IN COURT OF APPEAL FOR UGANDA

AT KAMPALA

(Coram: Saied, C.J, D. L. K. Lubogo, P.J., P. Nyamuchoncho J.A.)

CRIMINAL APPEAL NO. 1 OF 1978

BETWEEN

1. CLEMENT NAMULAMBO
2. TITYANI s/o WEPUKHULU……..……APPELLANTS

AND

UGANDA……...…….RESPONDENT

(Appeal from a conviction and sentence
the High Court of Uganda at Mbale (Ssekandi, J.
dated 29th December, 1977
in
Criminal Session Case No.190 of 1977)

JUDGMENT OF THE COURT

SAIED, C.J.:

The two appellants are appealing from their conviction of the murder on 4th June, l976 of Shisiro Wanakhamuna for which they were sentenced to death.

The appellants are the grand nephews of the deceased. It is pertinent to point out at the inception that this family has had an unfortunate and tragic history of killings due to their own internal feuds. One such killing was mentioned during evidence in the present case. This concerned the homicide of Edward Wepukhulu, an uncle of the second appellant, a little over a month before the present tragedy. We disposed of the resultant appeal (No, 25/77) in Wepukhulu's murder conviction of three people earlier during this session. It would appear from the evidence in the

instant case that the deceased Wanakhamuna was suspected of having had a hand in the murder of Wepukhulu.

The deceased was attacked in his home on 4th June, 1976 at about 9.30 p.m. His daughter Margaret Muzaki (P.W.10), who occupied the kitchen adjacent to the main house where the deceased lived with his wife Esitende Wangaya (P.W.6), saw a pig and a cow which had earlier been tethered loose and through the window saw the two appellants and one Wakabira, who is alleged to have died in prison after his arrest, in the compound. It was not disputed that there was some light from the first quarter moon. Next the door of the main house was broken open with a big stone and the three assailants burst into the sitting room where P.w.6 was with a small child. A ‘tadoba’ lamp was burning. The deceased was in the bed room. The two appellants were allegedly armed with pangas. A2 is alleged to have said, “I came to do the work. What are we waiting for? Let us go and do it.” A1 cut the old woman on both arms, the head and the left eye; and A2 is alleged to have gone into the bedroom where he slashed the deceased to death. he deceased’s right arm was completely severed from the shoulder joint and was hanging by the skin. The main artery and all blood vessels at the site of the wound were cut and he died prom shock due to the haemorrhage.

Margaret made a futile alarm. The assailants me out of the house and confronted her. After a short conversation during which she pleaded with A1 for her life, they went away. The witness went to the main house; saw her mother seriously injured and her father dead. She immediately made for the home of the mutongole chief, John Wamboga (F.W.9). On the way she was joined by John Wamulunde who was not called at the trial. To the chief she said,

> “I told the mutongole chief that we had been attacked at home and killed my father and cut my mother and a small child.”

The chief, however, swore that Margaret mentioned the names of the two appellants and Wakabira as the attackers. As it was then almost midnight the chief promised to visit the scene in the morning. Margaret then proceeded to Bungobi to fetch her maternal uncles, none of whom was called to testify either.

In the morning the chief found P.W.6 with cut wounds on her hands and all over the body. The widow merely said that she was then taken to hospital, but here again the chief maintained that like Margaret the widow also repeated the same three names to him.

This briefly was the prosecution case. The learned judge quite properly appreciated, more so in view of the fact that both appellants relied in their defence on alibi that "the most difficult and perhaps the only issue for determination in this case is one of identification." He had earlier directed the assessors that the circumstances in which the identification was made were difficult and had urged then to treat the evidence of identification with caution as such evidence was liable to lead to mistaken identify. In the result, accepting the unanimous verdict of his assessors, the learned judge held both identifying witnesses as truthful who, because the appellants were known to them before and there was sufficient light, could not have been mistaken in their identity of the assailants.

For the appellants, Mr. Ayigihugu submitted forcefully that in reaching the conclusions that he did the learned trial judge based himself substantially on evidence which was hearsay and, in any case, the possibility of error in identification had not been completely ruled out. The first limb of this argument rests upon the substance of the reports made to the mutongole chief by Margaret soon after the incident, and the widow some hours later in the morning. Such reports are admissible under s.155 of the Evidence Act (Cap.43) which states:

> "In order to corroborate the testimony of a witness, any former statements made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigation the fact may be Proved."

This section is similar to s.157 of the Indian Evidence Act. The desirability of the evidence being given has been stressed in the past. For instances, in Kella and Another v Rep. (1967) E.A. 809 the former Court of Appeal cited with approval the following passage from Shabani Bin Donaldi v R (1940) E.A.C.A. 60:

> "We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such report save such portions of it as may be

> inadmissible as being hearsay or the like should always be given at trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under s.157 of the Evidence Act, "which was then applicable in Tanganyika," and sometime as showing that he now swears is an afterthought or that he now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all."

That which applies to the police in this regard applies also to the chiefs. Another case, Tekerali s/o Korongozi & Others v Reg (1952) 19 E.A.C.A. 259 emphasises the same point at p.260 in the following terms:

> "Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safe guard against later embellishments or the deliberately made up case. Truth will often out in a statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others ."

We respectfully agree with these comments and would add by way of suggestion that in rural areas where police station or posts are located at distant places and invariably people report er1es to their nearest chiefs most of whom are capable of writing not English their own vernacular that such first reports be reduced to writing and signed by the informant for use during the trial if for no other purpose than to refresh their memory of when the first report stated.

In this Case Margaret made an immediate report to the chief. As a matter of fact she met Wamulunde on the way but he was not called for some unknown reason. The chief himself was inconsistent. He admitted that during the night Margaret mentioned only two names, omitting A2 whom she implicated in the morning. This would cast an equal if not somewhat higher doubt about the consistency of Margaret who was described by the learned judge as consistent from the beginning. Being alive to this inconsistency and omission, the learned trial judge took to justify the omission by Margaret by ascribing it to the long distance she had to cover to the chief's home and to her main concern at the time which was to get the chief to come to the scene for assistance. This naturally drew criticism from learned counsel for the appellants which, in our

view, was fully justified. We do not think that it is right for a trial judge to attempt to supply any deficiency in the prosecution evidence over such a vital matter as the omission of pertinent information concerning identification of a particular person or to justify such exclusion on the basis of any explanation which has not come from the mouth of the witness herself. With regard to the widow the learned trial judge had this to say:

> "She gave her evidence calmly without exaggeration. I have no hesitation, and indeed the assessors, in holding that she was a witness of truth. She gave the name of attackers to the chief who came to her home the followining morning. The chief accepted on that information to mount a search for accused persons."

We have looked in vain at the evidence of as recorded by the learned judge where she might have claimed mentioning those names or any names to this chief. What she said towards the end of her direct testimony was this:

> "The following day many people and the chief came to the scene. When the chiefs came the following morning I was taken to hospital."

It appears to us incontrovertible that the widow did not supply any information to the chief, and there is no evidence at all that she might have done so to anybody else. So what the learned judge said on this matter was what the chief himself had claimed, a matter upon which there was complete silence from P.W.6, just as it was in the case of Margaret. The police must in their investigation have taken statements from both the principal witnesses Esitene and Margaret. If these statements had been produced and in fact identified both appellants by name in those statements this would have considerably strengthened their testimony but if this portion of their evidence was untrue then it would have the opposite effort and have made their testimony of little value.

The investigating officer in this case was No.5273 Detective Sergeant Kisale, then stationed at Mbale police station. His evidence was admitted at the preliminary hearing but was confined only to tracing A2 in prison on 12th January, 1977. Surprisingly the prosecuting State Attorney, who, one would expect to have appreciated the nature and importance of adducing such evidence, was not minded to calling such evidence.

The situation in this case may be summarised this way. Margaret saw the chief noon after the incident and on her own testimony did not mention any names to him. The chief saw the widow the following morning but she did not talk of having had any conversation or of making any report mentioning any names to him either. The police investigating officer and, for that matter, no other witness talks of any statements having been taken from the two principia witnesses. Yet the chief was allowed to testify about names having been supplied to him by those two main witnesses. It was on this evidence that the learned trial judge relied. To Mr. Ayigihugu's submission that this was hearsay, learned Senior State Attorney Mr. Serwanga made an astonishing remark that if the prosecution had not cleared up this lacuna then the defence counsel at the trial should have supplied the deficiency during cross-examination. The burden of proving a criminal charge is upon the Prosecution and it is elementary that only in very few exceptional circumstances, which do not apply here, such burden never shifts. We should say also that the learned judge seems to have fallen in the same trap when he said:

> "Margaret was not cross-examined on the chief's evidence."

With great respect this was a serious misdirection. The defence is entitled in its discretion, where the evidence given by prosecution witness is in favour of the accused, to decline to cross-examine the witness and thus avoid the risk of bringing out evidence damaging to the defence. Such was the case here. We are fortified in this comment by what was said in R. V Kanji Naranji & Another (1948) 15 E.A.C.A. 59 at p.61:

> "This was a criminal prosecution and the court had, of course, no right to presume any essential fact against the accused. If the prosecution omits to prove a fact essential to the prosecution case it does not assist the prosecution to suggest that if the prosecution witness had been cross-examined by the accused's advocate as to the omitted fact the gap in the prosecution case night have been filled."

The defence cannot be blamed for the serious deficiencies and shortcomings of the prosecution case and we would agree entirely with the comment made by Mr. Serwanga that the prosecution and indeed the investigation had not been properly conducted. That is where the blame lies fairly and squarely.

The matter under discussion was the omission of an essential fact for the prosecution to show in the words of the section cited above corroboration of an equally important fact without which, as will appear presently, the entire prosecution would crumble. With respect, it seems to us that the learned judge misread the evidence of the two principal witnesses and confused it with that of the chief in ascribing with the latter said concerning the names of the assailants to the former who, according to the recorded evidence, have no where made any such claim. We are not concerned with the reason why they were not properly examined by the prosecuting counsel to bring out clearly and prominently the contents of their first reports as indeed should have been done. What we are concerned with is that much evidence is just not there and like the trial judge we too are bound by the record of the evidence. The upshot of the entire discussion is that in the circumstances the evidence given by the chief concerning the identity of the alleged assailants by witnesses who did not claim to have done so was clearly incompetent and inadmissible as hearsay. In SARKAR ON EVIDENCE, 12th edn, the following commentary with which we respectfully agree appears at p. 1354.

> "Where the statement of a prosecution witness examined earlier to another prosecution witness who is examined later, is sought to be made use of by the prosecution, without the earlier witness having been asked about it in his examination, the earlier prosecution witness to whom the statement is ascribed must be given an opportunity to explain it. The witness should at least be recalled for the purpose. In the absence of such opportunity the statement of the earlier prosecution witness is inadmissible in evidence."

The chief's evidence referring to the identity of the alleged assailants as the two appellants being hearsay was wrongly admitted, thus causing grave prejudice to the appellants because the learned judge acted upon it. As the two principal witnesses do not claim to have mentioned any names of the assailants to any witness called during the trial at the first opportunity we think the unavoidable and irresistible inference is that neither had had any opportunity of seeing or recognising the assailants. Furthermore, as P.W.6 and Margaret claimed in their evidence to have identified the appellants at different places and in different circumstances their evidence, before it could provide mutual corroboration which the learned judge took into consideration, had to satisfy the stringent requirements concerning correct identification set out in Roria v Rep., (1967) E.A. 583. In the final analysis after discarding the chief there is no other evidence such as

is invariably sought as pointing to the guilt of the accused and thus removing the possibility of error. In our opinion such evidence was categorically imperative in this case because of the peculiar circumstances of family feuds where after the killing of Wepukhulu suspicion rested on the deceased and, when he in turn was killed a month later, the need for such other evidence became inevitable as it was no unreasonable to suppose that suspicion for his death would cast on Wepukhulu's relatives on the obvious basis of a vendetta against one another in this woe-begalla family.

There is one other matter which need be mentioned. This refers to the manner in which the learned judge dealt with the defence of alibi, particularly that of A2. Al maintained that he was at his home at the time of the alleged offence. He was arrested the following day by a chief who was not called to testify about the circumstances in which he was arrested. Importance of adducing such evidence has been stressed often; see Fabiano Olukuudo v. Uganda, U.C.A. Criminal Appeal No. 24/77. A2 said that he went to Kenya for work on 31st May, 1976 and returned home to see his sick mother on 18th August, 1976. The mutongole chief said that he went to A2's home after interviewing P.W.6 and was told by his mother that he had run away to Tororo. The learned trial judge was aware that in law the accused need not prove the alibi but was "disturbed by the failure of A2 to call at least his mother to support him that he was not at home from 31/5/76." He then continued:

> "This is a serious offence and if the accused's story is true then he would be entitled to all acquittal. I should think that some effort would be made to back up this alibi even if there is no duty on the accused to do so. I shall of course discard this failure from my consideration of this alibi I think the accused deliberately changed the date of his departure to suit his defence. When toe chief visited his home on 5/6/76 his mother told the chief he had run to Tororo. Of course this is hearsay evidence but it was admitted to show that accused had left the home hurriedly. He was at home some ti.ne before the incident and in my view he must have left after 4/6/76."

This passage also attracted adverse criticism from Mr. Ayigihugu. As the learned judge rightly said at the beginning there in no burden on an accuo9c to establish that his alibi is true o even reasonably true. All he has to do is to create doubt as t the strength of the case for prosecution,

Raphael v. Republic (1973) E.A.473. Although he declared later that he was discarding the failure of A2 to call his mother in support of his alibi we do not think, with respect, that he succeeded in completely disabusing his mind of any such notion. We do not think that it is right or serves any useful purpose of making a correct statement of the law and then weighting against it an opinion which is quite contrary to it obviously in an attempt to indicate what the law really ought to be. Such a practice invariably leaves a lingering impression that the judge was perhaps guided more by what he thinks the law ought to be rather than that it is. It is best that such expressions of opinion be left out from judgments. Our lurking doubt that he might have acted upon his own opinion is somewhat strengthened by the fact that he again accepted hearsay evidence of the chief, this time to draw an inference adverse to the second appellant. We do not think that he was entitled to act in this manner. There is a distinction between and truth of the statement. Perhaps this is what the learned judge had in mind in accepting the chief's evidence of what A2's mother told him for the limited purpose of inferring that this appellant had left home hurriedly. In Subramaniam v. Public Prosecutor, (1956) 1 W.L.R. 965, quoted with approval in flatten Ratten v. R. (197?) 56 Cr. Appeal R.18, the Privy Council observed;

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth the statement but the fact it was made."

It is true to say that a witness may give evidence of words spoken by someone else not called as a witness if such words are relevant on the basis that they represent facts just as any other action by a human being. The question of hearsay only arises when the words spoken are relied on testimonially as establishing some fact narrated by the words. There was no obligation on the appellant to call his mother. The chief appears to have called on her soon after the event and it must be emphasised that this appellant disclosed his alibi on 11th November, 1977 in a statement made to a magistrate, the trial commencing in mid-December. There was sufficient time for the police to investigate the alibi and to call A2's mother if they so wished to contradict and demolish it. In any case we are of the considered opinion that the chief's evidence about what he was told by A2's mother was clearly hearsay and ought not to Save been allowed to be given. All

that evidence indicated was the factum of the chief calling at A2's home and not finding him there. It served no other purpose and with respect the learned judge was not entitled in our opinion to draw any inference from this evidence to the prejudice of the accused.

This was a difficult case needing careful and detailed investigation and efficient prosecuting. We regret to say that we drew no assistance from the learned Senior State Attorney who appeared before us to argue this appeal.

For the reasons we have endeavoured to give we think that it would he unsafe to allow the conviction of both appellants for murder to stand. They are set aside and we quash the sentence of death passed on them and order that they be liberated forthwith.

DATED AT KAMPALA this 21st day of November, 1978.

(N. Saied)
Chief Justice

(D. L. K. Lubogo)
Principal Judge

(P. Nyamuchoncho)
Justice of Appeal

Mr. P. S. Ayigihugu of Ayigihugu & Company Advocates for the appellants.
Mr. Sserwanga, Senior State Attorney for the Director of Public Prosecutions.

I certify that this is a
true copy of the original.

(M. Ssendegeya)
CHIEF REGISTRAR.