THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-CN-0010-2011
(Arising from Tororo Criminal Case No. 218/2008)

1. **ETORI MARTIN**
2. **EMOJONG EMMANUEL**
3. **OSIKOL TIMOTHY**
4. **PADDE PATRICK**
5. **IMOO YOWAB**
6. **OSIKOL BENARD**
7. **EKIRING PETER**
8. **EMOJONG AGGREY**
9. **EMOLOT FABIAN**
10. **OLAKITAR NICHOLAS**
11. **EMOYO IVAN**
12. **IMONI SAMUEL ……..APPELLANTS**

VERSUS

UGANDA……RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal from the judgment and orders of the learned Chief Magistrate Tororo in which he convicted the 12 appellants for several different offences and sentenced each to varying sentences.

According to the record, **Etori Martin, Emojong Emmanuel, Osikol Timothy, Paddy Patrick, Imoo Yowab, Osikol Benard, Ekiring Peter, Emojong Aggrey, Imoyo Ivan** and **Imoni Samuel** were all convicted of the offence of Arson c/s 327

(a) of the Penal Code Act (PCA) and sentenced to 5 years imprisonment on each count running concurrently with the exception of convicts who were juveniles who were cautioned. This was wrong because they ought to have been referred to the Family and Children Court (FCC) for appropriate action. (See S.100 Children Act). **Etori Martin** was also convicted of the offence of incitement of violence c/s 83(1) of the PCA and was sentenced to 20 months imprisonment. Further, appellants **Emojong Aggrey, Imoyo Ivan, Imoo Yowab** and **Osikol Benard** were convicted of the offence of Doing grievous harm c/s 219 of the Penal Code Act and sentenced to 2 years imprisonment except the juveniles. Osikol Benard was convicted of the offence of assault occasioning actual bodily harm contrary to section 236 of the PCA and was sentenced to 1 year's imprisonment.

The appellants are represented by M/s Wegoye & Co. Advocates while the respondent is represented by **Mr. Tumwebaze Ayebare** the Senior Resident State Attorney Mbale.

According to the Amended memorandum of appeal, the grounds of appeal are that:

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 offence charged.
2. The learned Chief Magistrate erred in law and fact in rejecting the appellant's defences of alibi.
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.

4. The learned Chief Magistrate failed to accord the appellants a fair trial which resulted in a gross miscarriage of justice.

The appellants prayed that this court allows the appeal, quashes the convictions and sets aside the sentences of the lower court.

The background to this case is that, on 17th day of May 2008 at around 6:30a.m. a total of 42 houses/structures were set ablaze and prosecution alleged that the appellants were part of the people who set the houses on fire. Further that in the incident some people were assaulted at the instigation of the first appellant. The appellants denied the offences. They were tried, convicted and sentenced as indicated above.

It is the duty of a first appellate court to reconsider and re-evaluate the evidence adduced at the lower court's trial and make up its mind whether the decision of the lower court can be upheld. ***KIFAMUNTE V. UGANDA (1999) 2 E.A. 127***. While doing this, the court has to be mindful of the known legal principle that in all criminal cases the burden of proof rests upon the prosecution throughout the trial and is supposed to be beyond any reasonable doubt. Any doubt has to be resolved in favour of an accused person.

In joint trials like the one under consideration, the guilt of each accused must come to the required standard.

Court allowed respective counsel to file written submissions.

After a meticulous study of the bulky lower court's record and relating the same to the submission by respective counsel, I will go ahead and consider the grounds of appeal as argued by both counsel starting with;

Ground 1:

Whether the learned Chief Magistrate erred in law and fact by finding that the appellants had been positively identified and that they were part of the group that committed the offences.

In his submission, the learned resident State Attorney said that circumstances of correct identification did exist at the time of offence. That the witnesses knew some of the attackers. That a distance of 120 or 300 metres is not too far for one to identify a familiar person. That A.1 was identified and was not stationary in one place and there is credible evidence on record to place the appellants at the scene of crime.

Mr. Wegoye learned counsel for the appellants submitted to the contrary and I agree with him.

From the evidence on record the first appellant was far away in the ground nuts garden watching people burning houses. No witness said he saw A.1 burning any house. PW.3 testified at P.39 of the record that:

> "*I entered my house, put on my jacket and ran and climbed a certain tree, near my father's home, Yokolamu Osiapil. From the tree I managed to see Etoori Martin (A.1) standing at the boundary of the*

home of late Yokosafart Okware and our land……..
He was putting on a kanzu and a coat about 120 metres away. He blew a whistle and I heard it. I then saw someone carrying a gun, coming from Etoori's home. He ran towards Etoori and Etoori gestured to him to go to a certain direction. That person disappeared there because there was spear grass. Next I heard gunshots,…….. only one gunshot."

When cross-examined, PW.3 said "the attackers were speaking Swahili which I identified to be Kenyan Kiswahili that is why I concluded they were Kenyans."

Given that PW.3 had climbed a tree with branches and A.1 was said to be 300 metres away and the incident took place between 6:00-7:00a.m it is doubtful whether this witness was able to positively identify A.1 among others. Infact during the visit to the *locus in quo* this witness did not show court which tree he climbed. In the circumstances one could not rule out mistaken identity as submitted by **Mr. Wegoye**. It is trite law that identification evidence must not only place an accused person at the scene but must show that he took active part in the commission of the offence. That is missing from the prosecution evidence which renders A.1 defence of alibi credible that he simply stood in his compound not groundnut garden and saw burning houses.

Infact no ground nuts garden is shown in the police sketch Exhibit DEX.H1. The said sketch plan does not reveal any trees apart from a jackfruit tree which is said

to have been cut. The sketch plan key refers to toilets and not trees. This piece of evidence was not discussed by the learned Chief Magistrate in his judgment.

In the evidence of PW.4 at P.51 he testified that on reaching **Esinget**'s home……

> "*I saw my village mates accused persons assembled at the compound of PW.1 Esinget. They were whispering to each other. I saw Etori counselor making an order to do it quickly*."

However during cross-examination he said that he was 25 metres away from the scene. He said A.1was dressed in a jacket and kanzu and held a pistol. PW.4's evidence contradicts the evidence of PW.3. Was A.1 in two places at the same time? PW.4 said in re-examination that, "*when I took cover I saw Etori take cover*……." See P.52. There is no way A.1 could be inciting violence and whispering orders and at the same time taking over. 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 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 inconsistencies 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.

Regarding count 2 to 17 of Arson, **PW.1 Asepril Apollo** testified that while bathing on the fateful day he heard his wife making an alarm. When he raised his head he saw a group of about 40 to 50 people. That they had pangas, clubs and slashers. That one **Osikol Benard** set fire on his son's house. The son's name was not mentioned. He did not tell how he was able to identify such a large number of assailants. PW.1 also admitted making two statements to police. At P.25 he says that:

> "*In my police statement I mentioned only Osikol and Immo Benard as people who burnt my houses I did not name the others given in the first statement*."

It is not explained how the arrest of 27 people came about. However lack of cogent evidence against them led to the acquittal of many of them. The recording of subsequent statements to replace the earlier statements was not revealed at the trial until learned defence counsel discovered it.

The learned Resident State Attorney explained this omission that police statements depend on the facts a witness has and the wisdom of the police officer recording the same and what questions were asked. That if an ambiguity is found then a

witness is re-interrogated and another statement is recorded. That this does not imply that a witness is a liar or making fabrications. This assertion is correct. However, this ought to be brought to the attention of the defence for a fair trial to be conducted.

In ***COMMON WEALTH V. ELLISON 379 N.E. 2d 560 (Mass 1978)*** relied upon by **Mr. Wegoye** the pronouncement on the consequences of this non disclosure is pertinent.

> "*Failing to disclose initial pretrial statements of co-defendants which did not name the defendant as one of the participants in the crime and which contradicted their subsequent statements and trial testimony amounted to the suppression by the prosecution of material evidence which is favourable to the accused. This amounts to a denial of due process. Secondly, under well established evidentiary principles, a litigant's intentional suppression of relevant evidence gives rise to an inference that the litigant's case is weak and that the litigant knew his case would not prevail if the evidence was presented at trial……..*"

Given that the accused persons were substantially not mentioned in the statements, in the dock identifications of the accused persons were questionable. There was absolutely no police statements and no first information by anyone except Mr.

Etori before he and his relatives were arrested *en masse* from his compound where they were peacefully gathered. Note that the attackers were between 40-50 people but it was not clear who gave information connecting the convicts and other accused persons to these offences.

None of the exhibited weapons were related to any of the appellants. These could have belonged to the armed group which was arrested by PW.11 but somehow released. D/IP Wamunyerere David (PW.11) made a blanket statement at P.76 that:

> "This group of people was disarmed; there and then we arrested them. I cannot recall how many we arrested…… Among those arrested are: Emojong Emmanuel, Okou Patrick and Timothy Osikol. These are the ones I can remember."

To show that he did not know the identity of the people he arrested and whether they participated in the offence, **Okou Patrick** was acquitted on a no case to answer. To compound the issue of identification was the mention in evidence of a group of Kenyan mercenaries who were reportedly hired to commit the offences but disappeared.

I am therefore in agreement with the submission by **Mr. Wegoye** that PW.4 did not see anybody set fire on the houses because he arrived at the scene when all houses had been burnt. He never identified any of the appellants. This is confirmed by PW.8 who stated that by the time neighbours responded to the alarm the attackers had already moved away. Furthermore, the lower court only lists the numbers of people who are supposed to have identified the accused/appellants but

does not give any names of the identifiers. The witnesses talked of guns being fired but do not say who did so.

Given the confusion at the scene and the large number of people involved, I am not satisfied that any of the appellants was positively identified. The appellants could not be linked to the charges of Arson. They were not put at the scene of crime and no common intent to commit arson was proved beyond any reasonable doubt. Regarding the charge of causing grievous harm in count 21 he learned Resident State Attorney submitted that prosecution offered consistent and credible evidence which talks of multiple cuts.

Mr. Wegoye submitted to the contrary.
In this count **Emojong Aggrey, Emoyo Ivan** and **Imoo Yowab** were convicted of doing grievous harm to **Emuria Joel**. The conviction was based on the evidence of PW.5, PW.9, PW.3 and PW.15.

PW.5 said he was attacked by many people but was cut once on the head. PW.9 said he identified the attackers as **Osikol Benard, Emoyo Ivan** and **Aggrey Osikol** as the people who cut **Emuriat** with a panga. He did not mention anyother person who cut **Emuriat.**

PW.10 said it was one **Osikol** who cut **Emuriat**. PW.2 testified that the people he identified at the scene never assaulted the complainant. Although the victim told court that he was cut once on the head, the medical evidence indicates that the victim had a fracture on the left leg, fracture on the ulna and neck next proximo

tharlyx, cut wound on the right forearm, and multiple cuts on the head. The big disparity in this evidence was not sufficiently explained away.
Whereas the victim said he was cut with a panga, **Ityang Fred** said **Osikol** assaulted **Emuria Joel** using a big stick. This contradiction was also not explained away.

The 6th appellant **Osikol Benard** was convicted of assault occasioning actual bodily harm. The State did not specifically comment on this complaint. I found no sufficient evidence to pin the appellant on this offence at all. None of the appellants was positively identified. Ground 1 of the appeal therefore succeeds.

Grounds 2 and 3: Evaluation of evidence and the Defences of Alibi.
In his submissions, the learned Resident State Attorney said that court should take judicial notice that issues of time are normally a product of guesswork and possibilities. That the recording in PEXH15 shows that it was already morning. That the reporter mentions 7:00A.M. That the reporter was a journalist who was not an investigator. He did not have interest in details such as trees and sisal or time when the incident happened. That his interest was only in chapped properties and wailing victims which would sell as news. He admits that the *locus in quo* yielded very little to the case and that the trial court did not follow the rules for conducting such proceedings and the findings which were not reflected in the judgment are of little value and should be ignored.

He however submits that the defences of alibi were properly rejected because the appellants were arrested at the scene. That the idea that the attackers were from

Kenya did not arise because the incident was a clan fight between Ikwaruk and Ikaruwok clans over land. That the video clip had opinions of area leaders and whoever volunteered information. That this evidence should be used to complement the evidence of eyewitnesses who were present at the time.

I must straight away reject the view by the prosecution that its case should be propped up by opinions and volunteered information by area leaders.
Criminal cases must be proved by evidence beyond doubt and not opinions. Opinions outside court cannot complement evidence in court. Whereas witnesses put the time the incident happened as between 7:00a.m.- 8:00a.m. the evidence in PEXH 15 by **PW.12 Abraham Odeke** quotes him as saying that "I received a call at 6:30a.m." implying that the events took place before 6:30a.m. This has a bearing on the evidence of identification and whether conditions were favourable for correct identification.

On the same CD the voice of the intelligence officer says that the houses were torched simultaneously by people hired from Kenya and that the burning was over in 5 (five) minutes.

Although the trial court based its decision partly on this evidence, it did not consider the above vital evidence. This would have led it to a conclusion that all the times given by witnesses in evidence were false. None of the witnesses interviewed by PW.12 mentioned any of the appellants. Not even PW.8 did so. The alleged gunshots were not mentioned to **Mr. Odeke (PW.12)** by any witness including the intelligence officer who volunteered information to the effect that his

department had learnt of a plan to torch the houses by Kenyan mercenaries the day before. It seems the occupants were forewarned for none was injured by the fire.

Although **PW.4 Musolo Peter** claims that when he heard gunshots, he became so scared that he scampered for safety from his home to hide in a sisal plantation, the recording did not show any sisal anywhere nor any big tree where refuge was sought. In my assessment, the recording substantially raised doubt about the guilt of the appellants instead of helping bolster the prosecution case.
As admitted by the prosecution the visit to the *locus in quo* did not help either because it was not done in accordance with the law.

The law regarding a visit to *locus in quo* in criminal cases was stated by S**ir Udo Udoma C.J.** (as he then was(In ***MUKASA V. UGANDA [1964] E.A 698, 700*** that:

> "*The view of a locus in quo ought to be, I think, to check on the evidence already given and, where necessary and possible, to have such evidence actuary demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or Magistrate should exercise great care not to constitute himself as a witness in the case. Neither a view or personal observation should be a substitute for evidence*."

In the lower record before me it is not shown what steps were taken at the *locus in quo.* It is not shown whether the parties were given the opportunity to clarify what they testified in court or to cross-examine either witnesses who had earlier testified in court. It is apparent that court relied on the visit to the *locus in quo* which was flawed. This definitely vitiated the trial. It rendered the lower court's decision void and occasioned a miscarriage of justice to the appellants.

A properly conducted trial at the *locus in quo* would have been used to test the defences of alibi given by the appellants. These defences were not adequately disproved thereby.

The other evidence which would have been tested is whether one can hear a whisper from 25 metres away or whether there was sisal at the scene and how tall it was or whether there was a groundnuts garden or where it was located at the time of offence.

Therefore the rejection of the defences of alibi had no justification since the learned Chief Magistrate gave no reason for the decision. Grounds 2 and 3 will therefore succeed.

Ground 4:

Whether the learned trial Chief Magistrate failed to accord the appellants a fair trial which resulted in a gross miscarriage of justice.

In his judgment, the learned Chief Magistrate appears to have been guided by the comment by Lord Denning in ***MILLER V. MINISTER OF PENSIONS (1947) 2 ALL.E.R. 372, 374*** wherein he held inter alia that:

> "*The burden (of proof) need not reach certainty but must carry a high decree of probability……..proof beyond reasonable doubt does not mean proof beyond the shadow of doubt*."

I agree with the submission by **Mr. Wegoye** that by relying on the above standard, the learned Chief Magistrate misdirected himself on the standard of proof in criminal cases. The scale pronounced in Miller's case was disapproved in a latter case of ***JUDD V. MINISTER OF PENSIONS & NATIONAL INSURANCE [1965] 3 ALL.E.R. 645***.

Therefore by lowering the standard of proof by adopting the Miller's case standard, the trial court used the wrong balance to weigh the evidence before it. This caused a miscarriage of justice which favours all the appellants. Such a misdirection usually leads to a conviction being quashed.

I am of the considered view that the evidence on record did not support the judgment of the learned Chief Magistrate. In view of the miscarriage of justice alluded to above, the judgment, convictions and sentences of the lower court cannot be supported.

Finally I wish to comment that by putting on trial a group of 27 people in one case involving different charges was a big gamble by the prosecution. I noticed and

understandably so, that the learned Chief Magistrate had difficulty in sufficiently evaluating the evidence in relation to each accused making him resort to summary conclusions against each accused person.
To manage such a case, prosecution had to do a thorough investigation before embarking on prosecution.

For the reasons I have given above I will allow all the grounds of Appeal. The convictions of each of the appellants are quashed. The attendant sentences are hereby set aside. The charges are accordingly dismissed and appellants set free.

Stephen Musota

JUDGE

02.05.2013