THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CN-0022-2003

(From MBR-00-CR-CO-0373-2002)

SAYSON MUGANGA…… APPELLANT

VS

UGANDA……... RESPONDENT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

This is an appeal against the judgment of the Chief Magistrate, Mbarara, of 9th April 2003. After she was convicted for attempted murder the appellant was sentenced to life imprisonment. She appeals against both conviction and sentence and sets out the following grounds of appeal:

1. The learned Chief Magistrate erred in law and fact to hold that there was proper identification of the appellant/accused when the evidence relating to that issue was marred by inconsistency and discrepancies to such extent that it created reasonable doubt as to the guilt of the appellant/accused.

2. The learned Chief Magistrate applied the wrong principle and came to a wrong decision in ascertaining whether the offence of attempted murder had been proved.

3. The learned Chief Magistrate wrongly admitted and gave much weight to the evidence of PW 10 Dr. Balikuddembe when he was not the medical officer who made and signed the medical report which was tendered in evidence as exhibit P.3 and this caused a substantial miscarriage of justice.

4. The learned Chief Magistrate was wrong to rely heavily on the evidence of PW11 Lugudo Ali when the evidence relating to the identification of exhibit P.4 allegedly examined by him was

very unsatisfactory as the procedure adopted by Police relating to its packing, marking and sealing was completely wrong and this resulted in a failure of justice.

5. The learned Chief Magistrate poorly and wrongly evaluated the defence evidence which led her to making a wrong decision.

6. The sentence of life imprisonment imposed on the appellant by the trial court was harsh and excessive.

This being the first appellate court, it is incumbent upon it to reconsider the evidence, evaluate it itself and draw its own conclusions when deciding whether the judgment of the lower court should be upheld. In addition this court should consider any questions of law raised in appeal. See *Okeno vs Republic* [1972] EA 32.

The first ground of appeal questions whether the appellant was properly identified. According to the testimony of the appellant and that of her mother the appellant was on the night in issue, 28th July 2001, at Kakiika, Mbarara Municipality in her parents' house. She never left the house to go to the scene at Kitunga High School. It is a long way from Mbarara Municipality to the scene of crime. The prosecution on the other hand called evidence which sought to establish that appellant was not only in the vicinity of the place where the crime took place but also that she was a participant.

PW5 was Deus Twebaze a boda boda motorcycle operator of Rwashamaire. He testified that at about 9 p.m. on 28th July 2001 the appellant, who he had known earlier when she kept a shop in Rwashamaire and whose husband he knew as Muganga, a teacher at Kitunga High School, hired him for Shs. l,000/ to give her a lift to Kitunga High School. PW5 did not know where appellant had come from but she had arrived by taxi. He was able to recognize her owing to light from security lights on the shops. He carried the appellant up to the school gate and left her there. According to PW5 the appellant was wearing a black pair of trousers and a sleeveless blouse. He did not recall whether appellant carried anything in her hands.

Byekwaso Wilson testified as PW6. He was a watchman at Kitunga High School and was on duty at the school gate on the night of 28th July 2001 when between 9.00 p.m. and 9.30 p.m. a

motorcycle stopped near the school gate and the appellant whose name he knew as Sayson, the wife of the Deputy Headmaster of Kitunga High School, alighted about 20 metres from where he was. The motorcycle left and appellant entered the gate after hesitating for about 3 minutes. PW6 was able to recognize the appellant because she was known to him before as a resident at the school at one time and a shopkeeper near the boda boda stage at Rwashamaire. On the night in issue there was light emanating from electricity security lights outside the staff room about 30 metres away. Later appellant went past PW6 at a distance of one metre. PW6 saw appellant carrying something black in her hand. It looked like a bag. She was wearing a black pair of trousers and a black jacket and headed towards her husband's house.

PW7 was Mubangizi Obedi who is nephew to appellant's husband. He resided at the house of appellant's husband at Kitunga High School on the night of 28th July 2001. Between 9.30 p.m. and 10.00 p.m. that night someone knocked at the door. When PW7 drew the curtain and looked outside he saw the likeness of a woman wearing a black pair of trousers and a jacket. On opening the door the person retreated backwards. PW7 had then closed the door and gone back to bed.
The victim testified as PW4. She said she had known appellant before because the two had been contemporaries at Bweranyangi Girls Senior Secondary School. While appellant was in S.3 the witness was in S.1. The two had met again in Mbarara in early 2001 and had a conversation which culminated in a lift for PW4 back to Kitunga High School in the company of appellant and her husband. The lift was in the car of appellant's husband. On the night 0f28t July 2001 at about 9.30 p.m. PW4 was marking students' scripts when someone locked her inside her house using the outside bolt on her door. Later when PW4 stood on her veranda she recognized appellant walking from the corner of the house towards her. According to PW4 appellant carried a plastic jug which was orange in colour in one hand and a bottle in the other. PW4 was able to recognize appellant because there was moonlight and because there was light emanating from a bulb which was in PW4's sitting room hanging from the ceiling. Appellant stood in the doorway.

There is need to be cautious concerning evidence based on identification. Court must ensure that there is no likelihood of mistaken identity. Indeed in *Abdala Nabulere & Another vs Uganda* [1979] HCB 77 it was stated:

‘where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the 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. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger----

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence, provided the court adequately warns itself of the special need for caution.’

PW4, PW5 and PW6 knew appellant before. They all said they were enabled to observe her by electric lights that burned. In the case of PW4 there was also moonlight. They were in close proximity of the appellant and took time observing her so that they were all in agreement she wore black trousers. Both PW4 and PW6 agreed in their respective testimonies she wore black trousers and a black jacket. PW5 however saw her in black trousers and a black blouse.

PW7 also saw someone with black trousers and a black jacket. The person who was seen and identified was seen and identified at more or less the time PW4 saw and recognized her; the time the alleged crime was committed.

The appellant put forward an alibi as her defence. An accused person who puts forward an alibi as a defence does not assume responsibility to prove it. It is the responsibility of the defence to disprove it by adducing evidence which places the accused at the scene of crime. See *Ssentale vs Uganda* [1968) EA 365. Both appellant and her mother DW2 testified that appellant spent the night of 28th July 2001 at the family home at Kakiika, away from the scene of crime. Appellant says she recalls the events of that night well because they had a special visitor at home. DW2 did not state why the date of all other dates stuck in her memory. On the other hand I find the

testimonies of PW4, PW5 and PW6 credible regarding their identification of the appellant. I find appellant has been placed at the scene of crime. In *Moses Kasana vs Uganda* [1992 —1993] HCB 47, 48 the following passage appears:

'where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of fabricated alibi.'

PW4, PW5 and PW6 properly identified the appellant. PW7 saw someone wearing more or less what PW4, PW5 and PW6 had seen appellant wearing on the night in issue. The person seen by PW7 went to the house where appellant's husband usually resided but according to PW7 that person did not want to be identified. Given the aggregate of the evidence I am satisfied that it was the appellant who went to her husband's house but shunned identification when PW7 presented himself at the door. I find the evidence of the appellant and that of her mother a pack of lies designed to buttress her alibi since prosecution evidence places her at the scene of crime. This disposes of the first ground of appeal.

Counsel for the appellant sought to make capital of the fact that on the night in question the victim did not immediately name who her assailant was. While I agree that early mention of the assailant would be helpful in adding to the evidence of identification, I am not persuaded that delay in mentioning the identity of the assailant is ipso facto evidence of failure to identify the assailant. The victim testified as to why it was she did not mention the name of her assailant immediately. I find the explanation credible. In any case the delay does not affect the body of evidence of identification as presented by the prosecution.

Grounds 2, 3 and 4 were argued together. Learned counsel for the appellant contended that the offence of attempted murder was not established. In the Penal Code Act section 204 (a) has since replaced section 197 (a) under which the appellant was convicted. For the offence to be established in addition to the overt act there should also be a positive intention to unlawfully cause the death of another. See *R vs Luseru Wandera* s/o *Wandera* (1948) 15 EACA 105. What was thrown at the victim was a corrosive liquid as demonstrated by its effect on the victim. The

person who aimed that liquid at the victim doubtless intended to cause the death of the victim. I am satisfied the prosecution proved the offence beyond reasonable doubt. While I find the method used in handling exhibits most wanting, I have no doubt in my mind the substance used was not only corrosive but also offensive and capable of causing death.

Regarding ground *5* of the appeal I find the learned Chief Magistrate properly found that the defence of alibi was destroyed and disproved by overwhelming prosecution evidence.

Nevertheless I am at one with learned counsel for the appellant that there is no basis for the finding by the Chief Magistrate that what scars were on the appellant's body were caused by acid. I reject that finding.

Ground 6 concerns the sentence imposed. A person convicted of attempted murder is liable to life imprisonment. That sentence is not mandatory. The learned Chief Magistrate gave her reasons for imposing that sentence, one of which was her vivid memory of the injuries that were inflicted on the victim. I am persuaded by neither the circumstances of this case nor the arguments of counsel to disturb the sentence. The act was ghastly and revolting and no remorse whatsoever was shown by the appellant.

This appeal fails. Conviction and sentence of the trial court upheld.

P. K. Mugamba

Judge

4th April 2005