THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE C. M. ATO, JA

HON. JUSTICE G. M. OKELLO, JA

HON. LADY JUSTICE A. E. N. MPAGI-BAHIGEINE, JA

CRIMINAL APPEAL NO. 140 OF 1999

BETWEEN

KASIBANTE JOHN :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from Conviction of Appellant

h High Court (Bamwine. Ag. J*)* for Murder

in Criminal Session Case No. 556 of 1999

at Mubende on 19/11/99.)

JUDGMENT OF THE COURT

The appellant was on 19-11-1999 convicted by High Court (Bamwine Ag. J) sitting at Mubende for Murder contrary to sections 183 and 184 of the Penal Code Act and was sentenced to death. He now appeals to this Court against that Conviction.

The Background facts which led to the conviction as found by the trial court are briefly that, on 22-3-98 at Kisamba village in Mubende District Semwanga Charles, the deceased, and his two young sisters Babirye Oliver Wakiganda (5 years), (PW 2) and Christine Nabita (9 years). (PW3) had gone to fetch water when the appellant who had way laid them attacked and killed him. He stabbed the deceased several times on the head with a knife, collected his blood and went away. Seeing this attack, the two Young sisters ran home and reported what they had seen to their mother, Teopista Kiringooba, PW4. An alarm was raised which attracted people to the scene.

Traced by his trail of foot marks, the appellant was apprehended by the mob in a nearby bush. Meanwhile, the deceased died from the injuries inflicted on him. An autopsy report made by Dr. Kodowa who carried out the postmortem examination revealed the cause of death as bleeding into the brain due to the deep cut wounds on the scalp.

At his trial, the appellant denied the offence. The trial judge however, rejected this defence and convicted the appellant as charged.

The sole ground of appeal is that the learned trial judge erred in law and fact when he found that there was adequate circumstantial evidence on which to base the appellant's conviction.

Mr. Henry Kunya, learned counsel for the appellant complained that the trial judge did not judiciously address himself to the adequacy of the inculpatory facts produced by the circumstantial evidence given by PW 6, PW 7 and PW 8. According to him, the inculpatory facts produced by the circumstantial evidence given by Kiiza Kasibante, (PW 6) the paternal uncle of the appellant was that in the morning of the day of the killing, the appellant came to the witness's home in a white shirt and had a polythene bag. He had not been seen for two years before that day. After visiting the witness, the appellant left with his polythene bag ostensibly to go to the trading centre. About two hours later the witness heard the news of the killing of the deceased and soon saw the appellant who was already under arrest, in a red shirt. Counsel criticised the trial judge for drawing an inference that the appellant's change of shirts was to conceal his identity when there was no evidence to support that inference.

He also criticised the trial judge for relying on the evidence adduced by Livingstone Kakembo (PW 7) a shopkeeper. who testified that at about 10:00 a.m. of the day of the killing, the appellant who was a stranger to him, bought from his shop two sticks of cigarette and a box of matches. Forty five minutes later the witness heard news of the killing of the deceased and when he went to the scene he found at the scene a stick of cigarette and suspected the appellant who had bought cigarette from him for being the killer. Counsel submitted that there was no evidence to connect the stick of cigarette found at the scene of murder with the sticks of cigarette bought from the witness's shop.

Mr. Kunya further challenged the trial judge for relying on the circumstantial evidence given by John Byekwaso PW 8 a neighbour to the parents of the deceased. He testified that when he heard of the killing of his neighbour's son, he and others rushed to the scene and found trail of footmarks which appeared to have been left by the killer. Tracing the trail they arrested the appellant in a nearby bush. At his arrest, the appellant without any prompting question became defensive and stated that he was not the one who killed the person. Learned counsel submitted that the footmarks were not sufficiently incriminating to the appellant as they could have been of anybody else. He argued that the appellant could have heard accusation against him from the charged mob which prompted him to deny being the killer. He pointed out that lack of mention by any witness of any blood stain being found on the appellant was a co-existing circumstance which tended to weaken the inference of the appellants guilt from the circumstantial evidence. He blamed the trial judge for finding that the evidence of PW 6. PW 7 and PW 8 produced adequate circumstantial evidence. He urged us to allow the appeal.

On the other hand, Ms Nandaula senior state attorney who appeared for the respondent supported the conviction and submitted that the trial judge was right to infer that the appellant's change of shirts within 45 minutes was to disguise himself. She pointed out that the appellant's running away at the approach of the crowd, his throwing away of a polythene bag he had in his hand and his making a defensive statement on his arrest that he was not the one who had killed the person when he was not asked about any killing was consistent with guilt. She contended that the trial judge considered all the circumstances of the case including the appellant's admission of the killing to those who arrested him before concluding that the inculpatory facts pointed to the appellant's guilt. She submitted that the appellant was properly convicted.

The sole issue for determination in this appeal is the identity of the appellant as the murderer. The trial judge found that there is the unsworn evidence of Christine Nabita (PW 3) on this point and found corroboration thereof in the circumstantial evidence given by PW & PW 7 and PW 8 and the admission stated to have been made by the appellant to those who arrested him. The case therefore, does not depend exclusively on circumstantial evidence.

Counsel for the appellant contended that the circumstantial evidence given by Kiiza Kasibante, Livingstone Kakembo and John Byekwaso does not produce sufficient inculpatory facts that

irresistibly pointed to the appellant's guilt. That may be so but as was stated in **Pandya vs. R (1957) EA 336.** This being a first appellate court it is under a duty to subject the evidence on record to a fresh and exhaustive scrutiny and to make its own findings of facts and draw its own conclusions of course making allowance for the fact that it had no opportunity to see the witnesses as they testified. Only then can it decide whether the lower courts findings should be supported.

In the instant case, we note that Christine Nabita though a child of tender years stated in her unsworn evidence that she looked at the assailant and recognised the appellant in the dock as the assailant. She did not however describe the assailant nor explained what made her recognise the appellant as the assailant. The evidence of Kiiza Kasibante the paternal uncle of the appellant shows that the appellant visited him two hours before his arrest and was in a white shirt and a polythene bag whose contents the witness did not know. Two hours later, when the witness saw the appellant under arrest, he was in a red shirt.

PW 7, a Shopkeeper testified that the appellant who was a stranger to him, had bought two sticks of cigarette and a box of matches from his shop at 10:00 a.m of the day of the killing and 45 minutes later, when the witness heard news of the killing and went to the scene, he saw a stick of cigarette. He suspected the stranger who had bought cigarette from his shop to be the killer. When appellant was arrested, the witness recognised him as the stranger who had bought cigarette from his shop. We think that the change of shirt within a period of two hours was not by itself sufficiently incriminating to the appellant. Similarly, the finding of a stick of cigarette at the scene of crime does not sufficiently connect the appellant with the offence.

The evidence of PW 8 was that following the alarm he and others rushed to the scene of crime where they found trail of footmarks seemingly left by the assailant. They followed the marks to a field where they found people who told them that a man in a red shirt who enquired for the direction to Busunju had passed there. When they continued the chase, they sighted a man in a red shirt. On seeing them the man branched into a nearby bush. They followed him. On seeing people chasing him, the man threw away a polythene bag he had in his hand and continued to run. The polythene bag was not recovered. We think this was a serious lacuna in the

investigation. The polythene bag ought to have been recovered. Its recovery and its contents would have provided useful evidence.

According to PW 8 after about half a mile, the man fell down and he was arrested. The arrested man was the appellant. On arrest, the appellant without any prompting, became defensive and stated that he was not the one who killed a person. We agree with Mr. Kunya that the sudden defensive utterance of the appellant could have been in response to accusation which the charged mob was making. This cannot be ruled out. Therefore, the appellant's change of shirts, his emerging from the direction of the scene of crime, his running away at the approach of a charging mob without any other incriminating evidence, like collected blood in any container, being found on him, do not irresistibly point to the appellant's guilt. They may raise suspicion but a mere suspicion is not enough to fix a person with criminal responsibility. See **William Herbert Willis vs. R (1932) 23 Cr Appeal Report.**

Mr. Kunya submitted that lack of evidence of blood stain on the appellant was a co-existing circumstance which weakens or destroys the inference of guilt. This submission of course cannot stand in the face of the evidence of Kalebo Paul (PW 10) that he saw blood on the appellant's shirt. PW 11 ruled out the possibility of that blood stain coming from the appellant himself when he testified that the appellant was not assaulted. We think that even with that evidence of blood stain being seen on appellant's shirt, the inculpatory facts produced by this circumstantial evidence do not irresistibly point to the appellants guilt to provide the requisite corroboration to the unsworn evidence of Christine Nabita regarding the identity of the appellant as the assailant.

The trial judge also found corroboration to the unsworn evidence of Christine Nabita in the admission made by the appellant to those who arrested him. John Kasibante testified that when he saw the appellant under arrest. He moved closer to him and heard the appellant pleading with those who arrested him not to kill him because it as his aunt Nabanja who had sent him to collect blood. According to Kasibante, policemen were also there Livingstone Kakembo also stated that he heard the appellant who was under arrest stating that he was hired by Nabanja to do so for Shs.40.000 = The witness testified that policemen and LDU were present and the appellant was not beaten. Another witness who testified to the appellant's admission was No. 18748 D/CPL Katumba (PW 11). His testimony vas that the appellant told him that he did what he did because

he had been sent by one Nabanja of Sobobo. The trial judge found these pieces of evidence as the appellant's admission of his participation in the killing.

It is notable that the alleged admission was made by the appellant who was already under arrest to those witnesses either in the presence of a police officer or to a police officer himself The predecessor of this court had held **in Uganda vs. Ojoba & Others (1976) HCB 4** that a confession to a chief while he is performing his administrative duties is admissible but a confession made to him while he is exercising powers which are ordinarily exercised by the police is not admissible. Admissions are, under Section 29 of the Evidence Act, not conclusive proof of the matters admitted.

The reliance by the trial judge on the admission made by the appellant to those witnesses in those circumstances for corroboration to the unsworn evidence of Christine Nabita regarding the identity of the appellant as the murderer was therefore, in our view not proper. We thus find no sufficient incriminating corroborative evidence to the unsworn evidence of Christine Nabita on the identity of the appellant as the killer

In the result, we allow the appeal quash the conviction and set aside the sentence of death. We order that the appellant be set free forthwith unless being held on some other lawful ground.

Dated at Kampala this 12th day of November 2001.

C.M. Kato
JUSTICE OF APPEAL

G. M. Okello
JUSTICE OF APPEAL

A. E. N. Mpagi-Bahigeine
JUSTICE OF APPEAL.