THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. MR JUSTICE S.G.ENGWAU, JA.

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

HON. MR JUSTICE S.B.K.KAVUMA, JA.

CRIMINAL APPEAL NO. 159/03

BETWEEN

OYEE GEORGE::APPELLANT

AND

UGANDA::RESPONDENT

[Appeal from the conviction and sentence of the High Court of Uganda Central Circuit sitting at Nakawa (*Okell0 J) *dared 21st July 2003 in High Court Criminal Session Case No.86/02]

JUDGMENT OF THE COURT

This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction.

The appellant herein was charged with one Kidega (now deceased) with murder contrary to ***section 186*** and ***187*** of the **Penal Code Act.**

It was alleged in the particulars of the indictment that on or about the 27th day of May, 2001 at Namuwongo Makindye Division in Kampala District, the appellant and Kidega murdered Okidi Vicent.

The case for the prosecution was that the deceased lived in Namuwongo. On 27th May 2001 in the morning, Nekolina Akello (P.W.3), a resident of the same area went to the well to fetch

water. She found the deceased in the water and pulled him out. She inquired from him as to who had assaulted him and he told her that it was the appellant and Kidega.

The matter was reported to the police who visited the scene and took the deceased to Mulago Hospital where he passed away on the same day.

A postmortem examination on the body of the deceased was done by Dr Linnet Kyokunda Tumwine (P.W.1) and she made a report (exhibit P.1) in which she stated that the cause of death was diffused brain damage secondary to assault.

The appellant was arrested on the same day wearing a blood-stained shirt. The shirt was later subjected to forensic tests and it was found by Mr Lugudo (P.W.2) and Raymond Okumu that the blood on the shirt did not belong to the same blood group as that of the appellant. It belonged to the same blood group as that of the deceased. They compiled reports (Exhibits P.2, and P.8).

The appellant denied the offence and put up a defence of alibi. He stated that on 26th May 2001 he did not meet the deceased at all. He stated that in the evening of that day he went for entertainment at a bar in Soweto and had a drink. While he was there one Ojame started dancing and in the process he poured the appellant's drink. A fight ensued and they boxed each other. The Ojame boxed the appellant on the ear and he bled and the Ojame bled from the nose. They were separated. He left the bar and went home at about 9 p.m.

He called two witnesses, Ocheing Louis (D.W.3) and his wife, Margaret Akullo (D.W.4) to support his alibi.

The evidence of Ochieng was that there was a fight between the appellant and Ojame in which the two boxed each other and both of them bled. He separated them. He left the bar with the appellant and he separated from him at about 8.30 p.m. The appellant and Ojame both bled from the nose and ear respectively.

The evidence of Akullo was to the effect that her husband returned home at about 9 p.m in the evening of 26th May 2001.

He informed her that he had fought with a Mudama man. After that they went to bed and nothing else happened until her husband was arrested the following day.

The learned trial judge rejected the appellant's alibi and in agreement with one of the assessors convicted him as charged and sentenced him to death- hence the instant appeal.

The memorandum of appeal filed on his behalf by M/S Kunya &Co Advocates contains the following grounds:

1. **The learned trial judge erred in law and fact when she convicted the appellant on the basis of unsatisfactory dying declaration evidence.**
2. **The learned trial judge erred in law and fact when she disregarded the appellant's defence of alibi which was credible.**
3. **The learned trial judge erred in law and fact when she held that all the ingredients of the offence had been proved beyond any shadow of doubt.**
4. **The learned trial judge erred in law and fact when she failed to adequately evaluate all the material evidence adduced at trial and hence reached an erroneous decision which resulted into a serious miscarriage of justice.**

Mr Kunya who represented the appellant argued grounds one and two separately and the rest of the grounds together. In submitting on ground one Mr Kunya stated that there was no direct evidence of the incident. He stated that the circumstances under which the deceased was attacked and by whom was not given. On the dying declaration, counsel submitted that the trial judge directed herself correctly on the law applicable but her application of the same to the facts amounted to speculation. He referred to page 5 of the judgment at which the learned judge stated that when the deceased made the dying declaration he had no false hope of recovering from the injuries he had suffered at the hands of his assailants. She added that although he was in a critical condition, "he was lucid, conscious and fully appreciated the nature of the information he conveyed to the two witnesses."

He cited the case of ***Uganda v Ssimbwa Criminal Appeal No.37/95(SC)*** to support his assertion that consistency does not mean accuracy.

Learned counsel submitted that there was no sufficient corroboration of the dying declaration and mistaken identity was not ruled out.

He invited court to allow this ground.

In reply, Mr Mulindwa, the learned Principal Attorney, who represented the respondent, submitted that the deceased knew the appellant and therefore knew the people he was talking about. He pointed out that the appellant was arrested with a blood-stained shirt.

He supported the trial judge for relying on the dying declaration since she did so after warning herself.

Section 30 of the Evidence Act (Cap 6 Laws of Uganda) governs the admission of dying declaration made by a person who is dead as to the cause of death. The section provides as follows:

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant in the following cases-

(a) when the statement is made by a person as to the cause of his or her death, or as to any circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and, whatever may be the nature of the proceedings in which the cause of his or her death comes into question."

The provisions of this section have been judicially considered in a number of authorities including the case of ***Uganda v Ssimbwa*** (supra). In this case the Supreme Court quoted with approval a passage from the decision of ***Okale &others v Republic [1965] EA***. The court said:

"In this respect we would quote the following passage from the judgment of the court in <u>Jasinga Akum v R (2) 1954 21 EACA</u> at page 334:

"The question of the caution to be exercised in reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from <u>Field on Evidence</u>(7th Edn) has repeatedly been cited with approval:

"The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and…….the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed……."

The deceased may have stated his inferences from facts concerning which he may have omitted important particulars from not having his attention called to them (Ramazani Bin Mirandu(1934 107) 1 EACA R.v Mugonya BinMsuma (1939 EACA 6 128)"

The court emphasized the need for corroboration of a dying declaration before it can be used against an accused person. The weight to be attached to a dying declaration depends on a number of factors. In the first instance, it is necessary to determine whether the deceased was

certain about the identity of the attackers. Secondly if the attack occurred at night when visibility is difficult, the court must be certain that there was no mistaken identity. Further more the fact that the deceased may have told different people that the appellant was his attacker, does not necessarily mean that the deceased was accurate. Such evidence shows that the deceased was just consistent.

In this appeal, there was no evidence of the circumstances and the place where the assault on the deceased took place. When Akello found him at the well he told her that he had been attacked by the appellant and Kidega at midnight. The conditions that were prevailing at the time of the attack that might have aided or hindered correct identification were not given. He did not mention the place where the attack took place. The prosecution seems not have bothered to inquire from members of his family if he had any, or his friends about his movements on the day in question.

This means that the dying declaration must be approached with extreme caution because the deceased may have been honest but mistaken about the identity of his assailants.

The learned judge after stating the law applicable and decided cases on dying declarations dealt with the evidence thus:

"From the evidence of N.Okello and B.Labeja, it is obvious that at the time the deceased made the dying declaration, he had no false hope about recovering from his injuries. Although he was in a critical state, he was lucid, conscious and fully appreciated the nature of the information he conveyed to the two witnesses".

With respect, we do not agree with the trial judge that the deceased at the time he made the dying declaration, was lucid, conscious and appreciated the nature of information he gave to the two witnesses. There was no evidence to support that conclusion. This amounted to speculation.

There was also no evidence to prove that the deceased knew both Kidega and the appellant. Kidega in his brief statement to court stated that he did not know the deceased. P.W.3 stated that she did not know either the appellant or Kidega before this incident. It is only P.W.4 who knew Kidega and the appellant.

With that evidence, mistaken identity can not be ruled out since conditions under which the deceased identified his assailants were not given. The deceased could have been honest but mistaken.

We would allow ground one.

Ground two concerned the appellant's alibi. While submitting on this ground, Mr Kunya criticized the trial judge for disregarding the alibi because of the dying declaration. He stated that there was no evidence putting the appellant at the scene of crime. He pointed out that the learned trial judge in her judgment stated that the appellant was involved in a scuffle with Ojame. Learned counsel also stated that there was confusion in the sampling of the blood by P.W.5.

He cited the case of ***Bogere&another v Uganda-Criminal Appeal No.1/97(SC)*** (unreported) for the legal proposition that the prosecution failed to put the appellant at the scene of crime.

The law is now settled that an accused person who sets up an alibi as a defence does not assume any burden to prove it. It is the duty of the prosecution to disprove it by adducing evidence that will put the accused at the scene of crime at the material time. See: ***Sekitoleko v Uganda [1967] EA 531; Sentale v Uganda [1968] EA 365; Raphael v Republic [1973] EA 473; Bogere Moses &another v Uganda Criminal Appeal No.1/97(SC).***

The Supreme Court in ***Bogere's*** case gave guidelines as to what amounts to putting an accused person at the scene of crime. At page 19 of the judgment the court had the following to say:

"We think the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies but adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted".

We shall use the above guidelines to determine whether the prosecution proved to the required standard whether the appellant was at the scene of crime on the material day.

The appellant gave evidence and called two witnesses to support his alibi. He stated that on the day in question he went to a bar in Soweto and had a drink with Ochieng (D.W.3). They left the bar together and parted company at about 8.30 p.m. The appellant then stated that he arrived home at about 9 p.m and he never left his house again that night. He called his wife, Margaret Akullo (D.W. 4) who supported his story.

The prosecution adduced no evidence as to where the offence was committed and the time when it was committed except the testimony of Akello (P.W.3) who stated in her evidence that the deceased told her that he was attacked at midnight.

In dealing with the appellant's alibi the learned judge said:

"The accused in his alibi defence (which he has no burden to prove), further shows that there no enmity between him and the deceased. Further, the defence evidence show that the accused was out of his home that evening. He went for drinks and was involved in a scuffle at the drinking place, or so he says. Definitely, some one's blood was split that evening and blood got onto his shirt that the accused wore that evening. In view of the emerging facts, I do not believe in the alibi although it was corroborated by Ocheng. The evidence of Akullo the wife of the accused does not change my finding that the alibi is a fabricated defence".

The learned judge's analysis of the appellant's alibi and his version of the fight in the bar was rather faulty. We say so because the appellant's version of the fight between him and Ojame was supported by Ocheng (D.W.3) who witnessed the same. The prosecution had no alternative version of its own to contradict it. In the absence of any other evidence to the contrary, his version ought to have been accepted. Moreover, the appellant raised the issue of the fight between himself and Ojame at the earliest opportunity. The prosecution should have investigated it in order to disprove it.

When he was asked by Bosco Labeja (P.W.4) in the morning of 27th May about the blood on his shirt, he told the witness that he had fought with someone the previous night.

D/Cpl Olupot (P.W.5) testified that he saw a wound on one of the ears of the appellant and when he asked him where the wound came from he informed the witness of the fought with some one. The story of the appellant's wound on one of his ears tallies with his own version of what happened in the bar. He stated that Ojame boxed him on the ear and he boxed Ojame on the nose and they both bled. Ocheng who witnessed the fight said:

"Oyee had boxed Ojambe's nose which was bleeding. Ojambe had boxed Oyee's ear and it bled. I separated them".

The appellant accounted for his movements on the night in question, at least up to 9 p.m. It was the duty of the prosecution to adduce evidence to prove to the required standard that the appellant and late Kidega met the deceased at midnight or earlier and assaulted him. The prosecution did not. In the absence of such evidence we are unable to agree with the learned trial judge that his alibi was fabricated. Ground two would succeed.

Grounds three and four would be handled together. The two grounds complained about the failure by the trial judge to evaluate evidence as a whole and her finding that the prosecution had proved its case beyond reasonable doubt. Mr Kunya made brief submissions on these two grounds and contended that the participation of the appellant and who assaulted the deceased remains a contentious issue.

Mr Mulindwa in his submission associated himself with the submissions of Ms Joan Kagezi at page 52 of the record of appeal. He supported the judge's finding that malice aforethought was proved beyond any reasonable doubt.

In her submission Ms Kagezi had contended that malice aforethought could be inferred from the injuries that were inflicted on the deceased. She further stated the appellant participated in the commission of the offence because he was arrested wearing a blood- stained shirt and the blood was found to belong to the same blood group as the deceased.

The duty of the first appellate court has been re-stated in a wealth of authorities. In the case of ***Okeno v Republic [1972] EA 32*** the court had this to say:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya v R* *(1957) EA 338)*** *and to the appellate court's own decision on the evidence. The appellate court must itself weight conflicting evidence and draw its own conclusions, (Shantilal m Ruwalo v R (1957) EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had had the advantage of hearing and seeing the witnesses. See* **Peters v Sunday Post [1958] EA 424."**

See also ***Kifamunte Henry v Uganda Criminal appeal No.10/97(SC)*** and ***Rule30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I. No.13-10.***

We shall now examine the forensic evidence. The evidence was contained in two reports- exhibit P.2 and P.8.

D/Cpl Olupot (P.W.5) gave evidence and stated that on 28th May 2001 he went to Mulago mortuary with a white hand kerchief and drew blood from the body of the deceased which was later examined by Mr Okumu Raymond, formerly an employee of the Ministry of Internal Affairs Government Chemist Department. This witness also examined the blood-

stained shirt of the appellant. He made a report (exhibit P.8). In the report he stated the blood found on the shirt and the one on the hand kerchief belong to group “O”.

The second report (exhibit P.2) was made by Mr Ali Lugudo (P.W.2). He examined the blood which P.W.5 obtained from the appellant with the assistance of a nurse at Upper Prison Luzira. The appellant’s blood group was found to be ‘AB’

It is these two findings which the learned trial judge relied on to find as she did that the appellant must have come into contact with the deceased on the fateful day.

The appellant in his testimony in court stated that he was not sure whether the blood on his shirt was his or Ojame’s since they both bled. P.W.5 however, testified that the appellant told him that the blood on the shirt was his.

The forensic evidence established that the blood which was on the appellant’s shirt was human blood of group “O”. This evidence did not establish that the blood in question exclusively belonged to the deceased. Blood groups unlike DNA are shared. The possibility of the deceased sharing the same blood group with Ojame cannot be ruled out. In the circumstances we are not satisfied that the prosecution proved its case beyond any reasonable doubt.

In the result, this appeal succeeds. The conviction is quashed and sentence set aside. The appellant should be set free unless he has other lawful charges to answer.

Dated at Kampala this 3rd day of March 2009.

S.G.Engwau

Justice of Appeal

C.K.Byamugisha

Justice of Appeal

S.B.K.Kavuma

Justice of Appeal