THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Cheborion Barashaki, Muzamiru Kibeedi, JJA*]

CRIMINAL APPEAL NO. 56 OF 2013

(*Arising from High Court Criminal Appeal No. 0010 of 2011 at Mbale*)

BETWEEN

Uganda==========Appellant

AND

1. Etoori Martin
2. Emojong Emmanuel
3. Osikol Timothy
4. Padde Patrick
5. Imoo Yowab
6. Osikol Bernard
7. Ekiring Peter
8. Emojong Aggrey
9. Emolot Fabian
10. Olakitar Nicholas
11. Emoyo Ivan
12. Imoni Samuel

==========Respondents

(*An appeal from the judgement of the High Court of Uganda [Musota, J (as he then was)] delivered on 2nd May 2013 at Mbale*)

JUDGMENT OF THE COURT

Introduction

[1] The respondents were charged with several offences including 3 counts of malicious damage to property contrary to section 335 (1) of the Penal Code Act and injuring animals contrary to section 334 (1) of the Penal Code Act on which the respondents were acquitted in the trial court. Etoori Martin was

charged and convicted of the offence of incitement of violence contrary to section 83 (1) of the Penal Code Act and sentenced to 20 months' imprisonment. The respondents were convicted of the offence of arson contrary to section 327 (a) of the Penal Code Act on 16 counts and sentenced to 5 years imprisonment on each count to run concurrently with the exception of Padde Patrick and Olakitar Nicholas who were only warned and cautioned because they were juveniles. Emojong Aggrey, Emoyo Ivan and Imoo Yowab were convicted of the offence of causing grievous harm contrary to section 219 of the Penal Code Act and sentenced to 2 years' imprisonment save for Emoyo Ivan who was a juvenile. Osikol Bernard was convicted of the offence of assault occasioning actual bodily harm contrary to section 236 of the Penal Code Act and sentenced to 1 year's imprisonment.

[2] Dissatisfied with the decision of the trial court, the respondents appealed to the High Court on the following grounds:

> '1. The learned Chief Magistrate erred in law and fact by finding that the appellants had been positively identified and that they were part of a group that committed the offences charged.
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> 2. The learned Chief Magistrate erred in law and fact in rejecting the appellant's defences of alibi.
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> 3. The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence adduced at the trial and reached an erroneous decision.
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> 4. The learned Chief Magistrate failed to accord the appellants a fair trial which resulted in a gross miscarriage of justice.'

[3] The first appellate court allowed the appeal, quashed the convictions of the respondents, set aside their sentences and ordered for the respondents to be set free. Dissatisfied with the decision of the first appellate court, the appellant has now appealed to this court on the following grounds:

> '1. The High Court at Tororo sitting as the 1st appellate court erred in law by failing to evaluate the evidence on record in regard to the identification of the respondents at

the scene of crime and their participation in the commission of the offence.

2. The High Court of Tororo sitting as the 1st appellate court erred in law by failing to re-evaluate the weight of the evidence on record against the respondents' alibis.

3. The High Court of Tororo acting as a 1st appellate court erred in law by failing to adequately re-evaluate the evidence on the record as a whole.'

[4] The respondents opposed the appeal.

Submissions of Counsel

[5] At the hearing, the appellant was represented by Ms. Barbra Kauma, Assistant Director of Public Prosecutions in the Office of the Director, Public Prosecutions, while the respondents were represented by Ms. Faith Lachivya. The parties presented written submissions.

[6] Counsel for the appellant, in relation to ground 1, submitted that the record of proceedings shows that the 1st respondent (Etoori Martin) was ably identified by PW3, PW4, PW5, PW6 and PW8 who all recalled in their testimonies that he was wearing a kanzu and a black coat the morning of the incident. Counsel for the appellant submitted that PW3 testified that he saw the 1st respondent from the tree in his father's compound. He was about 120 meters away and heard the 1st respondent blow a whistle, saw him gesture to a man who came out of his house and run in the direction of PW1's house. It was counsel for the appellant's submission that upon cross examination, PW3 stated that he had known the 1st respondent for over 40 years as they were from the same area.

[7] Counsel for the appellant argued that the trial court properly evaluated the evidence on record in regard to the participation of the 1st respondent when it discussed the doctrine of common intention as provided under section 20 of the Penal Code Act. Counsel for the appellant contended that the comments by the 1st respondent as PW4, PW8 and PW11 testified all point to his participation in the offence as a result of him having formed a common intention with the other respondents. Counsel for the appellant argued that

there is no way the 1st respondent would have been in two places at the same time because PW8 stated in her testimony that she saw a group of people coming towards her home, armed with pangas, arrows, guns and clubs and that they came from the side of the 1st respondent who was standing in her ground nut garden. Counsel for the appellant submitted that PW8 testified that she heard the 1st respondent give orders and was wearing a black coat and kanzu. Counsel for the appellant also submitted that it was PW4's testimony that on reaching Isigets' home, he took cover, saw houses burning and saw village mates in the compound who were whispering to each other and that the 1st respondent was making orders '*for it to be done quickly.*'

[8] Counsel for the appellant further submitted that the first appellate court did not take into consideration the fact that PW1 and the 1st respondent's land is neighboring. Counsel submitted that is not true that the prosecution witnesses only concentrated on the 1st respondent. Counsel for the appellant submitted that PW1 mentioned and described each of the assailants in his testimony and that PW5 mentioned the person who he saw attacking him in his testimony. Counsel for the appellant also submitted that the first appellate court failed to evaluate the evidence on record when it failed to relate the evidence of PW1 with that of PW8 who remained at the scene of the crime and witnessed the attack on PW1 and the subsequent burning of their houses, huts and other property.

[9] It was counsel for the appellant's submission that PW1 stated that at the time he made his first statement, he was not settled as he had just been assaulted, witnessed the burning of his home and had run a distance of about 3 miles to report the incident to Malaba police station. Counsel for the appellant relied on Mushikoma Watete & 3 Others v Uganda [2000] UGSC 11where it was held that courts attach more weight on witness evidence and not police statements simply because testimonies in court are given on oath. Counsel prayed that this court finds that the trial magistrate was justified in attaching more weight on the witness evidence that was given on oath.

[10] Counsel for the appellant submitted that PW1, the investigating officer testified that they found at the scene of the crime a group of people armed with sticks and pangas, clubs, iron bars and spears and managed to disarm some of them while others ran away. Counsel submitted that PW11 stated that they proceeded to the victim's homes where they found burnt houses, goats

stabbed and upon interrogation of the victims, they were told that the perpetrators came from the 1st respondent's home. Counsel for the appellant was of the view that the investigating officer clearly described how they came to arrest the respondents and that he should not have been expected to recall the names of all the suspects. Counsel submitted that PW1, PW4 and PW5 all mentioned that a group of about 40 to 50 people descended on them and that they managed to identify the leaders of the group who assaulted and cut them with pangas. Further, counsel for the appellant argued that when PW8 stated that the neighbors responded to her alarm after the assailants had left, she was referring to the neighbors that she physically saw coming to her home which does not rule out PW4's statement that he responded to an alarm from the direction of PW1's home.

[11] Counsel for the appellant submitted that the first appellate court derogated from its duty to re-evaluate evidence on record while relying on Abudalla Nabulere & 2 Others Vs [1978] UGSC 5 that set the standard for adequate identification. Counsel for the appellant submitted that the conditions were conducive for proper identification of the respondents because the attack took place between 7:00am to 7:30 am in the morning and that the assailants and victims knew each other since they were village mates.

[12] With regard to ground 2, it was counsel for the appellant's submission that the law governing alibi was discussed in Androa Asenua & Anor v Uganda [1998] UGSC 23 where it was held that a trial court is entitled to disregard defenses of alibi where the evidence on record places the accused persons or respondents in this case at the scene of the crime. Counsel for the appellant submitted that the evidence of PW1, PW3, PW4, PW5 and PW8 that squarely placed the respondents at the scene of the crime was not adequately re-evaluated by the first appellate court. Counsel for the appellant further submitted that the evidence at the *locus in quo* was not the only evidence available on the record and that it is only good practice for the trial court to conduct a visit at the *locus in quo*. Counsel was of the view that the absence or insufficiency of adequate locus in quo evidence does not vitiate the rest of the evidence of identification.

[13] With regard to ground 3, counsel for the appellant submitted that from the evidence on record, it is not in dispute that the complainants lost property, that the evidence by PW15 was to the effect PW5 had multiple cut wounds on the

head. Counsel for the appellant submitted that PW5 gave evidence of how he was cut on the head to the point that he lost consciousness and was admitted in hospital for 4 days. Further, counsel for the appellant submitted that the medical evidence adduced by PW15 was to the effect that PW1 had cane marks or stripes all over his back. Counsel for the appellant argued that for the first appellate court to have ignored this evidence and basing on a finding that PW5 mentioned one cut wound while PW15 in his medical evidence mentioned multiple cut wounds was a total failure in its duty as a first appellate court.

[14] Counsel for the appellant prayed that this court allows the appeal and reinstate the convictions and sentences against the respondents.

[15] In reply, counsel for the respondents reiterated the duty of a second appellate court as was stated by this court in Isingoma v Uganda [2019] UGCA 7. Counsel for the respondents submitted that PW3 testified that he saw the 1st respondent from a tree he had climbed which was 300 meters from the incident and that he also saw someone carrying a gun but he was not able to recognize the person. Counsel for the respondent argued that PW3 was not able to recognise the 1st respondent at such a distance. Further, counsel submitted that PW6 stated in his testimony that when he answered the alarm Osiapiri's house was already burnt and upon cross examination he stated that he did not see anyone setting fire on the house. Counsel submitted that PW6 also stated that he did not see Etoori Martin (1st respondent) cut anything. Counsel for the respondent was of the view that from the abovementioned evidence, it is clear that none of the witnesses saw the 1st respondent participating in the commission of any of the offences.

[16] Counsel for the respondent further submitted that the evidence of PW3 was inconsistent as to where he saw the 1st respondent standing during the incident which was rightly pointed out by the trial court. Counsel for the respondents was of the view that the respondents were not placed at the scene of the crime and no common intention to commit the offence of arson was proved beyond reasonable doubt. Counsel for the respondents submitted that the first appellate court evaluated the evidence of PW1 and PW8 which can be seen in its judgement. Counsel for the respondents also submitted that prosecution of cases and selecting prosecution witnesses and the evidence to be adduced in court is controlled by the office of the Director of Public prosecutions and

therefore the weakness in the prosecution evidence cannot be blamed on the first appellate court. Counsel was of the view that the prosecution should not have taken a statement from a witness who was unsettled.

[17] Further, counsel for the respondents was in disagreement with the view that the trial court is justified in attaching more weight to the witness evidence that is given in court than police statements because the contradictions in the police statements had a strong bearing on the respondents' case, that the circumstances under which the second police statement of PW1 was made was suspicious and that the statements at police are recorded often when the events complained of are still fresh in the minds of the maker. It is difficult to fabricate the facts at the time. Counsel for the respondents submitted that the second statement could have been an issue of afterthought. Counsel for the respondents submitted that the first appellate court duly discharged its duty when it stated that given the fact that the accused persons were not substantially mentioned in the police statements, the docket identification of the accused persons were questionable.

[18] Counsel for the respondents submitted that the 1st respondent testified that he never left his compound during the incident and that although he did not deny wearing a kanzu and coat, counsel was of the view that there is a possibility that the prosecution witnesses saw the respondent after the commission of the crime. Counsel for the respondent submitted that no prosecution witness stated in their testimonies that they saw the 1st respondent burning down any of the houses. Counsel for the respondents further submitted that the identification of the 1st respondent by his clothing did not necessarily place him at the scene of the crime because the respondent was arrested from his home and the prosecution never disputed this.

[19] Counsel for the respondents also submitted that the conditions were not favorable for a proper identification by the witnesses most especially for PW3 who stated that he climbed a tree and saw the 1st respondent about 300 meters away amidst the branches. Counsel for the respondents submitted that PW4 testified that the accused persons were assembled at PW1's home and the 1st respondent was mobilizing them while PW3 stated that he saw the 1st respondent in the groundnut garden which is contradictory. Counsel also submitted that no explanation was given of how the arrest of the 27 people came about and that PW1 did not state how he was able to identify such a

large number of people. Further, counsel for the respondent submitted that PW4 arrived at the scene when the houses had already been burnt and that this was corroborated by PW8 whose testimony was to the effect that the neighbors arrived at the scene when the attackers had already moved away. Counsel for the respondents was of the view that all this evidence points to the fact that the appellate court discharged its burden as required by law and in Kifamunte Henry v Uganda [1998] UGSC 20.

[20] Counsel for the respondents submitted that common intention was not established by the prosecution given the fact that the 1st respondent was not identified and placed at the scene of the crime. Counsel for the respondents was of the view that after the first appellate court after considering all the testimonies and difficulties in identification, the inconsistencies and contradictions in the evidence, it arrived to the proper conclusion. Counsel for the appellant submitted that much as PW8 stated that she saw the 1st respondent standing in her groundnut garden, seeing the 1st respondent standing in the place does not allude to his participation in the offences. Counsel for the respondent prayed that this court finds no merit in this ground.

[21] In reply to ground 2, counsel for the respondents submitted that that PW3, PW4, PW6 who came to the scene of the crime after the houses were burnt and PW8 never saw the respondents committing the offences. Counsel for the respondents submitted that the trial court left out many things when it visited the scene of the crime and that prosecution witnesses failed to prove major aspects in their evidence during the visit at the *locus in quo*. Counsel for the respondents relied on Bogere Moses v Uganda [1998] UGSC 22 for the proposition that the accused has the duty of raising the defense of alibi but does not have the duty of proving it, that the prosecution has the burden of destroying the defense by placing the accused at the scene of the crime at the time the offence was committed. Counsel for the respondents concluded by submitting that the first appellate court properly evaluated the evidence concerning respondents' alibis and rightly concluded that the rejection of the defenses of alibi by the trial court was not justified. Counsel for the respondent prayed that this ground of appeal fails.

[22] In reply to ground 3, counsel for the respondents submitted that the testimony of PW5 was properly evaluated by the first appellate court and that the first appellate court rightly noted the big disparities in the evidence of PW10 and

PW2. Counsel for the respondents averred that there is no evidence for this court to evaluate because every aspect of the evidence was put into consideration when the first appellate court arrived at its decision. Counsel for the respondents submitted that prosecution's contention that there was no re-evaluation of the evidence by the first appellate court is a mere allegation which was not proved. Counsel for the respondent prayed that this ground of appeal fails. Counsel for respondents prayed that this appeal be dismissed and the judgment of the first appellate court be upheld.

Analysis

[23] The facts of this case according to the prosecution are that on the 17th day of May 2008 in Kinyii central village Mella sub county in Tororo district, a group of people led by the 1st respondent attacked some members of the village and burnt down a considerable number of houses and other structures, destroyed crops, assaulted their victims and injured animals. Following the incident, a group of people including the respondents were arrested and charged with different offences in connection with the incident.

[24] This being a second appeal, this court is not bound to re-evaluate the evidence on record unless it is established that the first appellate court failed in its duty to do so. See Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and section 45 (1) of the Criminal Procedure Code Act cap 116. The Supreme Court in Kifamunte Henry v Uganda [1998] UGSC 20 stated:

> 'Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a court of first instance has wrongly directed itself on a point and the court of first appellate court has wrongly held that the trial court correctly directed itself, yet, if the court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view R. Mohamed Ali Hashan vs R (1941) 8 E.A.C.A. 93.
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> On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or even probably that it would not have itself come to the same conclusion; it can only

> interfere where it considers that there was no evidence to support the finding of fact, this being a question of law. R vs Hassan bin Said(1942) 9 E.A.C.A. 62.'

[25] The question for consideration, therefore, is whether the High Court failed in its duty to reappraise the evidence before reversing the decision of the trial court. We have carefully read the judgement of the High Court and the entire record of proceedings. We note that the High Court was alive to its duty to re-appraise the evidence that was before the trial court and to come to its own conclusion.

Ground 1, 2 and 3

[26] Much as the appellant put forth 3 grounds there is essentially one complaint that the first appellate court failed in its duty of re-evaluating the evidence on record leading it to wrongly acquit the respondents of the offences they were convicted of by the trial court. We shall deal with these grounds jointly.

[27] The gist of the appellant's case is that the learned appellate judge did not properly evaluate the evidence of identification and participation of the respondents in the commission of offences as required of a first appellate court thus occasioning a miscarriage of justice. The respondents in the first appellate court had contended the trial court had erred in law and fact by holding that the respondents had been positively identified as part of the group that committed the offence.

[28] The High Court considered the evidence adduced in the trial court and it came to the finding that the respondents were not properly identified. It concluded that the prosecution failed to prove the participation of the respondents in the offences charged against them. The evidence included that of PW3, PW4, and exhibit DEX.H1 (the sketch plan) while evaluating the evidence in relation to the offence of incitement of violence that was charged against the 1st respondent. After considering this evidence, the first appellate court came to the conclusion that the conditions were not ideal to positively identify the 1st respondent and that the prosecution had failed to produce evidence to show that the 1st respondent had participated in the crime. We find that there was sufficient evidence to support these findings.

[29] The first appellate court also evaluated the evidence of PW4 and found it inconsistent with the evidence of PW3 with regard to the position of the 1st respondent during the incident. The first appellate court stated at page 60 of the record that:

> 'There is no way A.1 could be inciting violence and whispering orders and at the same time taking cover. It is worth noting that it had rained at the time but the video evidence showed that A.1's kanzu never to have been soiled although he took cover. No threats were alluded to by any prosecution witness. Although the learned chief Magistrate explained it away using his own opinion, he had no basis of bringing in his own theory that A.1 could have lifted up his clothing to avoid the mud. No witness testified to this effect. The concern by the learned counsel for the appellants that witnesses concentrated on only one accused A.1 who was allegedly behind the attackers rather than the active soldiers who were violent and in front raises suspicion. I have found the prosecution evidence on count 1 very unreliable, full of inconsistences and contradictions. A.1 ought to have been believed when he said in defence that he never left his compound. His defence creates doubt as to the veracity of the prosecution evidence which ought to have been resolved in favour of the appellant.'

[30] Regarding the offence of arson for which all the respondents were charged, the first appellate court went ahead and carefully reappraised the evidence of PW1, the police statements of the witnesses and the evidence relating to the arrest of the respondents. The first appellate court also found that none of the weapons exhibited were linked to any of the respondents. It also examined the evidence of PW4 and PW8 came to the conclusion that PW4 and the neighbors arrived at the scene of the crime when the houses had already been burnt. Upon considering this evidence, learned appellate judge came to the conclusion due to the confusion and large number of people involved, it was not satisfied that any of the appellants were positively identified, placed at the scene of the crime and that no common intention had been established by the prosecution. We are of the view that the evidence on record supports these findings.

[31] For the offence of causing grievous harm, the learned appellate judge examined the evidence of PW5, PW10, PW2 and PW15 and found that there were contradictions in the evidence of the witnesses that were not explained with regard to the injuries sustained by the victim and the weapons used to inflict the injuries.

[32] In light of the above, we find that the first appellate court properly evaluated the evidence on record with regard to the evidence of identification and participation of the respondents and arrived at the right conclusion.

[33] The appellant contends that the first appellate court erred in law by failing to re-evaluate the weight of the evidence on record against the respondents' alibis. The first appellate court handled this issue in grounds 2 and 3 of appeal. It evaluated the testimony of PW12, a journalist who took pictures, videos and recorded comments of the people at the scene of the crime. The learned appellate judge examined the video recordings in PEXH.15 and was of the view that the recordings cast more doubt against the guilt of the respondents because they discredited the evidence of the prosecution especially that of PW4.The learned appellate judge observed that none of the witnesses mentioned the respondents as the perpetrators in the recordings but rather inferences were drawn that a group of Kenyan mercenaries were responsible for the attack. It is not true as alleged by the appellant that the first appellate court relied only on the irregular proceedings during the visit to the *locus in quo* to arrive at its decision.

[34] In light of the above, we find that the first appellate court re-evaluated the evidence on record. Neither ground 2 nor ground 3 has any merit.

Decision

[35] This appeal is dismissed.

Signed, dated and delivered at Mbale this 15th day of September 2020.

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Mutangula Kibeedi
Justice of Appeal