THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, J.A.;
HON. MR. JUSTICE S.G. ENGWAU, J.A.;
HON. LADY JUSTICE C.N.B. KITUMBA, J.A.

CRIMINAL APPEAL NO. 75 OF 1999

BETWEEN

MATSIKO EDWARD:::APPELLANT

AND

UGANDA :::RESPONDENT

(Appeal from the judgment of the high court Musoke-Kibuuka J.) at Mbarara dated 8/6/99 in criminal Session No. 434 of 1996)

JUDGMENT OF THE COURT

This appeal is against conviction. The appellant was on 8/6/99 convicted by High Court (Musoke-Kibuuka J.) sitting at Mbarara of murder contrary to section 183 of the Penal Code Act in Criminal Session Case No. 434 of 1996 and was sentenced to death.

The deceased, Charles Baryayebwa, was on or about 20/6/95 at about 9.00 p.m seated in his kitchen with his son Mwebaze Ivan (PW2). He was seated close to the door washing his feet with his back towards the door. Mwebaze sat facing the door. There was a wick candle *(tadoba)* burning in the kitchen with also burning firewood from the fire place when an attacker struck the deceased once on the neck, with a panga and ran away. Mwebaze saw the attacker and identified him as the appellant.

He shouted that *"Tata bamwita'* meaning that my father has been killed. This shout and the cutting blow were heard by Jovario Baramya (PW1) the wife of the deceased who was in the

main house putting a baby to sleep. She came out and Mwebaze named to her, the appellant as the attacker. Together with his mother, Mwebaze chased the appellant for some distance and stopped. They returned to the kitchen where the deceased was and continued raising alarm. The deceased soon died from the injury he had sustained. Many people answered the alarm and the matter was reported to the authorities.

The following morning, Dr. Amoti Kaguna (PW5) carried out post mortem examination on the body of the deceased. He opined that the cause of death was excessive bleeding from the deep cut wound. The appellant was arrested that morning from the home of the deceased and was eventually charged with the murder of the deceased. The deceased and Rwakakaiga, the father of the appellant, had a long standing land dispute. The matter was pending in the Chief Magistrate's Court at Mbarara after the deceased had won the case through the Local Council Courts.

At the trial, the appellant set up a defence of alibi which the trial judge considered and rejected. The memorandum of appeal sets two grounds of appeal but at the hearing, the second ground was abandoned, rightly so in our view, as it was against the mandatory sentence. The only ground that was argued was that:-

"The learned trial judge erred when he failed to properly evaluate the evidence before him as a whole which resulted into a miscarriage of justice to the detriment of the appellant."

Prof. Joseph Kakooza, learned counsel for the appellant, conceded that all the essential ingredients of the offence of murder have been proved in this case beyond reasonable doubt except the identification of the appellant as the culprit. This narrowed the issue in this appeal to only one of identification. The prosecution case on this point depended wholly on the evidence of a single identifying witness, Mwebaze Ivan.

Prof. Kakooza criticised the trial judge for the remarks he made about this witness thus:-

> "Court: Demeanor of this witness is excellent. He demonstrates a lot of calmness, consistency and confidence. He appears to be very truthful."

According to Prof. Kakooza, the above remarks suggested that the trial judge had believed the witness before he had even heard the other witnesses including the defence evidence. Mr. Berije, Commissioner for Civil Litigation who appeared for the state, submitted that the above remarks were not conclusive. Prof. Kakooza replied that the prejudice caused to the appellant by the remarks was compounded by the further prejudicial conduct of the proceedings at the locus in quo by the trial judge. He pointed out that the proceedings at the locus do not show that the appellant or his lawyer was present. Even if they were present, his lawyer was never given opportunity to cross-examine or comment on whatever was said or pointed to court by either Baramya or Mwebaze.

Mr. Berije conceded that the proceedings at the locus in quo were improperly conducted by the trial judge. He however, contended that even without the proceedings at the locus in quo, the trial judge could still have convicted the appellant on the strong evidence of identification available, before him. He urged us to find that the appellant was properly convicted.

The proceedings at the locus in quo were conducted by the trial judge on 11/5/99 after the close of the prosecution and the appellant's case but before the submissions of both counsel. The proceedings went as follows:-

> "11/5/99.
> At the Locus at Rushaka 1, Rugarama Bushesha.
> Court as before: PW and PW2 at the Locus:
> Court: The purpose of our Court's visit to the locus in this case is to verify the distances involved in the evidence of PW2. That is whether PW2 could from where he was standing after allegedly chasing the accused be in position to see the torch light up to the house of the accused. We have also to verify whether there exists a hill between the home of the accused and that of the deceased. –
> Court: - PW2 and PW1 take court to the-site where the kitchen used to be. It is no longer there. The main house is also in ruins. The Kraal is gone. What used to be the path to the home has been dug and planted with crops. All are shown to court.
>
> Court: PW1 shows court where he passed chasing the attacker and where lie stopped on the main road. It is about 100 meters distance and about 50 to 1100 meters to the home of

the accused. From where PW1 says he stopped one can easily see any torch light up to the accused's home in spite of some scanty shrubs and grass. There is certainly no hill in existence between the two neighbouring houses. The land gently slides downwards from the home of the deceased to that of the accused with other houses in between or nearby except across the valley.

Musoke-Kibuuka V.F
Judge
11/5/99."

Criminal proceedings in the Magistrates' courts are governed by the Magistrates' Court Act 1970 (MCA) as amended while similar proceedings in the High Court are governed by the Trial on Indictment Decree No.26 of 1971(TID) as amended. Section 139 of the MCA permits the recording of such remarks if any, as the Magistrate thinks material respecting the demeanor of such witness whilst under examination. There is no corresponding section in the TID. The repealed Criminal Procedure Code Act (Cap 407) which governed Criminal proceedings in both Magistrates' Courts and the High Courts had section 192 which was similar to section 139 of the MCA above. 1t applied to the recording of evidence in Magistrates' Courts only. The recording of evidence in the High Court was governed by section 201. That section allowed the Chief Justice to from time to time make rules prescribing the manner of recording evidence in the High Court. Criminal Procedure (Recording of Evidence) Rules, SI No. 107-6 which was made under the said section 201 of the CPC Act (Cap 107) did not make provision for recording of remarks respecting the demeanor of a witness in the trial before the High Court. The omission of such provision in the T.I.D. would appear to be a deliberate move to maintain the procedure that obtained under the Criminal Procedure Code Act. It would appear therefore, that there is no legal basis for the practice of recording remarks respecting demeanors of witnesses at the trial before the High Court.

Even if it were, the remark such as the witness "appears to be very truthful" would seem to exceed the permissible limit as that conveys a conclusion drawn from the demeanors exhibited by the witness. Such a conclusion can best be drawn when considering the evidence as a whole after the close of the case of both sides.

In the instant case, the remark made by the trial judge respecting Mwebaze that he "appears to be very truthful" is a conclusion and was improperly drawn at that stage.

The law regarding a view of the locus in quo in criminal cases was correctly, in our view, stated by ***Sir Udo Udoma CJ as he then was in Mukasa Vs. Uganda [1964] EA 698 at 700*** that:

"A view of a locus in -quo ought to be, I think to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."

In *Tameshwar and Another vs. R. [1957] 4 Cr. Appeal R 165* a case which arose from the British Guiana, the appellants were convicted of robbery and their appeal to the Court of Criminal appeal of British Guiana was dismissed. They appealed to the Privy Council. There was a view of locus in quo by the jury in the presence of the prosecution witnesses who gave evidence there in the absence of the Judge and the Prisoners. Their Lordships held that it was wrong for a view to be heard with the witnesses in the absence of the judge. They felt that "his absence during that part of the trial was such a departure from the essential principles of justice as they understand them that the trial cannot be allowed to stand." They allowed the appeal. The situation in that case may appear rather extreme as in our country such a view of the locus may not possibly take place in the absence of the judge or a commissioner.

In *Karamat Vs. The Queen [1955] 40 Cr. App R 13*, another Privy Council decision from an appeal from yet the British Guiana, the issue was whether a view of the locus in quo in the absence of the accused vitiates the trial. The appellant was convicted of murder. There was a view of the locus in quo which the appellant declined to attend. Their law allows court to permit an accused to be absent during a part of the trial. He was convicted and his appeal to the Court of Criminal appeal of the British Guiana was dismissed. The Privy Council also dismissed his appeal on the ground that "if an accused person declines to attend a view which the court thinks desirable in the interest of justice, he cannot afterward raise objection that his absence itself

made the view illegal." It held that if the view was held in the attendance of witnesses who had already testified but in the absence of the accused there would be no problem so long as the witnesses taking part were recalled to be cross examined if desired.

In our Country, the presence of an accused during his trial is a constitutional right afforded by article 28 (5) of the Constitution. He/she can only be absent from the trial by his/her own consent or when by his/her conduct it is impracticable to proceed with the proceedings in his/her presence and the court has made an order for his/her removal and for the trial to proceed in his/her absence then the trial can proceed in the absence of the accused.

In the instant case, the record of the proceedings at the locus in quo is silent about the presence or absence of the appellant at the locus. The minute that "Court as before" on the record would only indicate that the Judge, Assessors and the Court Clerk were as before. The parties and their representations ought to have been indicated whether they were as before or not. The minute of 11/5/99 does not reflect that. The irresistible inference to be drawn from that minute is that the appellant or his lawyer was not present at the locus. Yet there is no indication that his absence was ordered by the court on account of his conduct and that the hearing was ordered to proceed in his absence. In the absence of such orders, his absence would run counter to article 28 (5) of the Constitution.

Even if the appe1lat, his lawyer and counsel for the state were present at the locus, the record does not indicate that the appellant or his lawyer was afforded opportunity to cross-examine Jovario Baramya and Mwebaze Ivan on whatever they said to or showed the court at the locus. That omission is a flaw and a departure from the principal cannon of our Criminal procedure. As the purpose of the visit of the locus was indicated in the proceedings to verify certain facts in the evidence given in court, the appellant ought to have been afforded opportunity to cross- examine these witnesses if he desired.

In our view the remarks made by the trial judge in respect of the demeanor of Mwebaze, together with the defective proceedings at the locus in quo constituted a mistrial. Mr. Berije argued that, despite those flaws there was overwhelming evidence in support of the conviction. That may

well be so but we think that the proceedings at the locus in quo are integral parts of the whole trial. They cannot be expunged from the rest.

Even if the proceedings at the locus in quo had been properly conducted, the observations made by the trial judge in his Judgment were of concern to us. He observed as follows:

> "When this court visited the locus it was able to verify his evidence which he had earlier given in court. The court found that the facts were as PW2 had stated in his testimony in court.
>
> On the other hand the accused, no doubt told a lot of untruthfulness to this court in his sworn statement."

The above observations give the impression that prior to his view of the locus in quo, there were some doubts in the mind of the trial Judge and that a view was prompted by a desire to resolve the doubt. In other words had it not been for the view, the that Judge might not have accepted Mwebaze's evidence; If the locus in quo was visited for that purpose of clearing the doubt, then the visit was irregular. .

In the result, we allow the appeal, quash the conviction and set aside the sentence of death. We order a retrial before a different judge. The appellant therefore must be kept in custody pending the retrial.

Date at Kampala this 17th day of December 1999.

G.M OKELLO
JUSTICE OF APPEAL

S.G. ENGWAU
JUSTICE OF APPEAL

C.N.B. KITUMBA
JUSTICE OF APPEAL