THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AAT KAMPALA

CRIMINAL APPEAL NO.060 OF 2011

(ARISING FROM MASAKA HIGH COURT SESSION N0. 0081/2004)

MUGAMBE FRANCIS..... APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORUM: HON . MR. JUSTICE. A .S. NSHIMYE. JA
HON. MR. JUSTICE. ELDAD MWANGUSYA .JA
HON. MR. JUSTICE.RICHARD BUTEERA. JA

JUDGMENT OF THE COURT.

The appellant being dissatisfied with the decision of Hon. Mukiibi Moses J of the High Court sitting at Masaka on 2.10.2000 appealed to this court against both conviction and sentence.

Background of the case.

In the High court, the prosecutions' case was that, the appellant on 27th July 2003, at Kanyogoga village, in Masaka District raped and murdered the deceased one Maria Nakintu.

He was arrested on the 2nd day of August 2003 at Kirinya village allegedly after he had been missing from where he resided before the deceased was murdered.

On 24th May, 2004 the appellant was indicted on two counts, Murder contrary to **Sections 188 and 189 of the Penal Code Act Cap 120 and Rape contrary** to **Sections 123 and 124 of the Penal Code Act Cap 120.** He was convicted on both counts and sentenced to 20 years imprisonment on each count to be served concurrently.

He appealed to this court on two grounds.

1. *That the learned trial judge erred in law and fact when he held that the prosecution's evidence had placed the appellant at the scene of the crime.*

2. *That the learned trial judge erred in law and fact when he concluded that that the appellant had exclusive opportunity to commit both offences of Murder and Rape.*

Representation

The appellant was represented by learned counsel Mr. Kasirivu Yunus, on state brief while Mr. Muwonge Emmanuel a Principal State Attorney was for the respondent.

Counsel for the appellant told court that the appellant was appealing against both conviction and sentence on both counts. He preferred to argue both grounds of appeal together. He submitted that the essence of the grounds of appeal was that the circumstantial evidence was not enough to place the appellant at the scene of the crime. Counsel faulted the trial judge for relying on the following circumstantial evidence adduced by the prosecution that the appellant was seen on a public road walking ahead of the deceased at 7:30pm. And that the appellant was seen taking tonto (local brew) at the place of P.W.5 where the deceased also was. According to counsel that evidence did not amount to sufficient circumstantial evidence to place the appellant at the scene of crime. In his view, the prosecution failed to discharge it's duty to prove the case against the appellant beyond reasonable doubt.

Counsel further submitted that it was erroneous for the learned trial judge to have reached the conclusion based on the behavior of the appellant of not showing concern upon hearing the bad news and

the appellant's failure to attend the deceased's burial. Counsel asserted that, that circumstantial evidence was not enough to support convictions of the appellant as indicted. He further argued that the victim's body was found the following day, almost 12 hours after she was last seen alive. This time gap did not rule out that another person other than the appellant could have come in contact with the victim before she was killed. As such, counsel contended that there were gaps in the circumstantial evidence adduced by the prosecution to render it unreliable.

He prayed that this court do re-evaluate the evidence and find that the circumstantial evidence did not exclusively point to the appellant. As such there was a doubt which should tilt in favour of the appellant by allowing his appeal, quashing the convictions and setting aside the sentences.

Respondent's Submissions in reply.

Counsel Muwonge Emmanuel for the respondent on the other hand submitted that, the appellant had been placed at the scene of the crime by evidence of PW3 who identified the appellant walking 50 meters closely with the deceased at night. That the evidence, according to counsel, further corroborated by the evidence of PW5

who owned the bar from which the deceased asked for tonto (local beer) and shortly after leaving the bar the appellant followed her. Counsel however acknowledged that the case was based on circumstantial evidence. He drew the court's attention to the conduct of the appellant of not appearing at the scene of crime, failure to attend the burial, and running away into hiding because of guilt. Counsel contended that such conduct was inconsistent with the innocence of the appellant. On another angle, counsel submitted that the scars found on the appellant's face were, according to the doctor who examined him classified as those that could have been caused by finger nail scratches. In the circumstances, Counsel concluded that court should find that the circumstantial evidence was sufficient and that the appellant was rightly convicted and sentenced. He prayed that the appeal be dismissed and the convictions and sentences be upheld.

Appellant's Submission in rejoinder

Counsel for the appellant in rejoinder submitted that the issue of scars had been resolved in favour of the appellant. The judge had dismissed the issue of scars when he found that PW2's evidence contradicted that of the doctor and that he told a lie.

Counsel referred court to page 20 of the judgment where the trial court drew an inference that the cause of death of the deceased was suffocation to death. That there was speculation by the trial court when it made an inference that the accused had caught up with the deceased and over took her. He relied on the case **of SIMON MUSOKE VS UGANDA (1958) EA 1915** for the proposition that circumstances must be such as to produce with more certainty to the exclusion of any other person other than the appellant.

DECISION OF THE COURT

We should point out at this stage that rule **30 (1)** of the **Judicature (Court of Appeal Rules) Directions SI 13-10** places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it neither saw nor heard the witnesses. This gives the first appellate court the duty to re-hear the case. This principle was re-stated in the much cited case of ***PANDYA V R (1957) EA 336 AT 337*** and was subsequently repeated in several decisions of this court. See ***Bogere Moses & Anor Vs Uganda, Cr. Appeal No. 1 Of 1997, Bogere Charles Vs Uganda, Cr. Appeal No. 10 OF 1998*** and ***Supreme Court case of Kifamunte***

Henry Vs Uganda SCCR Appeal N0. 10/1997 but to mention but a few.

The burden of proof in criminal cases is always upon the prosecution (see: **Woolmington v. DPP (1935) AC 462**) and the standard of proof in criminal case is beyond reasonable doubt and where any doubt is created it is in the favour of the appellant. **(MILLER VS MINSTER OF PENSION [1947] 2 ALL ER 372.)**

The case before us was decided on the basis of circumstantial evidence. Indeed both counsel agreed on this point. It is thus necessary for court to re-define circumstantial evidence as we have done before in numerous cases and it's applicability to this case so as to facilitate a smooth re-evaluation of evidence on record. According to, **Sarkar on Evidence, 14th Edition, 1993, page 53** It is defined as:-

> *"the evidence afforded not by the direct testimony of an eye witness to the fact to be proved, but by the bearing upon that fact or other and subsidiary facts which are relied upon as inconsistent with any result other than the truth of the principal fact..."*

According to the above definition, the facts must be closely knitted and must carry conviction to the mind of the judge.

When court is evaluating circumstantial evidence on record, it should ensure that the evidence is capable of establishing certain circumstances or minor facts described as evidentiary from which the principal fact is extracted.

In the instant case, it is a fact that the deceased was raped and murdered and the inference here should be that it was the appellant who committed the offences given the circumstances surrounding the case.

In the case of **Janet Mureeba & 2 others, v. Uganda, Supreme Court Civil Appeal No. 13 of 2003**, a case based on a chain of circumstantial evidence is only as strong as its weakest link.

This court notes that before making such a strong inference there are certain principles laid down with regard to circumstantial evidence being used as a basis of a conviction the appellant. In the case of **SIMON MUSOKE VS UGANDA (1958) E.A, 715 at page 718. & IN MBAZIIRA SIRAGI AND ANOTHER VS UGANDA SUPREME COURT CRIMINAL APPEAL NO.7/2004,** Court noted that;

"..in a case depending exclusively on circumstantial evidence the judge must find before deciding upon conviction that the exculpatory facts where incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than the guilt."

The appellant was convicted and sentenced on the basis of circumstantial evidence exclusively that he was placed at the scene of crime by evidence of PW3 who testified that he had identified the appellant walking 50 meters closely with the deceased. This evidence was further stated to have been corroborated by the evidence of PW4 who testified that the two were at his bar and when the deceased left the bar, she was immediately followed by the appellant. Attention was also drawn to the conduct of the appellant upon hearing the news of the deceased that he showed no concern. He neither appeared at the scene, nor buried the deceased, instead he went into hiding. In the opinion of the trial judge, that was not conduct of an innocent man.

The question this court has to answer is whether the inferences made were incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than the guilt of the appellant.

With all due respect, to the trial judge, we find that these inferences are wanting in as far as they left room for other possibilities. The appellant and deceased were not walking on this public road alone. The fact that the appellant was on the same road with the deceased walking 50 meters closely at a particular moment does not rule out the fact that any other persons other than the appellant could have raped and murdered the deceased. The road was used by other people including P.W.3 who testified.

In his defence, the appellant stated that he left the bar with the vice chair person of Buddu village and he did not see the victim that evening. In so doing he raised the defence of alibi which shook the strength of the circumstantial evidence the prosecution was relying upon. It is trite law that when an accused person puts forward an alibi in an answer to a charge he does not assume any burden of proving the alibi and that if the alibi raises reasonable doubt as to the guilt of the accused, he or she should have the benefit of doubt. See **KYALIMYA EDWARD VS UGANDA SC.CR. A NO 10 /95).**

The prosecution was under duty to negative the alibi by evidence. The vice chairperson with whom the appellant said he was with, was the right witness to call. Unfortunately, the prosecution did not and

In the result, the appeal succeeds on both grounds. The two convictions of the appellant are quashed and the sentences set aside. We order the immediate release of the appellant unless he is otherwise held on other lawful orders.

Dated and signed this ....13th.....**day of**...January **2015**

HON. MR. JUSTICE A.S NSHIMYE,
JUSTICE OF APPEAL

HON. MR. JUSTICE ELDAD MWANGUSHA,
JUSTICE OF APPEAL.

HON. MR. JUSTICE RICHARD BUTEERA,
JUSTICE OF APPEAL

13/01/15
Kasirivu Yunus for Appellant
Appellant present
None for the State

Kasirivu ctn for reading of the judgment.

CB Judgment read in chambers.[13]

13/01/15