THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE G.M. OKELLO, JA.

HON. JUSTICE S.G. ENGWAU, JA.

HON. JUSTICE A. TWINOMUJUNI, JA.

CRIMINAL APPEAL NO. 162 OF 2001

1. LAWERENCE MWAYI (DECEASED]
2. MWAYI ANTONIO
3. MWEMENKE MARTIN ……APPELLANTS
4. KALOLI GANGA
5. DAUNA MANUERI

VERSUS

UGANDA……RESPONDENT

(Appeal against conviction and sentence of the High Court at Mbale (Mwondha Ag. J. as she then was) dated 18th December, 2001 in Criminal Case No. 23 of 2000).

JUDGMENT OF THE COURT:

In the High Court at Mbale, the appellants, Lawerence Mwayi, Mwayi Antonio, Mwemenke Martin, Kaloli Ganga and Dauna Manueri were indicted for and convicted of murder, contrary to sections 183 and 184 of the Penal Code Act. Each of them was sentenced to death.

The brief facts of the case are that on the 21St June, 1999 the shop of one Mboizi was robbed from Kaperi village in Pallisa district and one Asadi Muguli, (deceased) was one of the suspects of that robbery. The appellants and others still at large mounted a search for the deceased. They

were being led by L.C. 1 Chairman of the area, one Tambalei. The search team went to the home of the deceased but did not find him. Instead, the deceased's father, Swaibu Mbayo, was found at home. This was at around 5.00 p.m.

The search team dismantled the deceased's house but did not find any stolen property therein. Nonetheless, they continued looking for and vowed to kill him, if found. On his way back home, the deceased met the angry mob including the appellants who pounced on him and started assaulting him. His father, Swaibu Mbayo (PW1) standing 15 metres away was watching what was happening. He saw the angry appellants beating the deceased using stones, bricks and a piece of wood. They were beating him indiscriminately all over the body until he fell down and died instantly.

Nubu Nauliro, PW2, a brother of the deceased, heard of the incident and went to the scene. It was about 400 metres away from their home. It was during day time at about 5.00 p.m. He found the appellants and other people still at large beating the deceased. They were using stones, bricks and a piece of wood with which they assaulted the deceased indiscriminately all over the body. He was 5 spaces away from the scene. Eventually, PW2 saw his brother die on the spot as a result of the beatings he had received.

PW1 and PW2 reported the incident to Budaka Police Station on the very day (21.6.99). They informed the officer in - charge CD Budaka Police Station, Assistant inspector of Police, Gerei Johnson, PW4, of who the suspects were. The report included the names of the appellants. On the following day (22.6.99) PW4 arrested Lawrence Mwayi, Antonio, Mwemenke Martin and Kaloli Ganga, 1st, 2nd 3rd and 4th appellants respectively. Dauna Mannueri, the 5th appellant, was arrested on a different date.

At their trial, the defence was a total denial. In addition, each appellant pleaded a defence of alibi, except the 5th appellant who also raised a defence of a grudge. All the appellants denied having committed the offence. They stated in their unsworn statements that on the fateful day, they were in different places doing different duties but learnt of the demise of the deceased in the evening. The following day, they all attended the funeral but were later arrested and subsequently charged with the murder of Asadi.

The learned trial judge rejected the defence and convicted the appellants on the strength of the prosecution case. As a result this appeal is based on 4 grounds, namely:

1. The learned trial judge erred in law and fact when she failed to resolve the contradictions and inconsistencies in the prosecution evidence in favour of the defence.

2. The learned trial judge erred in law and fact when she did not sufficiently evaluate and assess evidence for both sides which occasioned a miscarriage of justice.

3. The learned trail judge erred in law and fact when she decided that the defences of alibi made by the defence were too farfetched and thereby discounted them as lies without giving sufficient reasons therefore and it occasioned a miscarriage of justice.

4. The learned trial judge erred in law and fact when in summing up to the assessors she did not do so correctly and impartially.

Before this appeal could start on 10th April, 2003, the 1st appellant, Lawrence Mwayi, died on 7th February, 2002. His death, therefore, abates his appeal under rule 70 of the Rules of this court. On the 10th April, 2003, the hearing of the appeal proceeded with Mwayi Antonio, Mwemenke Martin, Kaloli Ganga and Dauna Manueri as the 2nd, 3rd, 4th and 5th appellants respectively. Mr. Chris Bakiza, learned counsel for the appellants, argued all the 4 grounds of appeal separately but starting first with the 4th ground.

The complaint on the 4th ground is that the learned trial judge erred in law and fact when in summing up to the assessors she did not do so correctly and impartially. She did not resolve in favour of the appellants the contradiction between the evidence of PW1 and PW2 on the one hand and PW3 on the other. PW1 testified that it was the Chairman LC 1 who led the search team. He was called Tambalei (Mabalei). However, the LC1 Chairman who testified in court was called Peter Gariwire, (PW3). He said that he did not know who killed the deceased or how he met his death. The learned trial judge called PW3 a useless witness. Learned counsel submitted that the contradiction in the evidence of PW1 and PW3 is major and fundamental and that the trial judge should have resolved it in favour of the appellants because PW3 denied knowledge of the incident. He relied on the authorities of **Godfrey Tinkamalirwe & Anor. Vs. Uganda,**

Supreme Court, Criminal Appeal No. 5 of (1988-1990) HCB 5 and Kasule vs. Uganda (1992-93) HCB 38.

Ms. Damalie, Assistant DPP, on the other hand submitted that the learned trial judge had properly and impartially guided the assessors in her summing up notes. Looking at the evidence of PW1 and PW3, it is clear to us that Mr. Bakiza was mistaken about the identity of the Chairman LC 1 of Kapire village when the offence was committed. According to PW1, the Chairman was called Tambalei or Mabalei who did not testify in this case. However, PW3 who testified might have not been L.C. 1 Chairman of Kapire village at the time when the offence was committed. In her summing up notes, the learned trial judge was also mistaken when she held that PW3 was a useless witness who denied knowledge of how the deceased was killed and yet all the evidence including that of the defence shows that he was at the centre of reporting to police together with the relatives. According to PW4, it was PW2 and LC Vice Chairman who reported to him at Budaka Police Station. There is no evidence on record to show that PW3 was the LC Vice-Chairman. PW3 was never cross - examined for clarification on this point. Therefore, ground 4 fails.

The complaint on the 1st ground relates to contradictions and inconsistencies in the prosecution evidence. Learned counsel for the appellants pointed out two major areas of those contradictions. According to him, the first contradiction lies on the evidence of PW1 as opposed to that adduced by PW2. He submitted that both PWI and PW2 were eyewitnesses when the offence was being committed in broad daylight. PW1 was 15 metres away from the scene while PW2 was only 5 paces away. He said that both witnesses should have been able to identify the murder weapons used. Instead PW1 said that he saw stones and bricks as the murder weapons whereas PW2 testified that he saw 1 appellant (deceased), 2nd 3rd appellants use stones and bricks but the 5th appellant used a piece of wood. In counsel’s view. One of those witnesses ought to be a liar.

The second area of contradictions, according to counsel, was in respect of the two statements which PW1 had made to the police, exhibits Dl and D2 respectively. Counsel’s concern was that in exhibit Dl, PWI did not mention the names of the suspects in this case. It was in his additional statement, exhibit D2, where PW1 mentioned the names of the suspects but none of the appellants was mentioned. According to counsel, it was at the trial that PW1 mentioned the

appellants. In counsel's view, PW1 must have concocted the evidence with a purpose to penalise the appellants. Learned counsel contended that the trial judge should not have relied on the evidence of PW1 and PW2 because they were unreliable witnesses. As for PW4, Mr. Bakiza argued that since this witness investigated the case upon information given by PW1 and PW2, his evidence does not corroborate the evidence of both witnesses. In conclusion, Mr. Bakiza submitted that the evidence of PW2 never placed any appellant at the scene of crime.

We agree with learned Assistant D.P.P that there is no contradiction in the evidence of PW1 and PW2 concerning the murder weapons. According to the evidence on record, both witnesses saw stones, bricks and pieces of wood being used. In any case both witnesses went to the scene at different times and were also watching at different places. PW1 was at the scene when the deceased was captured but PW2 went there on learning that the deceased was being beaten. In our view this explains the state of affairs satisfactorily.

As regards police statements made by PW2, (exhibits Dl and D2), we again agree with Ms. Lwanga that the procedure followed for tendering the statements was wrong. The statements were neither shown nor read back to PW2 and that explains why PW2 denied the contents of exhibits D2. Further, D2 is dated 25th June, 1999 and not 23rd June, 1999 as alleged. We are of the view that those statements should not have been used in evidence as they were not shown to PW2. See: **Chemonges Fred vs. Uganda, Sc. Criminal Appeal No. 12 of 2001 (unreported).**

It is well established that where a police statement is used to impeach the credibility of a witness and such statement is proved to be contradictory to his testimony, the court will always prefer the witness' evidence which is tested by cross-examination. The learned trial judge was, therefore, entitled to prefer PW2's court testimony as against his police statements. Since PW2's police statements were never proved against him, the issue that his testimony was contradictory to his police statements, therefore, did not arise in our view.

We further agree with Ms. Lwanga that though PW4 was the investigating officer in this case, his evidence corroborated PW2 who gave him the names of the suspects, (the appellants), on the fateful day. As a result, PW4 arrested Al, A2, A3 and A4 the following day. A5 was arrested later. Consequently, PW2 never told deliberate lies to court. Ground 1 also fails.

Counsel's complaint on the 2nd ground was that stones, bricks and pieces of wood collected from the scene of crime were not produced in court by the prosecution. He also complained that medical evidence was not adduced. We think that it was desirable to produce those stones, pieces of wood and bricks in court. It was also desirable to adduce medical evidence. However, failure to do so when there is other cogent evidence is not fatal to the case. In any case that was not an issue at the trial. Nevertheless, both PW1 and PW 2 who were eyewitnesses testified about those murder weapons and the appellants were a part of that mob. The argument that both PW1 and PW2 had interest in the matter to tell a lie by reason of blood relationship does not arise in our view. The mere fact that PW1 and PW2 were related to the deceased per se does not mean that they told lies. From their demeanour, the trial judge found them credible and truthful witnesses. Ground 2 must also fail.

Finally, the 3rd ground of appeal relates to the defences of alibi by the appellants and in addition the defence of a grudge raised by the 5th appellant. Learned counsel contended rightly, in our view, that it was not the duty of the appellants to prove their defences of alibi. The burden lies on the prosecution to rebut any defence of alibi beyond reasonable doubt. The prosecution is required to put any suspect at the scene of crime. Ms. Lwanga conceded that the learned trial judge did not consider the appellant's defences of alibi. She also conceded that the trial judge did not address the issue of a grudge raised by the 5th appellant. In the circumstances, we agree with learned counsel for appellants that the trial judge was wrong when she failed to consider the defences of alibi. She was also wrong when she failed to address the issue of a grudge.

This court, however, being the first appellate court, is enjoined to review the whole evidence on record and make its own findings on the matters complained about. Rule 29 of the Rules of this court empowers it to do so. After strict scrutiny of evidence on record, we noted that PW1 and PW2 who knew the appellants very well before, identified them in broad day light. It was 5.00 p.m. when the offence was committed. PW1 was 15 metres away from the scene of crime and PW2 was only 5 spaces away from the scene. PWI and PW2 had observed the appellants for a very long time.

We find that the evidence adduced by PW1 and PW2 puts the appellant squarely at the scene of crime and disproves their defences of alibi.

Although the learned trial judge did not address the issue of common intention, we find that it was proved. PW1 testified that after the demolition of the house of the deceased by the mob, appellants inclusive, there was a threat to kill him all the same, if found. The deceased was killed on the ground that he had stolen some property from the shop of Mboizi the previous day. The mob including the appellants, in our view, had formed a common intention within the meaning of section 22 of the Penal code Act as they executed their threat.

On the allegation of a grudge, the 5th appellant alleged that he was framed because PW2 wanted to marry his sister but the father refused. On proper evaluation of the evidence on record, the allegation of a grudge cannot stand. The alleged grudge was not between the 5th appellant and PW2. It was allegedly between the father of the 5th appellant and PW2. As PW2 was never cross-examined on this issue, the allegation of a grudge was an afterthought in our view.

In the result, we find no merit in this appeal and it is accordingly dismissed.

Dated this 27th day of August 2000.

HON. JUSTICE G.M. OKELLO
JUSTICE OF APPEAL.

HON. JUSTICE S.G. ENGWAU
JUSTICE OF APPEAL.

HON. JUSTICE A. TWINOMUJUNI
JUSTICE OF APPEAL.