IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., MANYINDO, D.C.J, AND PLATT, J.S.C.)

CRIMINAL APPEAL NO. 7 OF 1988

BETWEEN

LT. MIKE OCITI ……………………………………………… APPELLANT

AND

UGANDA ………………………………………………… RESPONDENT

(Appeal from the Judgment of the
High Court of Uganda at Kampala
(Mr. Justice Kato) dated 15/6/88
IN
HIGH COURT C. CR. SS. CASE NO. 73/87

The appellant is a former Lieutenant in the defunct Uganda National Liberation Army. He was on the 15th June, 1988, convicted by the High Court sitting at Kampala of the murder of one Eriabu Tumwine, contrary to Section 183 of the Penal code and was sentenced to death. He was at the same time acquitted of the murder of a Lieutenant Byaruhanga and the attempted murder of Mwesigwa (PW1). He now appeals against the conviction.

The prosecution's case was, briefly, that on 14th September, 1985 the appellant abducted Tumwine, PW1 and Lt. Byaruhanga at Bugolobi's "Middle East" and took them to a house in Bugolobi where he shot them with a pistol and cut Tumwine and Pw1 with an axe before he and other persons drove the victims and dumped them in a bush off the Kololo By-Pass, near Kololo Secondary School. Byaruhanga and Tumwine died during the attack but PWI managed to escape at Kololo despite the severe injuries be had sustained. It is not quite clear whether the dead men died at Kololo or at Bugolobi.

The appellant denied the allegation at his trial and put forward the defence of alibi. He stated, in his unsworn statement, that at the time of incident he was with the then Eastern Command at Mbale in the Eastern Region.

The learned trial Judge believed the evidence of the sole eye witness PW1 that they had been attacked by the appellant who had shot Tumwine with a pistol and also cut him with an axe. The medical evidence showed that Tumwine had died from both gunshot wounds and the cut wounds. He disbelieved PWI's evidence that Byaruhanga had also been shot by the appellant in view of the medical evidence which showed that he had sustained cut wounds only.

The learned trial Judge also found that Mwesigwa had not told the truth regarding the assault on his person because he had testified that he had been cut with an axe when he had earlier on told Dr. Kakande (Pw6) who examined him for the purpose of this case that he had been cut with a Panga. It was because of these contradictions in the testimony of Mwesigwa (PW1) that the appellant was acquitted of the other two charges.

Three grounds of appeal were filed but only the first and third grounds were argued. The second ground was abandoned by Counsel for the appellant as it was similar to the first one. The complaint in the first ground is that the learned trial Judge erred in basing the conviction on the evidence of PWI which evidence was riddled with discrepancies and that in any case that evidence showed that the case against the appellant was a frame up.

In the third ground of appeal it was contended that trial judge had failed to properly consider the appellant's defence which he had rejected on grounds not supported by the evidence. With regard to the first ground of appeal, we are satisfied that the Learned trial judge properly directed himself and the Assessors on the burden of proof and on the possible danger of basing a conviction the evidence of a single witness. He rightly applied the rule in Roria v R EA 583 that before convicting an accused person on such evidence the court must satisfy itself that in all the circumstances it safe to do so.

In the case before us we think that the evidence of PW1 left a lot to be desired. After escaping from his assailants he was able to walk to the teachers' flats at Kololo Secondary School for assistance but unfortunately no one offered him any. We note that Pw1 was silent on his alleged meeting with PW5. In the event the evidence of Pw5 did not assist matters.

PWI did not in fact name his attacker until the appellant had been arrested. According to the appellant he was arrested on 23rd December, 1985 by a Major Ocan. PWI apparently first implicated him in his statement made to the Police on 11th April, 1986. In Our opinion it was

wrong for the prosecution not to have led evidence regarding the arrest of the appellant. A trial court is entitled to know the circumstances surrounding the arrest of an accused person.

Perhaps the trial Judge would have done well here to call for evidence of arrest himself. Instead he indulged in conjecture and said: - "I am sure Major Ocan could not have proceeded to arrest the accused if he was aware that the accused was not in Kampala by the time the murders took place."

If by this the learned trial Judge meant that there must have been some evidence implicating the appellant with the crime, then we say, with respect, that that was a misdirection. Major Ocan should have testified as to why he arrested the appellant.

The Police statement of PW1 was put in evidence only for the purpose of identification. It was not proved and did not therefore become an exhibit. It was not right therefore for the trial Judge to treat it as an exhibit. It is clear from that statement that PWI did not know the name of the appellant at the time of the incident. He learned of the name later from the late Byaruhanga. To that extent the statement contradicted his evidence that he knew the appellant by name well before the incident.

Then there is the firm finding by the trial Judge that Mwesigwa was:-

"Not a truthful witness as far as the circumstances in which he was injured is concerned (sic.)".

We have our own doubts whether the contradiction referred to was on an important point, or was actually falsehood as such. Whether the complainant had been cut by an axe or a panga made very little difference in the circumstances of this case, because there was corroborative medical evidence that he had been seriously injured and the opportunity to identify the appellant was not confined to this attack. The type of weapon so used was therefore not of great importance. The considerations which we would have thought of greater consequence were that this sole witness to the identity of the appellant was not proved to be consistent, nor corroborated, on the issue of identity. however, if a sole witness to the identify of an accused found to be deliberately lying on part of the case, great care must be taken in considering whether the false part, of the testimony can be excluded legitimately from the rest of his evidence, or whether, it affects his whole evidence. Generally speaking, where a sole witness as to identify is found to be deliberately lying on an important aspect of his evidence, it is not logically possible to believe the witness in part and reject his evidence in part.

In this case it seems to us that other evidence could have been called to support that of Pw1. For example, Naume Kadecemba (PW4) stated that she was arrested with Pw1 and the deceased persons at her bar/shop at Bugolobi but she was subsequently freed. She did not know the persons who arrested them. In the circumstances it might perhaps have been useful if an identification parade was conducted. There was also evidence that a Dr. Okullo who happened to be at PW4's bar/shop and intervened when the attacker was pressing the late Lt. Byaruhanga to identify himself, but Dr. Okullo was not called.

In view of the foregoing we find merit in the first ground. It succeeds. It follows that the remaining ground must also succeed since there was no evidence that the appellant in fact participated in the crime. We would, however, like to comment on the observation by the trial Judge that the appellant should have disclosed his alibi at the earliest opportunity upon his arrest when he was arraigned.

There was no evidence that the appellant made any statement to the police or Magistrate, so he cannot be blamed for not disclosing his defence then. When he was taken to the Magistrate he was clearly told not to plead under Section 174 of the Magistrate's Court Act. He was also advised that he was free to reserve in defence until his trial which he did. When he was arraigned in the High Court he was only required to plead to the charge. Clearly that was not the time for him to defend himself. The earliest opportunity came when he was put on his defence after the prosecution had closed its Case.

In the result this appeal is allowed. The conviction is quashed and the appellant is to be released from custody unless he is being held on other lawful grounds.

DATED at Mengo this 30th day of April 1990.

SIGNED:
S.W.W. WAMBUZI
CHIEF JUSTICE

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

H.G. PLATT
JUSTICE CF THE SUPREME COURT

I certify that this is a true
copy of the original.

B.F.B. BABIGUMIRA
REGISTRA SUPREME COURT