REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: TUMWESIGYE; KISAAKYE; OPIO-AWERI; MWONDHA, TIBATEMWA-EKIRIKUBINZA. J J. S.C.)

CRIMINAL APPEAL NO: 41 OF 2015

BETWEEN

1. ORUBA MICHAEL
2. AMUKUN JOHN MICHAEL :::::::::::::::::::::::: APPELLANTS

AND

UGANDA ::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Kasule, Mwangusya and Egonda-Ntende, JJ.A) dated 13th May 2015 in Criminal Appeal No. 07 of 2011]

JUDGMENT OF THE COURT

Oruba Michael, 1st appellant, and Amukun John Michael, 2nd Appellant, were indicted for the murder of Patel Piyus Chandra contrary to sections 188 and 189 of the Penal Code Act. They were tried by the High Court (Oguli Oumo, J.) sitting at Kumi, convicted

and sentenced to 40 years imprisonment each. They appealed to the Court of Appeal which upheld the conviction but reduced the sentence to 20 years imprisonment for each. Being dissatisfied with the Court of Appeal's decision, they appealed to this court.

Background.

The background facts to this appeal are fairly simple and straight forward. On 29th January, 2009 at about 2:00 a.m. Akello Esther (PW5), the OC Mukura Police station, in Kumi District, received a telephone call from Ag. DPC Kumi, Ebulu Selestino (PW4) informing her that there were robbers in her area who were trailing a Fuso lorry full of merchandise using a vehicle whose make and registration number were not given.

PW5 immediately called the two appellants together with two other police officers and briefed them on the matter. They were given guns and directed to go on an operation to intercept the alleged robbers and avert the suspected robbery. The four officers created a check point at Mukura Trading Centre where all vehicles were required to stop for a thorough check.

As the appellants were standing near the check point a vehicle registration No. UAJ 559L in which the deceased Patel Piyus Chandra was travelling, driven by one Mafabi Alfred (PW2), arrived at the check point and was flagged by the appellants to stop, but it did not. According to Mafabi Alfred (PW2) he believed that they were being stopped by robbers and so he decided to drive on.

The appellants fired in the air and when the vehicle failed to stop, fired at the car. After travelling some distance from the check point PW5 realized that the deceased who was seated at the back of the vehicle was bleeding, and had been shot. He drove on hoping to take the deceased to hospital in Soroti for treatment but when they reached Awoja Swamp, their vehicle got a puncture and they stopped to fix the tyre.

The driver of another vehicle which stopped at Mukura Trading Centre informed the appellants that there was a vehicle parked at Awoja Swamp. The appellants went in that vehicle to Awoja Swamp and found Mafabi the driver fixing the tyre. The second appellant wanted to beat him for refusing to stop at the check point but the first appellant restrained him. Mafabi was arrested by the

appellants and taken to Mukura Police Station. The deceased was evacuated by an emergency car and taken to Soroti Hospital where he died at 7:00 a.m. in the theatre as he was being operated.

Following his death, the appellants were arrested and charged with the murder of the deceased. The High Court found them guilty of the offence and sentenced them to 40 years imprisonment each. Their appeal was dismissed by the Court of Appeal except on sentence which it reduced to 20 years imprisonment each. Dissatisfied, they appealed to this court.

Grounds of Appeal.

The appellants filed separate memoranda of appeal to this court. The 1st appellant (Oruba Michael) appealed on the following grounds.

1. **That the learned Justices of Appeal grossly erred in law when they held that the appellant had a common intention to cause the death of the deceased yet there was no such common or similar intention or objective on the**

part of the appellant which decision led to a miscarriage of justice.

2. **The learned Justices of Appeal erred in law when they failed to consider the defence of lawful orders in favour of the appellant which led to a miscarriage of justice.**
3. **The learned Justices of Appeal erred in law when they confirmed a sentence that was based on wrong legal principles thereby leading to a miscarriage of justice.**

The 2nd appellant (Amukun John Michael) raised the following grounds of appeal.

1. **That the Honourable Justices of Appeal erred in law and fact when they failed to properly evaluate the evidence before them and thereby erroneously confirmed the conviction of the 2nd appellant.**
2. **That the Honourable Justices of Appeal erred in law and fact when they held that the death of the deceased was caused by malice aforethought and thereby came to the**

wrong conclusion that the case had been proved beyond reasonable doubt against the [2nd]appellant.

3. **That the learned Justices of Appeal erred when they upheld the trial court's finding that the doctrine of common intention applied to the facts of the case.**

4. **That the sentence of 20 years' imprisonment is manifestly harsh and excessive on account of the obtaining circumstances.**

Both appellants prayed that the appeal be allowed, their conviction be quashed and the sentence be set aside.

At the hearing, Mr. Sebugwawo Andrew appeared for the 1st appellant while Mr. Senkezi Steven appeared for the 2nd appellant. Mr. Odumbi James, Assistant Director of Public prosecutions, appeared for the respondent. All counsel filed written submissions.

Submissions of Counsel for the 1st Appellant.

Mr. Sebugwawo Andrew, learned counsel for the 1st Appellant, on the doctrine of common intention, urged that there was no prior

agreement between the 1st Appellant and the 2nd Appellant to kill the deceased and that it cannot be said that the 1st Appellant's presence or participation in whatever happened was unlawful. Common intention, according to section 20 of the Penal Code Act and case law require prior agreement to prosecute an unlawful act, he contended. The presence of both appellants at the check point was lawful as they had been deployed to carry out lawful orders.

Counsel further argued that the absence of common intention is manifested in the evidence of Mafabi Alfred (PW2) who testified that the 1st Appellant protected him from torture when he was arrested, and that it was the 1st Appellant who called ASP Ebulu to report the unfortunate incident relating to the death of one of the occupants of the omnibus.

Counsel further argued that the 1st Appellant was deployed under the command of the 2nd Appellant and that he was operating under his orders; therefore, as his junior, he should not be given the same sentence as his superior.

Submissions of counsel for the 2nd appellant

Learned counsel for the 2nd Appellant argued that the Court of Appeal failed in its duty as a first appellate court to re-evaluate the evidence properly thereby erroneously confirming the 2nd Appellant's conviction. He contended that the prosecution evidence had inconsistencies as to the time of shooting which should have been resolved in favour of the 2nd Appellant.

Counsel further argued that the shooting by the appellants at the vehicle in which the deceased was travelling was not intended to commit a crime as the appellants were deployed in order to intercept suspected robbers. They fired shots at the vehicle to force it to stop and not to cause the death of any occupant, counsel contended.

Counsel further argued that the 2nd Appellant should be cleared of any responsibility for the death of the deceased because the 1st Appellant took responsibility for the shot on the vehicle which resulted in the death of the deceased. The offence of murder is constituted by unlawful and inexcusable killing of another with

malice aforethought, and the prosecution failed to prove that when the appellants fired shots, they had the intention of causing the death of the deceased.

On common intention, counsel argued that the learned Justices of Appeal misapplied the facts as there was no evidence that the appellants had formed a common intention to commit a crime.

On sentence, counsel contended that even if the Court of Appeal reduced the sentence from 40 years' imprisonment to 20 years, still 20 years' imprisonment was excessive considering the circumstances of the case.

Submissions of the Assistant Director of Public Prosecutions.

Mr. Odumbi James Owere, learned counsel for the respondent, opposed the appeal and contended that the learned Justices of Appeal subjected the evidence on record to fresh scrutiny as required by the law. He cited the case of **Kasozi Lawrence vs. Uganda** SCCA No. 13 of 2009 and **Henry Kifamunte vs. Uganda** (1999) E.A. 127 to support his argument.

He argued that the learned Justices of Appeal rightly found that there was common intention on the part of the appellants as provided under section 20 of the Penal Code Act. He relied on the case of **No. 441 P/C Ismail Kisegerwa and No. 8674 P/C Bukombi vs. Uganda** Criminal Appeal No. 6 of 1978 which involved two police officers on patrol who shot and killed a suspected thief after failing to arrest him. It was held in that case that a common intention to pursue an unlawful purpose in the course of events developed when they decided to shoot at the deceased.

Counsel further argued that the defence of lawful orders was not available to the appellants. He again relied on **P/C Ismail Kisegerwa and P/C Bukombi** (supra) where the court held that being on lawful duty did not confer one with immunity if one engaged in an unlawful act.

On the argument that the 1st Appellant was under the command of the 2nd Appellant, counsel contended that both appellants were constables except that the 2nd Appellant was a detective. That the person who deployed them (PW5) did not mention that she put any one of them in charge of the operation.

Counsel contended that the learned Justices of Appeal looked at the circumstances under which the appellants fired at the vehicle in which the deceased was travelling and made a finding that jumping a check point was no license for the police officer manning the same to shoot without justification.

On sentence, counsel submitted that the learned Justices of Appeal were alive to their role of reviewing the sentence as set out in the case of **Kizito Senkula vs. Uganda**, SCCA No. 24 of 2001, and having found that the learned trial judge wrongly sentenced the appellants to 40 years imprisonment without considering the period spent on remand and other mitigating factors, they invoked the court's power under section 11 of the Judicature Act and section 34(2)(c) of the Criminal Procedure Code Act and substituted the 40 years' imprisonment with 20 years' imprisonment for each.

Resolution of the Appeal

The appellants' grounds of appeal were basically two and that is, whether the appellants caused the death of the deceased with malice aforethought and, secondly, whether they had common

intention in causing that death. That the death of the deceased was caused by a bullet fired by either of the appellants is not in dispute.

The issue as to whether the appellants had common intention was strongly argued by their respective counsel in their written submissions. The learned Justices of Appeal found that both appellants shot at the vehicle and agreed with the trial judge that they had a common intention in causing the death of the deceased.

Section 20 of the Penal Code Act provides:

"When two or more persons form a common intention to prosecute an unlawful purpose, in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

We respectfully do not agree with the learned Justices of Appeal that the appellants at any one time "**formed a common intention to prosecute an unlawful purpose**". They were assigned an onerous task in the wee hours of the night to intercept robbers who

were said to be present in their area of operation. Planning the execution of this assignment cannot be said to be forming a common intention to prosecute an unlawful purpose. Whether the death of the deceased that ensued from the operation was an "offence" on their part is discussed below.

In their judgment, the learned Justices of Appeal dwelt at length on the issue of malice aforethought which was a major ground of appeal before reaching the conclusion that the appellants killed the deceased either intentionally or knowing that a person in that vehicle would probably be killed. They stated this in their judgment:

> **In our view, the appellants must have known that shooting live bullets from a gun directly into a moving vehicle may result in the death of one or more of the occupants of the same. The appellants are both police officers of long standing, familiar with the lethal nature of the guns they put to use on that day. According to the testimony of PW2 he was told by one of the appellants that the bullet that hit the Asian was intended for the person driving the vehicle and he should therefore go and**

eat his chicken, implying that he was lucky to be alive. Clearly the appellants intended to kill the driver of the car.

Going through the record of proceedings it is perplexing to note that all the arresting police officers, the prosecutors, and more importantly the defence counsel who should have been more vigilant than anyone else, did not draw their attention or make any reference to section 16 of the Penal Code Act which provides as follows:

"**Where any person is charged with a criminal offence arising out of the arrest, or attempted arrest, by him or her of a person who forcibly resists the arrest or attempts to evade being arrested, the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of that person, have regard to the gravity of the offence which had been committed by the person and the circumstances in which the offence had been or was being committed by the person**."

This provision in the Penal Code Act was enacted to punish any person who would use unreasonable force during the arrest of any person or against any person attempting to evade arrest. The corollary to this is that if the force used was necessary or reasonable, then the person using that force would not be liable to prosecution.

With respect, therefore, the issue in this case should not have been whether the appellants caused the death of the deceased with malice aforethought under section 191 of the Penal Code but rather whether the force they used was reasonable or necessary in the circumstances. It is our view that when the occupants of the ill-fated vehicle failed to stop at the check point which had been set up by the appellants to intercept robbers and, further, when they did not stop when the appellants fired in the air to stop the vehicle, the occupants became a subject of lawful arrest and were deemed to have attempted to evade arrest.

Therefore, the question to resolve and which should have been considered by the two courts below is whether the appellants used unreasonable or excessive force when they used their guns to shoot

at the vehicle in their effort to arrest the occupants of the vehicle whom they suspected to be robbers.

According to the evidence on record, the appellants were woken up at 2:00 a.m. by their Officer in Charge (OC) of Mukura Police Station and told that there were robbers in the area. They were instructed to put on their uniforms, pick guns and go to intercept the alleged robbers.

Following these orders, the appellants went to Mukura Trading Center and put there a check point in order to stop and check all vehicles passing through the trading centre in case the alleged robbers were travelling in one of them. Other vehicles stopped at the check point. However, the vehicle carrying the deceased did not stop even when the appellants flagged it to stop. The appellants shot in the air to stop it but its driver ignored the warning and drove on. The appellants then shot at the car.

It is clear to us that the OC Police of Mukura Police Station regarded the circumstances of the operation to which the appellants

were deployed as very serious otherwise she would not have ordered the appellants to pick and carry guns for the operation.

Therefore, the possible use of force was anticipated. In view of this anticipation, the statement by the learned Justices of Appeal that the appellants should have known that shooting live bullets from a gun into a moving vehicle may result in the death of one or more of the occupants was, with respect, not the point at issue. The point was whether the circumstances of the case warranted the use of force, and if so, whether the use of that force was unreasonable or excessive in the circumstances.

It is our considered view, judging from the evidence on record, that when the vehicle that was shot at by the appellants failed to stop at the check point, and further, failed to stop when the appellants shot in the air to stop it, the appellants did not use unreasonable or excessive force by shooting at the vehicle to try to stop it. The appellants had been deployed to stop robbers who posed a danger to the public. If they had failed to stop the vehicle and it turned out that its occupants were in fact the feared robbers, the appellants

would have been accused of failure to discharge their duties and would probably have had to face disciplinary proceedings.

The tragedy, of course, is that the vehicle in issue was not carrying the alleged robbers but was instead carrying innocent travelers one of whom lost his life. In his evidence Mafabi Alfred (PW2), the driver of the ill-fated vehicle tried to shift the blame of what happened from himself to the appellants. He stated that the check point at the trading centre was not clearly visible. However, it is noteworthy that he did not knock the tyre that was put in the middle of the road to mark the check point but instead avoided it. He stated that he did not stop at the check point because he believed that the appellants who were trying to stop the vehicle were robbers. But the check point was in the middle of a trading centre with lights shining. Highway robbers do not ordinarily put their roadblocks in places such as in the middle of trading centres where they are bound to be seen by everybody. In our view, therefore, PW2 by failing to stop at the check point was negligent and bears a big share of responsibility for the tragic events of that night.

Genuine, honest mistakes are bound to occur in risky and dangerous situations where police officers are forced to take split second decisions to avert danger to the public. The case of **Da Silva v. United Kingdom**, application No. 5878/08 of 30th March 2016, illustrates this point vividly. The brief facts of that case are that there had been suicide bombing in a London train station in previous weeks in which many innocent people lost their lives.

On 22nd July 2005 de Menezes, a 27-year-old Brazilian electrician, was on his way to work and was on a tube station when law enforcement officers of the London Metropolitan Police owing to faulty intelligence mistook him for a suicide bomber. They held him and shot him several times in the head. In spite of the public outcry against the shooting to death of this innocent person the state prosecution after carrying out thorough investigations declined to prosecute any police officer for causing the death of this man.

The relatives of de Menezes applied to the European Court of Human Rights for redress. The Grand Chamber of the European

Court of Human Rights, in rejecting the application, stated this, among other things:

> **"...the principal question to be addressed is whether the person [who killed de Menezes] had an honest and genuine belief that the use of force was necessary. In addressing this question, the court will have to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, it was not based on subjective good reasons), it is likely that the court would have difficulty accepting that it was honestly and genuinely held.**

This decision is not part of our law. Still, it illuminates the issue that is confronting us in this case. It is important to recognize that law enforcement officers on many occasions put their lives on the line in order to protect the public from danger. Sometimes they face difficult decisions to make as we believe happened in this case. If they are prosecuted every time they make honest and genuine mistakes while carrying out such duties, it is bound to discourage

them and impair their capacity and commitment to effectively protect the public from criminal and dangerous elements in our society.

This, however, is not to say that police officers who carry guns are thereby licenced to kill or torture people on a whim. Every case must be judged according to its facts. High-handedness and arbitrary use of force must never be condoned. Those entrusted with enforcement of the law have a duty to ensure that such police officers who endanger the lives of members of the public through excessive use of force are prosecuted. This is what section 16 of the Penal Code was enacted for.

In conclusion, it is our view that by shooting at the vehicle in order to stop it and arrest the alleged robbers who they believed were travelling in that vehicle, and needless to say, were a danger to the public, the appellants used reasonable force in the circumstances of the case, having regard to the gravity of the offence they were seeking to prevent.

In the result, the appellants' conviction for murder is quashed and it is ordered that they be released forthwith.

Dated at Kampala this……7th….day of……November…… 2017

Hon. Justice Jotham Tumwesigye

JUSTICE OF THE SUPREME COURT

Hon. Justice Dr. Esther Kisaakye

JUSTICE OF THE SUPREME COURT

Hon. Justice Opio-Aweri

JUSTICE OF THE SUPREME COURT

Hon. Justice Faith Mwondha

JUSTICE OF THE SUPREME COURT

Hon. Justice Prof. Lillian Tibatemwa-Ekirikubinza

JUSTICE OF THE SUPREME COURT