memorandum of appeal contains the following grounds:

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{\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 The learned trial judge
erred both in law

and fact when he failed in his duty to subject the evidence to a fresh and exhaustive scrutiny and
hence came to an erroneous decision.}

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The learned trial judge erred in law and fact when he made a subtle omission of not weighing the
appellant's case against the respondent's case and thus arrived at an erroneous conclusion.}

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The learned trial judge erred in law and fact when he failed to consider the appellant's defence of
alibi}{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774

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That the sentence of 8 years imprisonment is excessive in the circumstances given the fact that
the appellant had been on remand for a period of 3 years at the time of sentencing.}

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\par }{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 When the appeal came before us for disposal, Mr Mungoma Stephen learned counsel for the appellant, submitted on the first three grounds of appeal together

and the last ground separately. The main thrust of the complaint in these grounds was that the learned trial Judge did not evaluate the evidence properly before reaching his conclusion. The prosecution supported the decision of the learned trial judge in

convicting the appellant and the sentence he imposed.

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\par The case for the prosecution was that there was a common intention between the appellant and others still at large to kill the deceased person within the meaning of }

{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 section 20 }{

\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 of the }

{\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Act. }

{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 The section provides that:

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

n of that purpose, each of them is deemed to have committed the offence"

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\par }{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 The section has been held to mean, }{\i\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 inter alia,}
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that it is not necessary for the accused persons to have had any concerted agreement before the attack on their victim, but their inten

tion may be inferred from their presence, their actions or omissions and failure to disassociate oneself from the attack; and if the violence of any degree had been used in prosecuting a common design incidentally resulting in death, and if the offence ch

arged was a probable consequence of the use of that violence, then all sharing the design are murderers: See }{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774
Bumbakali Lutwama &Others v Uganda }{

\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Criminal Appeal No.38/89}
 {\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 (unreported); }
 {\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774

Mungai v R [1965] EA

\par }{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Other authorities that have considered the provisions of the section are }
 {\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 R v Ramiji (1946) 8 EACA 127.}{

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The facts of the case were that four people were in a room with the deceased and a noise was heard outside suggesting that the deceased was being strangled. It was later discovered that the deceased had bee

n strangled but it was not possible to find which of the four strangled the deceased. At the trial for the murder of the deceased, it was held that while evidence showed a common purpose to assault the deceased, there was no common purpose to strangle an

d the accused were acquitted.

\par }{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Gitau v R [1967]EA 449.}{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774

In this case two policemen on patrol duty and armed with rifles saw a man whom they suspected to be a }{\i\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Masai }
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cattle thief. They challenged him and he ran. Both fired and one of them hit and grievously injured him. The intention of the two policemen was obscure. At the trial they were convicted of jointly and unlawfully doing grievous harm. They appealed. It was held on appeal that before both appellants could be jointly convicted under the then }{

\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 section 22 }
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Act, it had to be shown that the wounding was a probable consequence of the prosecution of their purpose to shoot in the air; but it was never shown that the appellants agreed on the manner of firing and the injury could not be said to be a probable resul

t of what the appellants agreed to do if indeed they agreed at all.

\par }{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Mugao & Another v R [1972]EA 543}{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774

. The facts of this case were that the appellants and others joined together in beating two suspects with light sticks with the intention of forcing them to r

veal information, one of them was released and the other detained in a hut guarded by two people. He died the following day. There was no evidence to show that the deceased received the blow, which caused his death for which a heavy blunt instrument must

have been used while being beaten by the appellants. On appeal, it was argued on behalf of the prosecution that even if the fatal blow, which caused death, had been struck during the night after the departure of the appellants, they were responsible. In a

llowing the appeal, the court held that there was no common intention that there should be further violence to the deceased or could it have been reasonably anticipated.

\par

\par With the above legal proposition in mind, we shall turn to the facts of this appeal. T

he appellant was the secretary for defence of Sono village where the offences were committed. There was no evidence as to why he led a group of people he was with, to arrest the deceased. There were two witnesses called by the prosecution namely Saleh Isa

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ya (P. W.3) the son of Chairo and Deheipa Kasei (P. W.4) his widow. P. W.2 testified that on the day in question, at around midnight, the appellant came with Koril Wilson, Tom Wafula, Musa Boyo, Sabulon Butala, Moses Makoye and Wanyonyi John. They were with

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he late Matayo Nambale who had been tied up with a rope. They were carrying clubs. The appellant was carrying a walking stick that he used to beat Matayo and Chairo. He is the one who tied his father with a rope. The following day, at about 6 a.m the body

of his father was found lying in a banana plantation of Wakuma.

\par The testimony of P. W. 4 was to the effect that on the day material to this appeal, the appellant came to the their home with Abdalla Kolir, John, Moses whose other names she did not know and M

usa Boyo. She was about to go to sleep and they asked her to open the door, which she did. The appellant was armed with a stick and a torch. The people he had, carried a club and a panga. When she opened the door, they tied her husband and started beating

him with sticks. As for Matayo Nambare, Moses kicked him on the throat and it became swollen and he stopped talking. The appellant then ordered her husband to lead the way. When she asked the appellant where they were taking her husband, he replied that

they were taking him to Kikwe's home or to his home. The next day the witness woke up very early in the morning to look for her husband and she found his body in a banana plantation. The matter was reported to the local council chairman.

\par

\par A doctor examined

the bodies. He compiled two reports that were tendered in evidence by Dr Peter Nabende (P. W.1). The findings were that the bodies had bruises all over. The cause of death was neurogenic shock after being battered with blunt weapons. In cross-examination,

he stated that the beatings and the bruises on the head caused the shock because it impaired the nervous system.

\par

\par The prosecution never investigated the reason why the deceased persons were arrested. At the home of Achiro, the appellant is reported

to have told P. W.4 that he was taking the deceased to his home or to the home of the local council chairman. What happened between that time and the discovery of the bodies is not known. As learned counsel for the appellant rightly submitted, this was

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a case that depended on circumstantial evidence. The law regarding circumstantial evidence has been set out in numerous authorities of this Court and the Supreme Court. It is that when the evidence incriminating the accused is entirely circumstantial, in

order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty: See {{

\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Simon Musoke v R [1958] EA 715; {{\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 }

{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 Andrea Obonyo &

others v R [1962] EA 545}{\b\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 ; }

{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 McGree v DPP [1973] C. L. R.232

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It was pointed out in these cases that where the evidence is circumstantial it must be such that it produces moral certainty beyond reasonable doubt that it is the accused that committed the crime. I

It was further pointed out that the facts proved by the prosecution must be such that there are no co-existing circumstances, which would destroy the inference of guilt. In other words, in order to support a conviction, circumstantial evidence must point i

irrestitutably to the accused as the one who committed the offence.

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\par In the instant appeal, the facts that were proved by the prosecution were that the appellant as secretary for defence in the village led a group of people to arrest the deceased. In the course of the arrest, they were assaulted with sticks or whatever weapons that was available. The assault with blunt weapons is consistent with the findings of the doctor. But there was no evidence to the effect that it was the assault by the appellant that ca

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caused the death of the deceased. The prosecution had a burden to prove the guilt of the appellant beyond reasonable doubt as the one who caused the death of the deceased. In our view it did not. However, the evidence adduced shows that the deceased were ass

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assaulted in the presence of the appellant and he did nothing to stop the men he had from assaulting the deceased. He was the leader of the team and therefore had a duty to restrain them in our opinion. He, too, was reported to have assaulted the deceased and

he ordered them to be tied with ropes.

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\par On an appraisal of the evidence as a whole, we are not satisfied that the prosecution proved beyond any reasonable doubt that the appellant caused the death of the deceased unlawfully. The evidence on record establis

hes assault occasioning actual bodily harm contrary to }

{\b\ul\lang2057\langfe1033\langnp2057\insrsid15946289\charrsid6772774 section 235 }

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Act. For that reason the appellant is acquitted of manslaughter and instead is convicted of assault occasioning actual bodily harm.

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\par As for the sentence, the appellant had been on remand f

or a period of three years before his conviction and sentence on 18/05/01. The offence with which we have convicted the appellant carries a maximum sentence of five years. At the material time, the appellant has served a period of over two years. Therefo

re we sentence him to a term of two and a half years imprisonment. The period to run from the date of first conviction i.e 18/05/2001. The appeal is allowed in the terms set out herein.

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\par S. G. Engwau

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