1 Karokora JSC

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: WAMBUZI, CJ, KAROKORA, MULENGA, KANYEIHAMBA, KIKONYOGO, JJSC

CRIMINAL APPEAL NO. 13 OF 2000

BETWEEN

ODONG JUSTINE .....APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala of Kato Okello and Mpagi-Bahigeine, JJA, delivered on 30/11/99 in criminal appeal No. 73 of 1999)

JUDGMENT OF THE COURT.

Odong Justine, hereinafter referred to as the appellant was charged for murder of Apwony Okello contrary to Section 183 of the Penal Code in 1st count, for murder of Engur Charles Contrary to Section 183 of the Penal Code in 2nd count, and for attempted murder of Okaka contrary to Section 197 of the Penal Code in 3rd count. He was tried by the High Court sitting at Lira. He was convicted on each count on 30/11/99. He was sentenced to death on 1st and 2nd counts and to 15 years imprisonment on 3rd count. The sentences on 2nd and 3rd counts were suspended. He appealed to the Court of Appeal. His appeal was dismissed; hence this appeal.

The brief facts of the case as accepted by the trial Judge were as follows:-

On 16/10/95 at Abalokoti Minakulu in Apac District the two deceased persons Apwony Okello and Engur Charles together with Okaka Peter were drinking "malwa" together with other people. At around 3:00 pm the appellant came with a gun and opened fire at them. Apwony Okello died on the spot while Engur Charles died on the way whilst he

was being taken to hospital. Okaka Peter, (PW3) suffered fractures of both legs. He was treated and survived though maimed.

At the trial the prosecution called four eye witnesses Raimond Ayo (PW1) Albina Okari (PW2) Peter Okari (PW3) and Okari Odyek (PW4). PW1 stated that around 3:00 pm while he (PW1) was together with the deceased, Opaka Peter and others at Abalokoti market, the appellant came with a gun. He first fired in the air. He then turned his gun to those who were drinking. PW1 saw appellant shoot Apwony Okello and Engur Charles. PW1 at that juncture ran away without seeing what happened next. He stated that he knew the appellant before, because they are from the same village.

Albina Okari(PW2), Peter Okaka (PW3) and Okari Odyek (PW4) gave corroborative evidence. In particular, Albina Okari (PW2) stated she was at the scene and saw the appellant shoot Apwony Okello. She stated that after the appellant shot Apwony, she (PW2) turned to the appellant and said, "Odong you see!" You have shot Apwony Okello!" Soon she saw appellant shoot Engur. She again said to him," you see what you are doing! She again saw him fire and shoot Okaka Peter. She knelt before the appellant and pleaded with him and begged him to stop shooting people. At that juncture the appellant started chasing people. He said, "Today people will see". She stated that she thereafter saw the appellant walk towards his home. She stated the appellant is a son of her co-wife and had no grudge against him. On the other hand, Okari Odyek (PW4) stated that he first met the appellant at around mid-day and conversed with him. He asked him if he (appellant) was going to join them at their drinking group. The appellant told him he was going back early to his detach. However, at around 2:00 pm when he was at the drinking place, the appellant came and knelt down and fired and the bullets got Okello Apwony first. Another bullet caught Engur Charles. He then saw the appellant turn his gun towards where Okaka was. The bullet caught Okaka in both legs. He ran away. On return, he found Apwony Okello already dead. Engur died while being taken

to hospital. He sated that he knew the appellant very well because he is a son of his brother.

In his defence, the appellant denied the charges and stated that on 16/10/95 he was in Kitgum doing operation at Pajule but not at the scene of crime. The learned trial Judge rejected the defence of alibi and accepted the prosecution evidence.

The appeal to this court was based on three grounds, namely:-

1. The learned Justices of Appeal erred in law when they confirmed the conviction of the accused which was partly based on "a Memorandum of agreed facts" that was void for non-compliance with the law.

2. The learned Justices of Appeal made an error of mixed law and fact when they confirmed the conviction of the appellant without making reference to his defence of alibi and allegation of a frame up and grudge.

3. The learned Justices of Appeal made an error of mixed law and fact when they upheld the finding that the appellant was correctly identified.

When the appeal came up for hearing, Counsel for the appellant abandoned the first ground, rightly so in our opinion, because both the trial Judge and the Court of Appeal never relied on the evidence contained in the Memorandum of Agreed facts under Section 64 of the Trial on Indictment Decree.

We now turn to the 2and and 3rd grounds of appeal which we shall deal with together. The thrust of Mr. Tusasirwe's submission for the appellant was that the Court of Appeal

failed in its duty to re-evaluate the evidence and that if it had done so it would have found that the evidence of identification did not rule out possibility of mistaken identity or even of frame-up because of grudge and that the appellant's defence of alibi had not been negatived. He argued that although there was evidence that the murder took place at 3:00 pm and that the appellant was known by witnesses, there were other circumstances which cast doubt on the identification.

Mr. Okwonga, Senior State-Attorney, on the other hand, agreed with findings of the lower courts and supported both the convictions and sentence. He contended that all the witnesses had properly identified the appellant at the scene of crime. He submitted that the four eye witnesses saw the appellant shoot the victims at 3:00 pm during broad day light. They knew the appellant as a villagemate. Odyek (PW4) is a paternal uncle of the appellant, a fact that was admitted by the appellant. Albina Okori (PW2) wife of Odyek (PW4) talked with the appellant at the scene of crime and knelt before him, pleading with him to stop shooting people.

He concluded that the evidence of Okaka Peter (PW3) who was the victim of the shooting at the scene was strong corroboration which pinned the appellant down to commission of the offence.

On the issue of the grudge, Mr. Okwonga submitted that although the appellant alleged that there was a grudge between him and Odyek (PW4) when Odyek testified, the issue of grudge was never raised during cross-examination. It was contended that it was inconceivable that Odyek PW4 could influence all the witnesses to give evidence consistent with his to the effect that they saw the appellant shoot the victims at the scene of crime.

We agree that on a first appeal from a conviction by a Judge, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to rehear the case and to reconsider the material evidence before the trial Judge. The appellate court must then

make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge who saw the witnesses. But there may be other circumstances quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant the appellate court in deferring from the judge even on a question of fact turning on credibility of a witness whom the appellate court has not seen. See Pandya vs R (1957) EA 336; Ruwala vs R (1957) EA 570; Okeno V Republic (1972) EA 32. Needless to say that failure by the first appellate court to re-evaluate the material evidence as a whole constitutes an error of law.

The question for our consideration now is whether the Court of Appeal failed in its duty to reappraise the evidence before upholding the decision of the trial court.

In our decision of Kifamunte Henry v Uganda (SC) Criminal Appeal No. 10/97 (unreported), we pointed out that except in the clearest of cases, we as a second appellate court, are not required to re-evaluate the evidence like a first appellate court. In our view, the instant case is one of such clearest of cases which make it incumbent on this court to re-evaluate the evidence. See also Bogere Moses & Another v Uganda (SC) criminal Appeal No. 1 of 1997 (unreported). This is especially so, because it is apparent from its judgment that the Court of Appeal did not evaluate the evidence as a whole and in particular in respect of the evidence on identification together with the alibi.

The Court of Appeal did not deal with the defence of alibi, although it had featured before the trial court. We note that the learned trial judge was alive to the principle of law which places the burden on the prosecution to disprove the defence of alibi. However, it appears that he was not conscious of the requirement to consider the evidence as a whole. For instance, in his summing up notes to the assessors on the alibi he directed them as follows:-

> *"The accused raised the defence of alibi whereby he is not supposed to prove it in court. It is the prosecution to lead*

evidence destroying the alibi. If you believe the prosecution that there were four eye witnesses who identified the accused and placed him squarely at the scene of the crime, then you will find that this defence of alibi has been destroyed."

Then in the judgment, after reviewing the evidence of Albino Okari (PW2) the learned trial Judge held as follows:-

"It is therefore clear that the accused was properly placed at the scene of the crime. His alibi was accordingly destroyed. It is not conceivable that the accused could have been in two places at the same time i.e at Pajule in Kitgum and Minakulu in Apac District or Bobi about 10 miles from the scene of crime at the same time."

This court has in very many decided cases stated that the starting point in dealing with evidence of identification by eye-witness in criminal cases is that a court ought to satisfy itself from the evidence whether the conditions under which identification came to be made were or were not difficult and so warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold conviction, unless it is satisfied that mistaken identity is ruled out. In doing so it must consider the evidence as a whole, namely the evidence if any, of factors favouring correct identification together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to the rest of the evidence. See Suleiman Katusabe v. Uganda (SC) criminal Appeal No. 7 of 1991 (unreported) where this court held inter alia:

"It is the duty of the trial Judge both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. It is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed no single piece of evidence should be weighed except in relation to all the rest of the evidence".

We reiterate the above principle. We think that in the instant case the defence of alibi was rejected mainly because through the evidence of four eye witnesses the accused had been put at the scene of crime. We would point out that we disapproved of that approach in the case of Bogere Moses & Another v. Uganda (supra) when we held inter alia:-

> *"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."*

Needless to say that we found the evidence of Albina Okori (PW2) and Okori Odyek (PW4) must be considered carefully together with the defence of alibi. First, Okori Odyek (PW4) an uncle of the appellant met the appellant at mid-day when he (witness) was returning from the Trading Centre. He asked the appellant if he was going to join their drinking group. The appellant told him that he was returning to his detach early. After that appellant left while Odyek (PW4) proceeded to his home. At around 2:00 pm when Odyek (PW4) was at their drinking place with other people, the appellant came. He first fired in the air. He thereafter knelt down and fired several bullets killing Okello on the spot and injuring Engur who died on the way as he was being taken to hospital. Okaka Peter, (PW3) was shot in both legs. After shooting those people, he ran away. The evidence of Albino Okori (PW2) showed that she talked, pleaded and persuaded the appellant to stop shooting people. The appellant spoke to her and told her "today people will see."

This witness (Albino Okori PW2) together with her husband Odyek (PW4) could not have been mistaken as to the identity of the appellant. The appellant stated in his evidence that he was in his detach at Pajule in Kitgum at the material time in question and that he had a grudge with his uncle (Odyek Okori PW4) over a piece of land, but then there was no evidence of any grudge between the appellant and Ayo (PW1) and Okaka (PW3) who gave consistent evidence with that of Odyek (PW4) and Albino Okora (PW2).

In our view, although the appellant claimed that he was in his detach at Pajule in Kitgum at the material time in question, Odyek (PW4) met him in the village around mid-day before the attack on the victim. When Odyek (PW4) asked the appellant whether he would join them at their drinking place, the appellant intimated that he would be returning to his detach early. Although he might have been stationed at Pajule in Kitgum, he was seen in the village before the attack and during the shooting of the victims at Abalokoti market at the material time in question.

On full consideration of the whole evidence we are satisfied that his claim that he was in Kitgum at Pajule at the material time in question was rightly rejected as false in view of the evidence of Okori Odyek (PW4) who first met the appellant in the village around mid-day and then later saw him at the scene of crime when he was drinking with Ayo (PW1) Albina Okori (PW2) and Okaka (PW3) in Abalokoti market. Furthermore, in our view, his claim that Odyek (PW4 testified against him because of the grudge he had with him over a piece of land cannot stand in view of the evidence Ayo (PW1) Okaka (PW3) and Albino Okari (PW2) which corroborated the evidence of Odyek (PW4).

On the issue of identification, the factors which Mr. Tusasirwe highlighted from the evidence, as having been obstacles to proper identification were that there was confusion when the assailant fired at the drinking group as a result of which identification by witnesses of the assailant became difficult. However, witnesses were not challenged as to their identification of the assailant having been hampered because of the shooting. Secondly, it was contended that because of drink, power of observation was impaired; but with due respect, no such evidence was led. Thirdly, that the assailant was wearing a hat

on his head as a result of which witnesses could not see and identify the face of the assailant but at no time in the proceedings was this hat raised as an obstacle. Fourthly, that there were many trees at the scene as a result of which witnesses could not properly identify the assailant. When Albina Okori (PW2) was confronted in cross-examination, she stated that despite the trees at the scene of crime, she properly identified the assailant whom she knew as a villagemate and a son of her brother-in-law. All the four eye witnesses stated they knew the appellant before and saw him shoot the victim at around 3:00 pm and properly identified him.

The ground argued before the court was that the trial court erred in law and fact in holding that the appellant was properly identified. After analysing the evidence of identification the learned Justices of Appeal held that the law governing identification is as follows:-

> *"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.'*

They cited the case of Abudalla Nabulele & Another v. Uganda criminal appeal No. 9 of 1978 and Moses Kasana v. Uganda (SC) cr. Appeal No. 12 of 1981 (unreported) for the above proposition. They then went ahead to show how conditions favouring correct identification existed and stated:-

> *"We agree with Mr. Opolot that the conditions favouring correct identification existed, the incident took place in a broad day light between 2:00 pm and 3:00 pm; all the identifying witnesses had known the appellant before.*

Okari Odyek (PW4) is even his own paternal uncle who could not have mistaken him in day time like that. Even Albino Okari, wife of his own paternal uncle whose home is hardly 150 meters from his (appellant) own had time to plead with him to stop firing at people. That indicated that she had properly identified him. She even dispelled the fear that she might have been obstructed by the many trees at the scene from properly identifying the appellant when she answered in cross-examination thus:

'that place was full of trees. I saw the accused without any obstruction.' As conditions favouring correct identification there was no need to look for other evidence to support the correctness of the identification and to make the trial court sure that there was no mistaken identification ……"

We agree with the Court of Appeal that the appellant was rightly identified.

In the result grounds 2 and 3 must fail.

Before taking leave of this case we wish to comment on failure to adduce essential evidence. Mr. Tusasirwe, submitted that the absence of any evidence of any report to the police investigation and arrest of appellant cast doubt on prosecution case.

There was no evidence that there was any report made to Police Station concerning this case. There is no evidence to show how, when, where and by whom the appellant was arrested. We would like to re-echo Sir Udo Udoma CJ, as he then was in Rwaneka v Uganda (1967) 768 at page 771 when he stated;

"Generally speaking, criminal prosecutions are matters of great concern to the state; and such trials must be completely within the control of the police and the Director of Public Prosecutions. It is the duty of prosecution to make certain that Police Officers who had investigated and charged an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contest between two private individuals."

However, this does not mean that the absence of such evidence is necessarily fatal to prosecution case. For instance, this court held in the case of Alfred Bumbo & others v. Uganda (SC) Cr. Appeal No. 28 of 1994 (unreported) as follows:-

'While it is desirable that the evidence of a police investigating officer and of arrest of an accused person by the police, should always be given where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule be fatal to the conviction of an accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charges."

The evidence available in Alfred Bumbo case (supra) was sufficient to prove the case beyond reasonable doubt. Likewise, we think that the evidence in this case has been sufficient to prove beyond reasonable doubt that the appellant committed all the three offences.

We therefore find no merit in this appeal which is dismissed.

Dated at Mengo this ..2nd.....day of September, 2001.

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S.W. WAMBUZI,
CHIEF JUSTICE.

.....
A.N. KAROKORA,
JUSTICE OF THE SUPREME COURT.

.....
J.N. MULENGA,
JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA,
JUSTICE OF THE SUPREME COURT

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L.E.M. MUKASA-KIKONYOGO
JUSTICE OF THE SUPREME COURT