

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0566 OF 2015

5 **KATONGOLE ARAJABU.....APPELLANT**

VERSUS

UGANDA.....RESPONDENT

(Appeal against the judgment of the High Court at Nakawa in Criminal Session case No. 144 of 2004 before Hon. Justice Joseph Murangira dated 13/07/2009)

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Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

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JUDGMENT OF THE COURT

Introduction

This appeal arises from the conviction of the appellant by the High Court at Nakawa for the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act.

20 **Brief Background**

The facts as accepted by the learned trial Judge are that the appellant was accused of killing Rukundo Jovule on 16/7/2003 at Kisugu in Kampala District. The appellant participated in the murder of the deceased using a gun. The incident was reported to Police and it



25 recovered the gun with 27 rounds of ammunitions. A postmortem examination was carried out and the cause of death was found to be hemorrhagic shock following trauma to the lung.

The prosecution in agreement with the appellant and the defence counsel tendered in court the postmortem report and the Ballistics expert report. The prosecution, in addition, called four (4) witness who gave evidence against the appellant. In defence, the appellant denied the offence and gave evidence not on oath and called no witnesses to testify on his behalf.

The appellant was convicted as charged and sentenced to 25 years imprisonment hence this appeal on conviction on the following grounds:-

1. ***The learned trial judge erred in law and in fact when he held that PW1 and PW3 properly identified the accused as the one who shot the deceased thereby arriving at an erroneous decision.***
- 40 2. ***The learned trial judge erred in law and in fact when he held that the inconsistencies in the prosecution case were so minor thus arriving at an erroneous decision.***
3. ***The learned trial judge erred in law and fact when he held that defence failed to challenge the charge and caution statement thereby occasioning a miscarriage of justice.***
- 45 4. ***The learned trial judge erred in law and fact when he held that the appellant caused the death of Rukundo Jovule.***

Representation

The appellant was represented by Mr. Francis Karoro, learned Counsel on Private Brief while the respondent was represented by Ms Jacquelyn Okui, learned Senior State Attorney. The appellant was present.

Submission by the appellant

55 Counsel argued the grounds of appeal in order of 1, 4, 3, and 2 separately.

On ground one, counsel submitted that PW1 and PW3 did not positively identify the appellant given the fact that they were in a speeding taxi and did not have enough time to identify the appellant who was not even known to them before. He relied on **Abdallah Nabulere & Anor V. Uganda**, Court of Appeal Criminal Appeal No. 9 of 1978 and **Moses Bogere V. Uganda**, Supreme Court Criminal Appeal No. 1 of 1997 in support of the above argument.

On ground four, Counsel argued that it was not proved beyond reasonable doubt that it was none other than the appellant who killed the deceased. He pointed out that the gun that was tendered in court as the prosecution's exhibit was not linked to the appellant. Further, that all the investigating officer stated was how he obtained the said gun and rounds of ammunition from the exhibit store, but never gave evidence that connected the gun to the appellant and consequently to the commission of the offence.

As regards ground three, counsel submitted that the learned trial Judge erred when he held that the defence had failed to challenge the charge and caution statement because he shifted the burden from the prosecution to the appellant instead to prove that the statement was involuntarily made. He relied on **Walugembe Henry & Ors V. Uganda**, Supreme Court Criminal Appeal No. 39 of 2003 and submitted that in cases of trial within a trial, the onus of proof is always on the prosecution.



80 Lastly on ground two, Counsel submitted that the inconsistencies in the
prosecution's case could not be stated to be minor as they were major.
He pointed out that PW1 testified that three people came chasing the
taxi as opposed to PW3 who testified that one person came chasing the
taxi. Further that PW1 testified that the appellant was putting on a
85 long sleeved shirt while PW3 testified that he was putting on a T-shirt.
According to counsel, these were major inconsistencies in the
prosecution's case that the learned Judge ought to have noted. He
asked court to allow the appeal, quash the appellant's conviction and
acquit him.

90 **Submissions by the Respondent**

The learned Senior State Attorney opposed the appeal and supported
the appellant's conviction. She submitted on ground one that PW1 and
PW3 had enough time to identify the appellant. She pointed out that
PW1 testified that he saw the appellant before the shooting and at
95 Mulago Hospital. Counsel argued that since the incident took place
during the day at about 5.30 p.m. there were no issues of mistaken
identity and this was corroborated by the charge and caution statement
of the appellant.

In reply to ground four, counsel submitted that although there was no
100 witness called to connect the gun recovered to the appellant, the
learned Judge based his conviction mainly from the evidence of PW1
and PW3. She argued that the gun tendered in court was reported to
have thirty (30) rounds of ammunition of which three (3) were fired and
twenty seven (27) remained. Further, that this was corroborated by
105 the charge and caution statement wherein the appellant stated that he
had a gun which had thirty (30) rounds of ammunition which he fired at
a taxi and shot two persons that is; a woman and a man.

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110 Counsel submitted on ground three that the learned Judge considered both the evidence of the prosecution and the evidence of the defence before he ruled that the charge and caution statement was recorded voluntarily.

115 On ground two counsel submitted that the inconsistencies in the prosecution case pointed out by counsel for the appellant were minor as they did not go to the root of the prosecution case. Counsel pointed out that what is material is that both PW1 and PW3 testified that they saw someone who they identified as the appellant putting on a striped shirt pick a gun from a car. She prayed court to dismiss the appeal for lack of merit.

Consideration by court

120 We have carefully listened to submissions by both counsel. We have also perused the court record and the authorities cited to us and those that were not cited.

125 We have a duty as a first appellate court to re-appraise all the evidence adduced at the trial and come up with our own inferences on issues of law and fact. See: Rule 30 (1) of the Rules of this court, **Bogere Moses & Anor V. Uganda**, Supreme Court Criminal Appeal No. 1 of 1997 and **Kifamunte Henry V. Uganda**, Supreme Court Criminal Appeal No. 10 of 1997.

130 The Prosecution led evidence of 4 witness to prove its case against the appellant.

PW1, Otem Alfred and PW3, Acan Hellen the eye witnesses, PW2, D/ASP Lamony Appollo Michael, the investigating officer and PW4 D/SP, Bahemuka John, who recorded a charge and caution statement.

135 In relation to identification of the appellant which complaint is in ground 1, PW1 testified that:-

135 *"So as we reached the junction of Muwale Road and entered into it just a few metres of that to the Monitor Publications the taxi stopped, I saw the man standing across the road with a stick in his hand, he was wearing a long sleeved shirt with stripes across. He took off coming towards a taxi with a stick. And that was the accused in the dock. So as he was reaching*
140 *near the taxi with a stick in his hand, the conductor of the taxi closed the door and the driver started moving the car, the accused ran back to the car which was packed there close to the road, picked a gun. The driver drove a high speed. Then after 50 metres, the accused started shooting. He shot three bullets directly at a taxi. One bullet killed a lady. She was*
145 *shot from behind her back. For me I was shot at my right arm and got injured. The driver drove very fast and at the junction at Tondinyira Market, there was a blue Pajero short Checic Reg. No. UXN 985 came from Kisugu side and blocked the taxi that we were in. The accused and two more men were running on foot chasing that taxi."*(sic)

150 PW3 testified that:-

155 *"Then after green Hill School we branched to the road going to Kisugu. Immediately after the junction, I saw a Pajero parked by the road side of the left arm. Then people from the Pajero stopped the taxi. The person who was stopping the taxi had a stick in his hand. He was from the Pajero. Now the taxi did not stop, then that person ran to the Pajero and got a gun. That person is the accused in the dock but at that time he was putting on a T-shirt. That T-shirt had stripes on the chest. It was still about 5:00p.m. I saw clearly. When the accused got a gun and started shooting, I then saw blood all over the taxi and I saw a woman fall down."*

160 The appellant started shooting at the taxi from the distance of 50 metres and it is not clear to us for how long this incident lasted. It was about 5:30 pm in the evening. The appellant was not known to PW1 and PW3.

165 In *Abdallah Nabulere & 2 ors V. Uganda, Court of Appeal Criminal Appeal No. 9 of 1978* this court held inter-alia that:-



170 *“Where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken”*

175 In the instant case, the appellant does not dispute having been at the scene of crime but contends that it was his boss Onen Chan who shot at the moving taxi. The two witnesses who identified the appellant had not seen him before the incident. The shooting happened about 50 meters away from the taxi which was moving. It is not clear to us how long the incident took place. The circumstances surrounding this case were not favourable for correct identification although it all happened 180 during the day at about 5:30 p.m. More than one persons were identified at the time of the incident, the appellant, his boss Onen Chan and one Kasozi Dauda. Both PW1 and PW3 did not testify having seen the appellant shoot at the taxi. They could be mistaken because of fear and tension at the time of the incident. This is a case where the police 185 would have carried out an identification parade for proper identification.

We note that the learned trial judge failed in his duty to ensure that there were no instances of mistaken identity. In our view, in the 190 circumstances of this case, the appellant was not properly identified as the one who actually shot and killed the deceased. Ground one succeeds and it is hereby allowed.

Having resolved ground one in the affirmative, we find it not necessary to consider the merits of the three remaining grounds. However, we 195 would like to take note of the following:-

We note that the investigating officer did shoddy investigations on this case. The two principle witnesses PW1 and PW3 stated that the person whom they identified was wearing a striped shirt; this shirt was never recovered. Secondly, although the gun that was tendered in court was examined by a ballistic expert and confirmed that it was capable of firing bullets, it was never confirmed that indeed it fired the bullets that shot the deceased and the victim. It was also not connected to the appellant. All that PW2 stated was that he was told by the arresting officer that the gun was found on the appellant. Thirdly, the persons that is; the arresting officer, the appellant's boss Onen Chan and Kasozi Dauda, who were at the scene of crime were never called to testify in court.

We find that the learned trial Judge, with all due respect, erred when he held that the appellant was properly identified by the two principle witnesses. Further, he did not caution himself of the danger of convicting the appellant on a retracted confession. The learned trial Judge simply believed the prosecution case in isolation without considering the defence case.

In conclusion, this appeal succeeds. In our view, the charges against the appellant were not proved beyond reasonable doubt as required by the law. Consequently, we find the appellant not guilty, quash the conviction, set aside the sentence and acquit him and order for his release forthwith. We so order.

Dated this*Jan*.....day of*Aug*.....2019.

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Elizabeth Musoke
Justice of Appeal

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Hellen Obura
Justice of Appeal

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Ezekiel Muhanguzi
Justice of Appeal

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8/8/19

Appellate panel.
Mr. Kamukama (Chair)
Mr. Mubiru (Appellate)
Mr. Bwalya (Acting Attorney General)
The Clerk
Seal: Clerk

Copy: Judgment delivered in the presence
of the court.