THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

HON. MR. JUSTICE S.G. ENGWAU, JA

HON. LADY JUSTICE C.N.B. KITUMBA, JA

CRIMINAL APPEAL NO.138 OF 1999

CHEMONGES FRED :: APPELANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from a conviction and sentence of the High Court of Uganda held at Mbale before Mr. Justice A. Kania dated 24th day of November 1999 in Criminal Session Case No.284 of 1997]

JUDGEMENT OF THE COURT

This appeal was against both conviction and sentence. The appellant was indicted on two counts for the offences of murder contrary to Sections 183 and 184 and of attempted murder contrary to Section 197(1) of the Penal Code. He was convicted and sentenced to death on the first count while the sentence on the second count was suspended.

The prosecution case was that on 1.2.96 at Cheminy Market in Kapchorwa District at around 7.00 p.m., the appellant threw a hand grenade into the shop of one Stanley Kuka which fatally injured the deceased, Michael Chemisto and seriously injured one Nelson Bariteka. The appellant was identified at the scene of crime by PW2 and PW5. He was arrested in Jinja where he had run to and indicted accordingly.

At the trial his defence was an alibi that he was in Jinja where he had arrived on 29.1.96 to see his siblings which was rejected by the learned trial judge who convicted him as charged.

The memorandum of appeal comprised three grounds:

"(1) That the learned trial judge erred in law and fact by finding that the Appellant had been positively identified and that he took part in the commission of the offence.

(2) That the learned trial judge erred in law and fact in disregarding the inconsistencies in the prosecution case.

(3) That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence adduced at trial hence reached erroneous decisions"

Mr. Henry Kunya for the appellant on a State brief argued ground one separately but combined the last two grounds.

Regarding ground one Mr. Kunya submitted that though the identifying prosecution witnesses PW2 and PW5 might have been honest and convincing they were truly mistaken as their evidence fell short of the requirements as stated in the case of Nabulere and Others vs. Uganda (1979) HCB 77. He pointed out that the proximity or distance between PW2 and the appellant was not indicated and therefore it was not clear whether the appellant was close enough to remove any doubt that it was the appellant he had seen. Mr. Kunya further argued that the evidence of both PW2 and PW5 who claimed to have identified the appellant differed. He contended that the scene of crime being a public place, a market place and given the circumstances surrounding such an incident, there was a possibility that the culprit might have escaped. He submitted that the conditions did not favour correct identification. The judge's finding was therefore erroneous.

Mr. Vincent Wagona, Senior State Attorney supported both the conviction and sentence. He contended that the identification by PW2 and PW5 relied on by the learned trial judge was free from error. He submitted that though PW2 did not specify the distance between him and the shop, which was the scene of crime, let alone the direction he was facing, the incident according to both witnesses occurred at around 7.00 p.m. before sunset. Both witnesses knew the appellant well before the incident. Mr. Wagona further submitted that the inconsistencies pointed out by Mr. Kunya regarding as to who fired the gun shots were minor as they did not go to the root of the matter. He asserted that the evidence of Pw2 and PW5 ought to be read together.

The learned trial judge after reviewing the evidence said:

“I find that the accused was known to PW5 Sikuku Stanley at the time of the offence from the evidence of PW2 Sokuton Geoffrey PW6 Stanley Kuka and that of PW5 Sikuku Sadik himself the incident happened at 7.00 p.m. when there was still day light. Though the encounter between the accused and the witness may have been brief they came into close proximity of each other. Taking all the circumstances of this identification as a whole I find that the conditions of identification were favorable and that the accused was the person seen by PW5 Sikuku fleeing from the scene of crime”.

From the evidence on record we find that the appellant was known to PW2 as a clansman. They used to exchange visits. Pw2 had seen the appellant thrice during the course of that fateful day, 1.2.96. Most importantly the incident occurred at around 7.00 p.m. when there was still light. When the appellant was fleeing from the scene of crime he came into close proximity of PW5, Sikuku Sadik, who was going in the opposite direction towards the scene to find out what had happened. When PW5 saw him running away from the scene he inquired from him what had happened as indeed he expected him to know what he was escaping from. The appellant kept mum and instead sped off thus arousing the suspicion of PW5, who then raised an alarm and turned to chase him.

We agree that inevitably there must have been some commotion after the blast but it occurred inside the shop and not outside in the market place. We think that it is proper to assume that the people’s attention must have been focused on the shop. The likelihood of a stampede with people scampering in all directions would have been minimal. While we also agree with Mr. Kunya that people react differently to different situations, it was nevertheless a little strange for the appellant to be running away from the scene of crime and refusing to say why he was running away but instead increased his speed. PW2 and PW5 did not give contradicting evidence as claimed by Mr. Kunya. Their testimonies complemented each other. PW2 saw him at the scene and running away before PW5 saw him running towards him. When PW5 turned to chase the appellant he was ahead of PW2. They need not have viewed things from the same angle. We find that the learned trial judge correctly found the appellant’s conduct of running away corroborative of his guilt, relying on the case of **Terikabi Vs Uganda (1975) E.A. 60.** The judge correctly applied

the guidelines set down in **Abdalla Bin Wendo vs. R (1953) 20 EACA 166, Roria vs. R (1967) EA 583** and **Nabulere and Others vs. Uganda (1979) HCB 77**. Ground one therefore fails.

Grounds two and three were argued together. Mr. Kunya pointed out that there were inconsistencies between the statement PW2 made to the Police and his evidence in court made on oath two years and eight months later. He argued that PW2 completely disassociated himself from the police statement he had made earlier. He submitted that the entire prosecution case was full of contradictions and inconsistencies which affected its credibility and consequently its weight. He also singled out the incidents of shooting and pointed out that PW2 said it was the appellant who fired the gun shots during the chase whereas PW5 said it was the LDU guards who had fired.

Mr. Wagona submitted that the inconsistencies as pointed out by Mr. Kunya were minor and the learned trial judge was entitled to treat them such. He asserted that PW2 made his statement to the police in Kupsabiny and it was recorded by a police officer Det/C Mbabazi who merely had a working knowledge of Kupsabiny and he misconceived everything he was being told by the witness. Mr. Wagona stated that the statement was never proved against the witness as the officer recording it did not testify. He submitted that the evidence of PW2 and PW5 has to be read together. Regarding the inconsistencies the learned trial judge observed:

> **"These inconsistencies if they at all are inconsistencies are minor and in no way go to the root of the case which so that the accused was seen at the scene by Pw2 Sokuton Geofrey and running away from the scene by PW5 Sokuton Sadiq. For these reasons I disregard them."**

Regarding PW2's statement to the Police, PW2 said under cross- examination:

> **"I made a statement to the police in Kupsabiny to a police officer who spoke Kupsabiny but it was not perfect Kupsabiny. The statement was not read back to me but I simply signed. I am the one who reported the case and made the statement.**
>
> **I never told the officer that arrived (sic) at the Trading centre at 3.00 p.m. what I said was that I arrived at 9.00 a.m. I did not say while I was there one Chemonges Fred alias Brown asked me for cigarettes. I did not tell the officer that I refused telling him I had no money……The contents of the statements are not mine."**

This statement was tendered in evidence by the defence as Ex DI. The record indicates the police officer who recorded the statement never testified but his casual command of the Kupsabiny dialect was confirmed by another witness police officer DW1, Det/Cpl. Bureto David who told the court:

> **"On that day I remember receiving a report of a murder case and recording a statement in connection with it. I was with D/C Mbabazi. The latter recorded a statement from Supton Mbabazi was speaking in Kupsabiny a language he had learned (sic)."**

PW2 denied most of the contents of the statement which was never proved against him. It was 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's evidence which is tested by cross-examination. The learned trial judge was therefore entitled to prefer PW2's court testimony as against his police statement.

Mr. Kunya also attacked the judge's reliance on the alleged earlier threats by 10 the appellant to kill Kuka on the ground that Kuka was still following his former wife who was then married to the appellant. Mr. Wagona countered that evidence of a prior threat was relevant. It was made in respect of PW6 who formed the subject of count two of attempted murder. He was the owner of the shop which was the scene of crime. The learned judge after directing himself regarding the law governing a prior threat to commit an offence or to kill ruled:

> **"In the present case this threat was communicated through PW5 Sikuku Sadik who with the accused had met for the first time. In this respect the accused could not have been joking. When he uttered the threat he had travelled from his home looking for PW6 Stanley Kuka. He must have been thinking of the threat all along and so he could not have uttered it impulsively the reason of the threat was that PW6 Stanley Kuka was having an affair with his wife which is a serious matter. . . . It is irrelevant that the threat was not issued to the deceased."**

We find that the learned trial judge properly appraised the evidence regarding the prior threat to kill Kuka. The appellant had travelled eight kilometers from. his home to the Cheminy market

where Kuka had a shop. The threat was uttered on 6.1.96, almost a month prior to the attempted murder. We consider this period proximate enough to make the threat relevant as the learned judge so rightly held relying on **Waibi and Another v Uganda (1968) EA 278.**

Lastly Mr. Kunya contended that the learned trial judge erred in rejecting the appellant's alibi in view of the questionable evidence of PW2 and PW5 regarding identification. Mr. Wagona submitted that the learned trial judge having accepted the evidence of identification had to reject the alibi because it had been destroyed by identification. The learned trial judge after analysing the evidence of PW2 and PW5, the identifying witnesses together with that of PW3 D/Cpl. Cheptai, the arresting officer, who arrested the appellant in Budondo on 10.2.96 concluded:

> **"Having believed the evidence of PW2 Sokuton Geoffrey and PW5 Sekuton Sadiq I find that the prosecution has successfully displaced the alibi of the accused and placed him squarely at the scene of crime as the person who hurled the grenade that fatally injured Chemsto Michael his alibi accordingly rejected."**

We agree with the learned judge's finding. It is trite law that the appellant did not have to prove his alibi, but once the prosecution had succeeded in placing him at the scene of the crime, this entitled the learned judge to reject his alibi see - **Siraji Sajjabi vs. Uganda Criminal Appeal No.31/89.** In the premises grounds two and three also fail.
The appeal is accordingly dismissed.

Dated this 27th day of February 2001

HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE,
JUSTICE OF APPEAL

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

HON. LADY JUSTICE C.N.B. KITUMBA,
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