THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CR-CN-0009-2008
(ORIGINATING FROM TORORO CRIMINAL CASE NO. 56/2006)
UGANDA.....APPELLANT
VERSUS
ASAYA ANDREW.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal against the Judgment and Orders of the Chief Magistrate **RUTAKIRWAH PRAFF**, acquitting the Respondent on two counts of Reckless or dangerous driving c/s 4(1) (a) and causing bodily, injury through reckless driving c/s 2(1) of the TRA.

The memorandum of appeal listed 2 grounds of appeal.

1. That the learned Magistrate erred in law and in fact when he failed to evaluate the evidence on record thereby arriving at a wrong decision.
2. That the learned trial Magistrate misdirected himself in disbelieving the appellant's evidence in preference to the version given by the defence thereby arriving at a wrong decision.

On ground 1 the State argued that evidence of PW.1, PW.2, was sufficient to show that the accident actually took place; alongside evidence by PW.4 and PW.5. He referred to section 45 of the Evidence Act to support the assertion that evidence of PW.4 (Police Officer) and PW.5 (Doctor) though they were not the authors of the

documents they presented ought to be believed. Referring to the case of ***Uganda v. Sowedi Ndosire (1988-90) HCB 46,*** the learned State Attorney argued that unless inconsistencies are grave enough to point to deliberate untruthfulness should be ignored.

Counsel for Respondent on the other hand in submission maintained their earlier submission citing the case of ***DAYA V. R (1964) E.A. 529***, to support their argument that a court cannot convict a person of exceeding the speed limit on pure opinion evidence. They further agreed with the findings of the trial Magistrate on the evidence that accused was never properly identified, and the trial Magistrate reached a proper finding.

The duty of the first appellate court is to subject the evidence to a fresh scrutiny and reach its own conclusions thereon. See ***Kifamunte Henry vs. Uganda SCCA 10 of 1997***, **PANDYA V. R (1957) E.A. 336.**

I will therefore review the lower court evidence as here below.

PW.1 Ogoola Sam, stated that he knew accused as a customer he used to carry on his Boda Boda. On the fateful day while on his bicycle carrying timber and about to cross Tagore road opposite shell, he saw a speeding vehicle Toyota Hilux from Tagore road, which didn't stop but didn't indicate where it was going. It knocked him and he fell on the Bonnet of the pickup. The driver didn't stop, but accelerated and the said PW.1 knocked his knee on the right leg, he slid down and his left leg got stuck there.

He held on some metals under the vehicle, got burnt by the exhaust pipe on his right hand. The vehicle dragged him for 1½ km without stopping. The vehicle later stopped after **Keta** (a businessman) threw a log in the road which forced it to stop. Accused then packed and Keita rushed to bring a torch and began pulling PW.1'S leg out of the vehicle. He was later joined by **PW.2 Orach Denis** and **Bebe**.

He was assisted and taken to hospital by accused. After discharge he made a report to police. Accused tried to have a settlement out of court and offered shs. 600,000/= which he rejected.

PW.2 ORACHI DENIS confirmed that he saw the accident happen, and he indeed followed the vehicle and found its driver trying to remove someone from underneath. They jacked the vehicle and assisted accused to remove the victim. They advised him to take the victim to Hospital.

PW.3 Ogola Ida, confirmed that she had received information about the accident. She went to hospital and found her son (PW.1) admitted. She saw the injuries on his body, and PW.1 told her it was **Asaya** (Respondent) who had knocked him (PW.1). Later accused (respondent) contacted her so that they settle the matter but negotiations failed hence this case.

PW.4 Turyahirwa, appeared on behalf of AIP Angura Sam who drew the sketch plan; and confirmed to court its contents.

PW.5 Kasajja Charles appeared on behalf of **Mr. Ogutu** who signed the PF.3. and confirmed its contents to court.

DW.1 Asaya Andrew, denied the charges and set up a defence of alibi alleging that on that day and time he was in his mother village at Mella, Magola, Iyolwa; Tororo District. He further claimed that he had used his personal vehicle Toyota Corona UAD 399R, and had left the Government car LG 0050-45 at home packed away securely. He claimed that the Inspector of Vehicles had subjected the vehicle to examination and had found no problem with it. He said the evidence led was not true but a frame up in order to extort money out of him.

DW.2 Oyo Athanasius and **DW.3 Okoth Bonifa**ce, both confirmed to court that they spent the date in question with accused in their village home at Mella, Iyolwa; Tororo.

The trial Magistrate after reviewing and hearing all the evidence concluded that accused was not liable on both counts.
My findings are as follows.

Ground 1:
That the Magistrate erred in law and in fact when he failed to evaluate the evidence on record arriving at a wrong decision.
The areas pointed out by the State where these failures are according to them is regarding the evidence of witnesses pointing at reckless driving. The findings of the trial Magistrate in my view, as far as evidence on record, are correct. The Prosecution failed to lead evidence of reckless driving c/s 2(1) of the Traffic and Road Safety Act, whose ingredients are that;

(i) Accused was the driver of the vehicle at the material time.
(ii) The accused must have acted with recklessness, dangerously and without regard to other road users.

(iii) Victim was injured on account of accused's reckless behaviour.

The prosecution has a burden to prove the case beyond all reasonable doubt. If there are major inconsistencies and contradictions in the evidence, which are not sufficiently explained, and they operate to cause doubt in the mind of court, such inconsistencies cast doubt on the prosecution's case and are always terminated in favour of the accused.

In this case, witnesses did not sufficiently place accused at the scene of crime. Only PW.1 claims to have identified him. However the circumstances of the identification were not favourable for him to positively identify accused. He said he was knocked, he fell on the Bonnet, he was under pain, his leg got stuck, his arm got burnt, he was rolling with the car for over 1 ½ km. It was at 11:00p.m and fairly dark. It was not possible without independent corroborative evidence to sustain the hypothesis presented by PW.1. The pain, shock, and hysteria that go with a sudden knock by a speeding vehicle cannot allow the level of alertness that PW.1 portrays in his statement. The conditions and cautions that go with evidence of a single identifying witness as laid down in the case of ***BOGERE MOSES & ANOR V. UGANDA (Cr. App No.1 of 1997 SC)*** were not sufficiently taken care of. The conditions of identification in this case were very difficult, and needed corroboration.

I therefore agree with the Chief Magistrate when he chose to disbelieve the evidence as full of fantasies. No error was committed and i find that the ingredients of the offences were not proved by evidence. A lot of questions remained unanswered, and the inconsistencies pointed out by defence counsel, went to the root of the case. I therefore find that Ground 1 of this appeal fails.

Ground 2:

That learned Trial Magistrate misdirected himself on the evidence in preference to that of defence.

From the discussion of ground 1, I find that the defence put up a defence of alibi, which was very strong. The three defence witnesses consistently stated that accused was at his home at time of accident. The State's evidence through PW.1, PW.2, PW.3, PW.4 and PW.5 was not strong enough to destroy this alibi. The defence successfully offered to court an explanation which it has no duty to prove.

The law on the defence of alibi was laid down among others in the case of ***FESTO ANDROA ASENUA AND ANOR. VS. UGANDA CR. APP. NO.1 OF 1998***.

An accused person has no burden to prove this alibi. The defence of alibi puts upon the prosecution a stronger burden to place the accused at the scene. I did not find on record any attempt by prosecution even to address court on this evidence by submission; or calling of other evidence capable of placing accused at the scene. On this ground alone the trial Magistrate was obliged to fault the Prosecution's case and find for accused as he did.

On this premise I find no merit in the second ground and it also fails.

In the result, I do not find any merit in this appeal. I uphold the Judgment and acquittal in the lower court, and I dismiss the appeal.

I so order.

Henry I. Kawesa

JUDGE

16.04.2014