THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CR-CN-0031-2010
(Arising from Tororo Criminal Case No. 0056-2009)

OCHOLA EZRA alias MZEE……APPLICANT
VERSUS
UGANDA……..…….RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal by **Ochola Ezra alias Mzee** represented by M/s Jungo, Ssempijja & Co. Advocates against the judgment and orders of the learned Chief Magistrate Tororo in which he convicted and sentenced to the maximum sentence of 10 years imprisonment for attempting unlawfully to cause the death of **Adikin Dyna** c/s 204(a) of the Penal Code Act.

According to lower court's record, the particulars of the offence were that the appellant and another still at large, on 31st day of January 2009 at Bison 'A' Zone, Tororo Municipality attempted unlawfully to cause the death of **Adikin Dyna**. The appellant denied the offence. He was tried and judgment was passed wherein he was convicted and sentenced.

The appellant was dissatisfied with the conviction and sentence hence this appeal.

In the memorandum of appeal four grounds were raised that:-

(1) The learned trial Chief Magistrate erred in law and fact when he decided that the appellant was properly identified by the evidence of a single identifying witness occasioning a miscarriage of justice to the appellant.
(2) The learned Chief Magistrate erred in law and fact when he misdirected his mind on and/or ignored the defence of alibi raised by the appellant thus occasioning him a miscarriage of justice.
(3) The learned Chief Magistrate erred in law and fact when he failed to properly and/or apply the law on burden of proof leading to a wrong decision occasioning a miscarriage of justice to the appellant.
(4) The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and wrongly convicted the appellant.

It is trite law that as a first appellate court, this court is enjoined to re-evaluate the evidence adduced at the trial and satisfy itself that the decision complained against can stand. If the judgment of the lower court cannot be supported having regard to the evidence or if it is found that it was based on a wrong decision on any question of law causing a miscarriage of justice, then the appeal must be allowed.

This may lead to a reversal of the finding and sentence of the appellant.

It is trite law that in all criminal trials, the burden of proof is always on the prosecution and it must be beyond any reasonable doubt.

- ***WOOLMINGTON V DPP 1935 AC 462.***
- ***JUDD V MINISTER OF PENSIONS & NATIONAL INSURANCE (1965) 3 ALLER 645***.

In order to do this I will outline the brief evidence adduced at the trial.

PW.1 Adikin testified that she knew the appellant as the best friend to **Watake Yoweri** her boyfriend. That on 31.01.09 she was coming back home at 9:00p.m. from Bison centre. When she reached the industrial area next to a mango tree, the appellant and **Yoweri** jumped down the mango tree. They both had pangas. She was with **Adanya Charles** also known as **Dabs**. That the appellant slapped Dabs with a panga. PW.1 decided to run away. That both **Ezra** and **Yoweri** pursued her and the appellant cut her with a panga on the left arm above the elbow. That after, he left her and ran for **Dabs** and **Yoweri** continued to cut her using a panga on the arm and breast. PW.1 reported to her father **Okello Amos** who rushed her to hospital. Her right arm was amputated, wounds stitched and she spent 3 months in hospital. PW.1 further testified that she was in a relationship with **Wetaka Yoweri** for 9 months but refused him because she was pregnant and hated him. That she had no grudge with the appellant.

PW.2 was Okello Amos Odong a laboratory Assistant at Tororo Hospital. He testified that he knew the appellant when at police because of this case. PW.2 did not know **Wetaka Yoweri**. That on 31.1.09 while in his house at 9:00p.m, his wife **Aida Okello** heard PW.1 crying outside the house shouting that **Wataka** had killed her. PW.2 opened the door and saw PW.1 with cut wounds on the right and left arms. He made an alarm which the wife answered and they tied the wounds and took PW.1 to Tororo Hospital.

PW.3 was **Adania Charles**. He testified that he saw **Ochola Ezra** on the day they attacked them in January 2009 at about 10:30p.m. He was from town with PW.1 after drinking at Bison centre. They were heading home and then 2 people jumped

from a nearby mango tree. One (the appellant) slapped him with a panga. That he saw him because there was moonlight. That the attackers chased them and he hid in a bush but saw the appellant cut PW.1. After which they ran away. That although he had taken a bottle of beer, he was sober.

In his defence as DW.1, the appellant **Ochola Ezra** denied being a friend to **Yoweri**. That on 31 January 2009 from 9:00p.m, he was at home with his wife **Atiang Judith** and a friend called Wilson. They were conversing at his father's verandah. They were taking soda and beer till 10:00p.m when they went to sleep with the wife. Wilson went to his home. Then at 3:00a.m the wife received a phone call from **Adikini Diana** saying the husband i.e. DW.1 cut **Diana**'s hand and she was in hospital. Next morning he was arrested.

DW.2 Atiang Judith testified that on 31.1.2009 at 9:00p.m. She was with Ezra **Ochora DW.1** at corner Osukuru together with Wilson who had come to visit them. That they stayed up to 10:30p.m. Thereafter they went to rest. Then at around 4:00a.m she got a missed call. Soon after the caller, called again. It was Diana's mother. She told her that Diana had been injured by **Yoweri** and they were in hospital. At 6:00a.m, DW.2 went to hospital and **Diana** told her **Yoweri** was with the appellant when he cut her. DW.2 told her she was with **Ezra** at the time and he could not have cut her.

DW.3 was **Bisombi Wilson**. He testified that on 31 January 2009 from about 9:00p.m up to 10:30p.m he was with the appellant (DW.1) and his wife (DW.2) at the appellant's father's house. From there he left the two entering their house.

This was the evidence adduced at the trial and on which the learned Chief Magistrate based to convict the appellant.

With the above outlined position of the law and evidence I will go ahead and deal with the grounds of appeal as argued in the submissions.
Ground 3 of the appeal was abandoned.

Ground 1:
In his submission, learned counsel for the appellant submitted that on the available evidence, the appellant was not identified by the single identifying witness because it was a surprise attack. That the moment **Yoweri** and the 2nd assailant stepped on the ground, **Yoweri** who is stated to be the husband of PW.1 pursued PW.1 and cut her arm. Therefore it was not possible for PW.1 to see the 2nd assailant because he did not come near. That the moment the assailant jumped from the tree, PW.1 was frightened, in pain and fear. That the conditions for correct identification were difficult.

Further that there was no time mentioned to indicate how long the attack lasted nor was there evidence of the distance between the assailants and the victim. That it was not revealed how bright the moonlight was and whether the victim was familiar with the attackers.
That ground 1 should therefore succeed.

In his submission, **Mr. Ayebare** the Resident Senior State Attorney Mbale supported the findings of the learned Chief Magistrate that the appellant was properly identified because;

(i) There was sound moonlight.

(ii) The appellant was well known to the victim as her boyfriend's friend with whom they had met before.

(iii) The assault took a reasonably long time as it involved a chase.

(iv) The offence was committed at a short range, i.e. there was direct contact in the exercise of cutting.

(v) The victim was consistent in her testimonies as to the identity of her attackers. That she shouted the name and told her father straight away when she reached home.

(vi) That PW.3 confirmed the identity of the appellant which removed the case from the class as a single identifying witness rule.

(vii) That the appellant first slapped what he called **Dabs** with a panga before he descended on PW.1.

The learned State Attorney further submitted that if a witness states that he/she identified the accused by help of moonlight then it becomes obvious that the moonlight was bright enough. That the offence was not completed under trees and it is not possible to determine the level of friendship and being frightened is not the same as being unconscious. That one remains with senses. That there is no merit in ground 1 of the appeal because proof beyond reasonable doubt does not mean proof beyond a shadow of doubt.

After a careful re-evaluation of the evidence adduced by both sides at the trial, I am inclined to agree with the submissions by **Mr. Jungo** learned counsel for the appellant.

The incident of attack took place at night between 9:00p.m- 10:00p.m. It is true as submitted by learned counsel for the appellant that the trial court relied basically

on the evidence of PW.1 on the issue of identification. The evidence reveals that this was a surprise attack which was not expected by PW.1. When she realized she was in danger she immediately decided to run away and soon after she was cut. There is however no evidence to prove that it was the appellant who cut the complainant together with **Wataka Yoweri**.

The appellant denied being with **Wataka Yoweri** that day or being a friend to him as asserted by the complainant. This placed a strong burden onto the prosecution to prove the contrary.

Clearly the time of attack was a time where conditions for correct identification were difficult given that it was at 9:00p.m. It is not clear from the evidence how long the attack took. There was therefore no evidence to support the conclusion by the learned Chief Magistrate that;

> *"……..…the identification was not based on a fleeting glance. Adikini identified the accused from the moment he jumped down from the tree up to the time when the accused is said to have inflicted injuries on her. The time the accused was under observation was long enough for the complainant to form her opinion as to the quality of identification*."

The longer the time of observation and the conditions prevailing are important aspects to assist court establish whether there was correct identification or not.

The testimony by PW.1 seems to indicate that she had no time to observe the assailants that is why she tends to blame the assault on her estranged friend who was not on trial.

Further I agree with the submission by the appellant's learned counsel that there is no evidence from PW.1 to indicate the distance between the assailants and herself. The conclusion by the learned Chief Magistrate that the distance was 2 metres cannot be supported. By saying that,

> "*I would probably estimate the distance between the accused and the victim to be less than two metres……*"

Was an assumption based on mental gymnastics.

As rightly submitted by learned counsel for the appellant, the nature of moonlight did not come out in prosecution evidence. The witnesses did not describe the moonlight to be bright or otherwise. It is prosecution that ought to have brought out this aspect during its examination of the witnesses. A blanket statement by the learned Chief Magistrate that;

> "*The moon is a good source of light for identification at night*" cannot be supported because it is a generalized assumption. Other prevailing conditions ought to have been taken into account especially the fact that the assailants jumped from a mango tree which could have prevented light to assist the complainant. Merely stating the name of the appellant without more did not give a clear description of him during the attack. It was a general description.

Apart from the complainant's evidence, there was no other independent evidence to corroborate her testimony. The investigating officer did not testify to clarify

why he arrested the appellant. The evidence of **PW.3 Adaing Charles** did not help.

Infact PW.3 revealed that they had been drinking with the complainant at Bison Centre at 10:30p.m.

It has been repeatedly held by the Supreme Court that 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 a prior threat to the deceased (in this case the complainant) naming of the assailant to those who answered the alarm and ……" ***Moses Kasana v. Uganda [1991-93] HCB 47***.

A witness may be truthful and his/her evidence apparently reliable and yet there is still a risk of an honest mistake in identification – ***KIWANUKA V UGANDA [1977] HCB 2***

Greatest care has to be had if conviction is based on the evidence of identification when conditions were difficult like in the instant case.

There was no evidence to support the submission by the learned Senior Resident State Attorney. The evidence the learned Magistrate relied on to convict was not on record which was a grave misdirection. There was no evidence to prove beyond any reasonable doubt that the appellant was properly identified to sustain a conviction. I will accordingly uphold ground 1 of the appeal.

Ground 2 and 4:

Learned counsel for the appellant faulted the learned Chief Magistrate's finding that the appellant was placed at the scene of crime by the prosecution evidence. That the appellant put up a strong defence of alibi.

On the other hand **Mr. Ayebare** learned counsel for the respondent supported the finding of the learned trial Magistrate because the evidence of identification was admitted and that the victim knew the attackers.

On these grounds, I will also agree with the submission by learned counsel for the appellant.

When I re-evaluated the evidence, I formed the opinion that the defence story and defence of alibi was believable and was not disproved by the prosecution evidence.

In his judgment, the learned trial Magistrate did not make any analysis of the defence version of where he was at the time of the alleged attack. There were no reasons for rejecting the appellant's defence of alibi. The evidence for the prosecution ought to have been examined and weighed against the evidence of the defence so that a final decision is not taken until the evidence has been considered. The strengths and weakness of each side should always be considered and weighed as a whole. It should then be applied to the burden of proof in order to rule out any doubt ***ABDU NGOBI V. UGANDA SCCA 10/1991***.

In the instant case the evidence by the appellant DW.1 was minutely corroborated by that of DW.2 who received a call from the mother of the complainant (PW.1). DW.2 went to hospital and told PW.1 and her mother that at the time of attack she

was with the appellant and **Wilson Bisombi** at her home. This version of the story was not adequately disproved by the prosecution evidence which did not adequately show that the appellant was properly identified during the attack. The learned trial Magistrate erred when he based the conviction of the appellant on the weak prosecution case.

Finally, the medical evidence Exhibit 1 does not indicate that the victim's life was in danger to warrant prosecuting the appellant on a charge of attempted murder. According to the complaint on page 3, the offence cited was unlawful wounding.

On the whole, I will find that a miscarriage of justice was occasioned to the appellant. The appellant lost a chance of acquittal by reason of the mistakes and irregularities in the evaluation of the evidence at the trial.

For the reasons I have given above I find it unsafe to allow the appellant's conviction to stand. I will uphold all the grounds of appeal and order that the conviction of the appellant be quashed. The sentence is set aside.
The appellant will be acquitted and set free.

Stephen Musota

JUDGE

02.05.2013