THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CRIMINAL APPEAL NO.8/97

(COR.AN: WANBUZI, C.J., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHANBA, J.S.C.)

BETWEEN

KAMESERE MOSES :: APPELLANT

versus

UGANDA ::RESPONDENT

(Appeal against a decision and judgment of the Court of Appeal of Uganda at. Kampala (Manyindo, D.C.J., Byamugisha, J., Kireju, J.) dated the 20th day of June 1997 in Criminal Appeal No. 24/96 originating from the Nigh Court Criminal Session case No.288 of 1995)

JUDGMENT OF THE COURT

This is a second appeal in a criminal case which originated in the High Court. Moses Kamesere, in this judgment called the 'appellant", was charged with murder contrary to section 183 of the Penal Code on three counts, and with attempted murder contrary to section 197 of the Penal Code on the fourth count. The High court convicted him on all counts as charged and sentenced him to death on each count of murder, but omitted to sentence him on the fourth count. The Court of Appeal dismissed his appeal thereto, hence the appeal to this court.

The facts which gave rise to the charges and the convictions are brief and uncomplicated. A man called Eriabu Kamongoli resided with his family at Kibira-Kyera village Kagulu sub county, in Kamuli district. The young family in addition to Eriabu himself comprised of his wife, three daughters aged about 9, 6, and 3 years respectively and a son aged between 4 and 5 years. There was also a niece who lived with the family. In the night of 9.8.94, Eriabu Kamongoli and his said family slept in their house which was made of unbaked bricks. They were awakened in the deep

of night by banging on the external wall of the house. Part of it gave way causing a hole in the wall. On realising that they were under attack by several assailants, Eriabu Kamongoli and the niece ran out of the house and escaped to safety. The wife and the three daughters were not so lucky. While the former was helping the latter to also escape to safety, they were intercepted in the courtyard by one of the assailants who attacked and cut them with a panga. One of the daughters who was cut in the neck died on the spot instantly. The other two daughters who sustained deep cut wounds in the abdomen and lumber regions respectively, died shortly after at Kamuli Hospital. Their mother who sustained a cut wound at the back of the head and two cut wounds on the shoulders, survived the injuries. The son who apparently remained in the house throughout the incident, presumably unnoticed by the assailants, was not harmed. Following the incident, Eriabu Kamongoli, his wife and his son, severally told diverse witnesses, including the police, that they had recognised Moses Kamesere, the appellant, as one of the assailants. Two days later, on 11.8.94 the appellant was arrested and charged with the offences mentioned above. A second person who was arrested separately and charged with the same offence was subsequently acquitted by the High Court which found at the close of the prosecution case that there was no evidence implicating him with the offences. He is not subject of this appeal.

At the trial, the substantial contentious issue was whether the appellant had been properly and correctly identified as one of the assailants. The prosecution called three eye witnesses. The son Kitimbo-Kalaamira was called as PW2. Because of his tender age and lack of understanding of the nature of an oath, he did not testify on oath. He was however permitted to make an unsworn statement to the court, but in apparent error was not subjected to cross-examination. The other two eye witnesses were Eriabu Kamongoli and his wife, Rose Tiberowooza who were called as PW3 and PW7 respectively. They gave evidence on oath arid were duly cross-examined. All three, PW2, PW3 and PW7 testified that the appellant, whom they knew well, as he had previously lived in the same village as their neighbour, was among the assailants who attacked their home in the fateful night. PW2 and PW7 were specific that it was the appellant who had cut the three young girls to death and inflicted the cut wounds on PW7. Furthermore, PW7 testified that prior to being hacked to death the deceased, in respondence to the appellant's question whether they knew who he was, had answered in the affirmative, saying he was Kamesere. The other evidence adduced to implicate the appellant was from PW6, the police

officer who investigated the case. He testified inter alia, that an hour after re-arresting the appellant he took him to the scene of crime where there were foot prints suspected to have been left by the assailants. The appellant was asked to match his foot with one of the foot prints and it was found to fit exactly. PW6 also said tyre sandals (lugabire) said to belong to the Appellant were found at the scene.

In his defence the appellant also gave evidence on oath and was cross-examined. He denied the prosecution evidence implicating him with the offences. He asserted that he did not commit the offence or participate in their commission, and that he was not at the scene of the crime. He gave account of his having been at his home in Bwiza village in Namasagali sub-county, both in the night of 9.8.94 and throughout the day and night of 10.8.94. He further testified that on 11.8.94 while he was escorting his father to the latter's home he was stopped by Local Administration Police who were intercepting graduated tax defaulters at the road block near Kamuli town, and was detained there until police from Kamuli police station came and rearrested him on charges of murder which he knew nothing about.

In her judgment the learned trial judge directed herself on the law applicable to the issues in the case and carefully reviewed and evaluated the evidence. She held that the conditions during the commission of the crimes were favourable to correct identification of the assailants by the eye witnesses. She expressed doubt as to whether PW2 had independently identified the appellant or was influenced by what he might have heard from his parents. She however was satisfied that PW3 and PW7 were truthful witnesses and ruled out the possibility of their having been mistaken in the identification of the appellant. She held that the evidence by PWE of having found at the scene of crime a foot print that matched the appellant's foot and tyre sandals said to belong to the appellant strengthened the evidence of identification. She rejected the defence evidence of alibi as a fabrication. In agreement with the unanimous opinion of the assessors, she held that the appellant had been correctly identified as one of the assailants and accordingly convicted him as charged.

On appeal to the Court of Appeal it was contended on behalf of the appellant that the learned judge had erred in finding that the appellant had been properly identified "when the conditions favouring proper identification did not exist;" and secondly in rejecting the appellant's evidence

of alibi. In its judgment, the Court of Appeal considered the ground of appeal and reevaluated the evidence. It noted with approval that the learned trial judge had not placed reliance on the unsworn evidence of PW2. On the other hand, it held that it was a misdirection on her part to find that the evidence on the foot print and the tyre sandals strengthened the evidence of PW3 and PW7, because these items had not been conclusively proved to belong to the appellant. However it held that there was other ample evidence implicating him; and in particular that it was satisfied that the appellant was correctly identified by PW3 and PW7 during the attack at their home, and that the appellant's alibi was correctly rejected as false.

The appellant appealed to this court on two grounds framed in the Memorandum of Appeal as follows:-

"1. The learned Appeal Court Judges erred in law and in fact in confirming the finding of fact of the trial judge especially on the issue of identification of the appellant having regard to the law of standard of proof to be applied in a capital offence where it should have been that as the offence is graver so ought: the standard of proof to be higher and the evidence to be clear.

2. The defence of alibi raised would accordingly be upheld since it would be destroyed if the higher degree of standard of proof were applied to the prosecution's testimony."
To say the obvious, the framing of both grounds offends r.61 (2) of the Rules of this court in that they are not concise but argumentative. In addition, in the form they are, it is difficult to comprehend the objections or issues being raised. However at the hearing in this court, Mr. Zagyenda counsel for the appellant, sought to argue the grounds together and condenced them into two simplified propositions. We agreed to consider the appeal on the substance of those propositions.

The first proposition was to the effect that the graver an offence charged is, the higher the standard of proof and the clearer the evidence must be, to prove and sustain a conviction of the offence. He maintained that within the established standard of proof required in criminal cases, namely "proof beyond reasonable doubt", there were different degrees of proof depending on the gravity of the offence to be proved. However he was not able to define or otherwise elaborate on the different degrees in that established standard of proof. Nonetheless in support of his

proposition he cited the decisions in MILLER vs MINISTER OF PENSION (l974) 2 ALL ER 372 per Denning J.; R vs SHARMPAL SINGH (1962) EA 13; and CHHABILDAS SOMAIYA vs R (1953) 20 EACA 144.

In MILLER vs MINISTER OF PENSIONS (supra) The English Court in the King's Bench Division was concerned with the standards of proof in respect of claims made under regulations governing pension's payable upon death of a member of the British Army. The standards were derived from interpretation of the regulations. The court held that it had been settled that in respect of cases falling within one set of the regulations, the standard of proof was, as in criminal cases, "proof beyond reasonable doubt', and that in respect of cases falling within another set of the regulations, the standard was one of "preponderance of probability" as in civil cases. There is no mention, let alone recognition, in that decision, of different degrees in the standard of proof in criminal cases, varying according to the gravity of the offence to be proved. On the contrary what the learned judge said in describing what "proof beyond reasonable doubt" means tends to negate that proposition. At p.373, Denning J., as he then was, referring to evidence required to refute a presumption under one set of the regulations said:

> "….for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence: 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice"

We agree that the degree of cogency of evidence necessary to prove guilt in a criminal case is, and has long been, settled. It is described as proof beyond reasonable doubt. In MILLER'S case (supra) it is not stated to be a standard or degree of proof for a specified or particular criminal offence but rather of proof required in any criminal case generally irrespective of the gravity of the criminal offence to be proved. The decision therefore is not authority for counsel's

proposition that there are different degrees of proof required to prove different criminal cases. We also find no support for the proposition in either of the other two cases referred to us by counsel. R vs SHARMPAL SINGH (supra) is a decision of the Privy Council upholding a decision of the Court of Appeal for East Africa, substituting a conviction of manslaughter for one of murder. The ratio decidendi of that case was that the circumstantial evidence on which the conviction was based did not prove malice aforethought which is an essential element for murder. The decision should not be misconstrued (as presumably was done in the instant case by learned counsel for the appellant) as holding that the standard of proof for murder is of a higher degree than that for manslaughter. The difference was in the elements constituting the two offences. In murder, two elements namely an "unlawful killing" and 'malice aforethought' have to be proved. In manslaughter, however, only "unlawful killing' has to be proved. In both cases the proof of each of those elements must be beyond reasonable doubt. In CHHABILDAS SUMAIYA'S case (supra) the decision was also concerned with sufficiency of the circumstantial evidence to prove forgery. It is irrelevant to the issue canvassed in the instant appeal. However, on surface, Mr. Zagyenda's proposition may claim support from observations made in a decision of the English Court of Appeal in BARTER v BARTER (1950) 2 ALL ER 458. The case was an appeal by an unsuccessful petitioner for divorce whose petition had been dismissed on the ground that the charges of cruelty made in the petition had not been proved "beyond reasonable doubt". The issue on appeal was whether it was a misdirection to put the standard of proof for a divorce petition which is a civil case, as high as the standard of proof for criminal cases. The Court of Appeal held that it was not a misdirection and dismissed the appeal. In opening his judgment Denning L.J., as he then was, made the following observations inter alia, at p.459 B-C:

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that in proportion as the crime is enormous so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability but there may be degrees of probability within that standard."

In our view these observations are not to hold that there are categories or different standards for proof of different criminal cases. Needless to say it would be an impossible task to demarcate and define such different categories and/or degrees of proof for the different crimes. What the learned Lord Justice was elaborating on, as is evident from reading his further observations, was the thought process, whereby, in arriving at a decision a reasonable mind is influenced by diverse factors including the nature and gravity of the decision to be made. The learned Lord Justice observed further at p.459 E-H:

'The degree of probability which a reasonable and just man would require to come to a conclusion- and likewise the degree of doubt which would prevent him from coming to it- depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or civil case, what the charge was and what the consequences might be, and if he was left in a real and substantial doubt on the particular matter he would hold the charge not to be established. He would not be satisfied about it.

What is a real and substantial doubt? It is only another way of saying a reasonable doubt, and a "reasonable doubt is simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion. So the phrase "reasonable doubt" gets one no further. It does not say that the degree of probability must be as high as ninety-nine per cent, or as low as fifty one percent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject matter. In some cases fifty one percent would be enough but not in others. When this is realised the phrase "reasonable doubt' can be used just as aptly in a civil case or a divorce case as in a criminal case."

It is noteworthy that his final observation at p460 was that if the trial court had put the proof higher by saying the case had to be proved "with the same strictness as a crime is proved in a criminal court" it would have been a misdirection. In a later decision by the same court in HORNAL vs NEUBERGER PRODUCTS LTD (1956)ALL, ER 970, it is even more evident that the observations were not recognition of varying degrees or standards of proof of different criminal cases but rather reflection on factors that affect decision making. After endorsing the same passage reproduced above, HODSON L.J. said at p.977 D:

“I would like to express my complete concurrence with the words used by Denning L.J. in the passage which I have cited. Just as in civil cases the balance of probability may more readily be tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.”

In the result we hold that in the proof of criminal cases, no offence is so grave as to require a higher degree of proof and none is so minor as to require a lower degree of proof, than the established standard of proof beyond reasonable doubt.

Mr. Zagyenda’s second submission was, to use his own words, that the evidence of identification in this case was poor. For illustration of his point he referred the court to the evidence of PW7 who testified that she had dropped her torch during the incident. Counsel appeared to suggest that that had impaired her ability to identify the appellant. With due respect to learned counsel however, he made the reference out of context. The evidence of PW7 on the matter was:

“I noticed the clothes Al was wearing. He had a black jacket with a shirt underneath. I was able to recognise him because the other assailants had also torches which they were flashing. Later I dropped mine. The assailants had two torches.’

More importantly, the evidence of identification of the appellant by both PW7 and PW3 was carefully considered by the trial court and re-evaluated by the Court of Appeal. Both courts were satisfied that the evidence was truthful and that the eye witnesses had correctly identified the appellant. In respect of PW7 the Court of Appeal ruled out any possibility of her having been influenced by an earlier allegation against the appellant. Their Lordships said:-

“PW7 who did not see her slain children again as she was in hospital when they were buried, was still able to describe where the injuries were inflicted on them. If she was able to see what happened to the children there was no reason why she could not identify the appellant who struggled with her and was at a very close range. Therefore we cannot say that PW7 named the appellant because of an earlier allegation that the appellant had attempted to set their house on fire. She must have seen him.”

This court cannot on a second appeal reverse that finding of fact. It can however as a matter of law inquire into whether the evidence on which the convictions were based constituted proof of the appellant's guilt to the legal standard, namely proof beyond reasonable doubt. Into this direction or arena however, learned counsel did not venture beyond his first proposition which we have considered and rejected. His assertion that evidence of identification was poor appears to have been made without any seriousness. With due respect to counsel he did not make the slightest effort to articulate or otherwise indicate in what way, if any, the evidence relied on by the Court of Appeal to uphold the convictions fell short of the legal standard of proof.

For our part we are satisfied that the evidence relied on was to the required standard. After expunging the inconclusive evidence as noted above, the Court of Appeal in upholding the convictions relied on the evidence of the eye witnesses, PW3 and PW7. Their Lordships had this to say in their conclusion:

"On the evidence, we are satisfied that the appellant was correctly identified by PW3 and PW7 during the attack at their home. The witnesses knew the appellant before the incident and they were assisted by the light from the torches the attackers had and that of PW7. PW7 spent some time with the appellant and was able to identify him. PW3 and PW7 informed their neighbours at different times soon after the attack that it was Kamesere who attacked them. This showed consistency on their part. In our view the appellant's alibi was rightly rejected as false as the prosecution evidence had clearly put him at the scene of the crime.'

There is no discussion of the standard of proof in the judgement of the Court of Appeal. Needless to say this is because the matter was not made an issue. We are satisfied however, that their Lordships were conscious of the legal standard of proof and were satisfied with the guilt of the appellant beyond reasonable doubt, as indeed any reasonable court possessed of that evidence would be.

In the result we find no merit in this appeal. It is accordingly dismissed.

Dated at Mengo this 15th day May 1998.

S.W.W Wambuzi,

Chief Justice.

J.W. N Tsekooko

Justice of the Supreme Court

A.N. Karokora

Justice of the Supreme Court

J.N. Mulenga

Justice of the Supreme Court

G.W. Kanyeihamba

Justice of the Supreme Court