THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE A.E.N MPAGI-BAHIGEINE, JA
HON. JUSTICE S.G ENGWAU, JA
HON. JUSTICE A.TWINOMUJUNI, JA

CRIMINAL APPEAL NO. 95 OF 2004

BETWEEN

CHESAKIT MATAYO……..APPELLANT

AND

UGANDA…….....RESPONDENT

[Appeal from a conviction and sentence of the High Court of Uganda holden at Mbale (Rugadya Atwoki J) dated 15th July 2004 in Criminal Session Case No. 0143 of 2002]

JUDGEMENT OF THE COURT

The appellant, Chesakit Matayo, was indicted and convicted on two counts for murder contrary to ***sections 188*** and ***189*** of the ***Penal Code Act***. It was alleged in the particulars of the indictment that the appellant murdered Beatrice Ayeba and Moses Mwanga, hereinafter referred to as the 1st and 2nd victims respectively. He was sentenced to suffer death on the first count. The sentence on the second count was suspended.

The brief facts of the case are that on the fateful day of 6th October 2001 at midnight, Augustine Ayeba, PW1 in his sworn evidence stated that he was sleeping in the house with his wife the 1st victim. He heard an alarm outside. He woke up his wife and they went out. He opened the door and saw the appellant and two others, Nelson Sokuton and the 2nd victim. The appellant was in an army uniform with a gun. PW1 heard a gun shot which hit the 1st victim. He took off and hid in the fence. The appellant told PW1 that he did not intend to kill the lady and proceeded to kill Moses Mwanga whom he wanted to kill and later fled the village. The appellant was arrested in Kenya and later brought to Uganda where he was indicted. At the trial the appellant raised the defence of alibi, denied everything and stated that he was sleeping at his home at the time of the incident. The appeal is premised on two grounds, namely:-

1) ***That the learned trial judge erred in law and fact when he convicted the appellant on the basis of unsatisfactory identification evidence***
2) ***That the learned trial judge erred in law and fact when he failed to evaluate adequately all the material evidence adduced at trial and hence reached an erroneous decision which resulted into a miscarriage of justice***.

The parties were represented by Mr. Henry Kunya, learned counsel for the appellant on state brief and Ms. Nabaasa Caroline, RSA for the state. Counsel for the appellant argued both grounds of appeal together and counsel for the state chose to do the same. Since this arrangement was followed by counsel, the court will also follow the same.

Counsel for the appellant in his arguments stated that the identification evidence of a single witness was unsatisfactory and that the evidence of PW1 should have been considered with caution. His contention was that since the incident had happened at about midnight when PW1 was sleeping at the particular time, his evidence at the scene of crime was suspect. On the issue of bright moonlight on the fateful night, counsel cited and relied on the case of ***Lugolobi Lwetute and another Vs Uganda. CACA No. 150/02 at p10, lines 9-20*** where the court of appeal stated that the trial court should have called an expert witness to testify as to the position of the moon and therefore ascertain the conditions of identification.

Learned counsel submitted that while the appellant had told lies to court in that he had denied knowledge of his wife, knowledge of how to use a gun, knowledge of Moses Mwanga

and also denied being at the scene of the crime, it was erroneous for the trial judge to dwell too much on these lies. He further reiterated that the appellant was arrested at his home and not in Kenya as stated by the prosecution witnesses. He argued that the aspect of the grudges between the appellant and PW1 and between the appellant and Chelimo Charles, PW3 was not addressed by the trial judge and he referred to the case of ***Sabiiti Vincent and Others Vs Uganda CACA 140/01*** where one of the issues dealt with the existence of a grudge between the appellant and the prosecution witness.

Regarding demeanour, he referred to the ***Lugolobi*** case (supra). He prayed for the court to allow the appeal, quash the conviction and set aside the sentence. Learned counsel for the appellant prayed for a more lenient sentence since the appellant apparently has a large family to take care of.

The prosecution case was based on the identification evidence of a single witness, PW1. Ms. Nabaasa, learned counsel for the state supported both the conviction and sentence. Counsel submitted that the issue of identification was properly considered by the trial judge. She contended that there was bright moonlight and that PW1 knew the appellant and 2nd victim before very well. She added that the appellant was dressed in army uniform and this was confirmed by PW2, Bongit Alfred who had seen the appellant on that day before. PW1 was the father -in-law of the appellant which was also confirmed by PW2. Learned counsel stated that on the fateful night PW1 heard an alarm and he got out with his wife. He saw the appellant who shot his wife. The appellant informed PW1 that he had not intended to kill his wife but the 2nd victim. He proceeded later to kill the 2nd victim. PW5 Dr. Batambuze Majid went to the scene the next day and PW1 confirmed that the appellant killed the victims.

On the issue of corroboration, Ms. Nabaasa stated that there was no need for it since the judge warned himself and the assessors. She added that in any case corroboration was in the conduct of the appellant after the incident. He ran away from the village. She added that the evidence of PW3 was to the effect that the appellant was arrested from Kenya. The witness identified him to the Kenya police. She argued that the alleged lies were properly dealt with by the judge. She prayed for the court to dismiss the appeal, uphold the conviction and sentence since the appellant killed the people he should have protected.

Mr. Henry Kunya for the appellant in reply stated that the lies told by the appellant could not be used as corroboration and reiterated his earlier prayers.

This being the first appeal, it is our duty to re-evaluate the evidence ourselves and determine whether the conclusions reached by the trial court should be allowed to stand or not, bearing in mind that we have neither seen nor heard the witnesses. This was stated in ***Pandya Vs R [1957] EA 335.*** The burden to prove a charge against an accused person lies on the prosecution. The onus is, as it is always, on the prosecution in all criminal cases except a few statutory offences, to prove the guilt of the accused beyond reasonable doubt. This was stated in the famous case of ***Woolmington Vs DPP (1935) AC 462***.For the offence of murder contrary to ***sections 188 and 189 of the Penal Code Act cap 120***, the following ingredients have to be proved,

i) that the deceased is dead,
ii) that the death was unlawful,
iii) that there was malice aforethought
iv) and finally that the accused participated.

The first three ingredients were conceded by the defence. However we shall go through them briefly for the purposes of re-evaluation the evidence.

Considering the first ingredient, a postmortem report produced by PW5 proved that the two victims were dead. In addition PW1 testified that he buried his wife while PW2 and PW3 testified that they saw the dead bodies of the two victims.

For the second ingredient, the presumption is that homicide is unlawful unless excused by law or it is by accident. This was set out in the case of ***Gusambizi Wesonga and Others Vs R (1948) 15 EACA 63.*** As stated by the learned trial judge, there was nothing to indicate that the deaths by shooting were in any way accidental, or justifiable in law. Neither were they excusable or permitted under the law. Thus the conclusion here is that the deaths were unlawful.

The third ingredient is malice aforethought, which is defined in ***section 191(a)*** of the ***Penal Code Act*** as ***'an intention to cause death of any person***, ***whether such person is the person actually killed or not'***. Secondly under ***section 191 (b) 'knowledge that the act or omission***

causing death will probably cause the death of some person, whether such person is actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.' For the purposes of this case we shall consider the definition in ***section 191(a)*** above. The learned trial judge also considered the case of ***Uganda Vs John Ailing (1992-93) HCB 80*** which has the definition of what constitutes malice aforethought and what factors are to be considered. These include the part of the body injured, type of weapon used, the extent of bodily injuries and conduct of the accused. The fact that at the appellant aimed at the heart and trunk of the 1st and 2nd victims respectively, the use of a gun which is a deadly weapon and the fact that the appellant ran away to Kenya were evident signs of the existence of malice aforethought.

The last ingredient which is the first ground of appeal is proof of participation of the appellant based on his identification. Counsel's arguments on this point have already been stated. Dealing with the issue of identification of the appellant at the scene of crime, the trial judge considered the evidence of PWI and stated thus;

"Ayeba got out of his house at the sound of alarms of someone being chased. He stood in the doorway with his now deceased wife. He saw his LC II Chairperson with another, Sokuton Nelson having caught the one they had been chasing. There was such bright moonlight that there was no hesitation about the identity of these people, who were a mere 4-5 metres away from him. He even saw that the two, the Chairman and Sokuton were forcing down Mwanga Moses. He described what each of the men was wearing. The LC II Chairperson was in military uniform and was holding a gun. Sokuton Nelson was wearing a jacket and trousers. Mwanga Moses was wearing a white long sleeved shirt with folded sleeves."

After commenting on the defence case, the trial judge continued,

"It cannot by any stretch of imagination be said that there was ever the possibility of mistaken identification. The conditions though were unfavourable, but they led to a correct and error free identification. Upon that evidence alone, court would convict even in absence of evidence of corroboration."

In relation to proper identification the court considers the following factors, familiarity of the witness with the accused, the nature and source of light, time and opportunity and the

distance between the two when the identification was made. This was stated in the case of ***Abdalla Nabulere Vs Uganda (1979*) *HCB 76***. If these factors are considered with what the learned trial judge mentioned in the passage above, it is clear that all these issues were properly dealt with. We therefore find no reason to fault him.

Counsel for the appellant relied on the case of ***Lugoloobi Lwetute (supra)*** regarding the issue whether there was bright moonlight on the fateful night**.** In that case, it was stated as follows.

"Unfortunately, this calendar was not exhibited and we had no opportunity to examine it ourselves. We think the trial judge should have summoned a witness under the provisions of s.39 of the Trial on Indictments Act which empowers the High court at any stage of the trial to summon or call any witness if his or her evidence appears to be essential to the just decision of the case. Such witness could have been somebody with expert knowledge on the weather and the position of the moon. The learned trial judge relied on the case of Silver Tugugu and 3 others Vs Uganda SCCA No. 16/92(unreported) in which a dispute arose as to the position of the moon during the trial. The supreme court observed that in a criminal trial where evidence as to whether on a given date, there was moonlight or not in existence, the court may take judicial notice of the position of the moon as indicated on the calendar."

What counsel for the appellant was in effect stating, basing on the above excerpt, was that evidence should have been brought to prove the presence of bright moonlight on that night and therefore to further prove that the conditions favoured a correct identification. While it might have been good to call a witness to testify as to the presence of the moon on the fateful night, it was not necessary because even if it was a dark night, there were other factors that favoured identification. For example, the appellant was identified when he spoke in kupsabiny to PW1 his father-in-law. In addition, the length of the whole incident which the trial judge mentioned lasted about 20 minutes, was enough to awaken PW1. Also since the appellant was very well known to PW1, there were very minimal chances of mistaken identity.

To further explain this point, we will quote from the case of ***Bogere Moses and another Vs Uganda Criminal Appeal No. 1/97 (unreported)*** considered in the case of ***Lugolobi Lwetute (supra).*** In this case guidelines were given on the approach to be taken in dealing

with evidence of identification by eye witnesses in criminal cases. At page 11 of the judgement the court said:

"The starting point is that court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been were or were not difficult and to warn itself of the possibility of mistaken identity. The court then should proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing, the court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult."

Having properly considered the evidence as a whole, the learned trial judge in the instant case stated,

"By his own evidence the accused placed himself at the scene of crime. He was in the area that night and was seen in the bar that very evening, in spite of the fact that he had two other homes elsewhere. He was a well known person in the area. He was a person of authority being an LC II Chairperson. I was satisfied that he was properly identified at the scene of crime. That evidence further placed the accused at the scene of crime."

We entirely agree with the trial judge that the appellant was well identified and we find no reason to fault his judgement. In ***Abdalla Nabulere Vs Uganda (supra)*** the court held that the judge should warn himself and the assessors of the need for caution before convicting on the evidence of a single identification witness. This is what the trial judge accordingly did. We therefore find that the first ground must fail.

We now turn to the second ground of appeal which was that the learned judge erred in law and fact when he failed to adequately evaluate all material evidence adduced at trial and hence reached an erroneous decision which resulted in the miscarriage of justice. Several issues were raised by counsel for the appellant as hereunder:

On the issue of lies by the appellant, counsel for the appellant argued that it was erroneous for the trial judge to dwell on the lies of the appellant while counsel for the state argued that these had properly been dealt with by the judge. In evaluating evidence concerning this issue, the trial judge stated;

"Lies are inconsistent with innocence. Proved lies can be used to corroborate prosecution evidence. See J<u>uma Ramadhan Vs Republic Cr. App. No. 1 of 1973 (unreported)</u>). I am aware that an accused person cannot be convicted on the basis of the lies he tells court. I found that the numerous lies which the accused told court were inconsistent with his innocence. They corroborated the prosecution evidence that he was a participant in the death of the two deceased persons."

We therefore find that the learned trial judge properly addressed this issue and we entirely agree with him.

The second aspect regarding demeanour of the prosecution witnesses, counsel for the appellant criticised the learned trial judge for commenting about the prosecution witnesses. In support of his argument, counsel relied on the case of ***Lugolobi Lwetute(supra)***.In that case the learned trial judge made comments about the demeanour of the witnesses. The judge stated,

"From the demeanour, the calmness, the confidence and the manner in which he answers questions, the witness appears to be totally credible."

The court of appeal later stated that it was wrong for a trial court to adopt an impression as to the demeanour of a witness without testing against the evidence given by the witness in the case as a whole.

In the instant case the trial judge commenting about the demeanour of the prosecution witnesses stated,

"The demeanour of the witnesses was important. I observed the demeanour of the prosecution witnesses as they gave their testimonies in court. They were reliable. They were consistent and not shaken even under the intense cross-examination they were subjected to. I found them convincing and truthful. I accepted their evidence."

He however continued,

"I observed the accused as he gave his testimony. He was an outright liar. He denied knowledge of his own wife with whom they have three children just because that would show a close association with Ayeba; this being Ayeba's daughter. He denied knowledge of using a gun yet he was seen that very evening holding one by PW2."

Applying the principle in the above case of ***Lugolobi Lwetute,*** the learned trial judge was entitled to give his opinion about the demeanour of the witnesses as long as he looked at the

evidence as a whole. He was therefore not wrong in this respect as he proceeded to consider the evidence given as a whole in addition to that given by the appellant in his defence.

Concerning evidence of the appellant's arrest, counsel for the appellant contended that the appellant was arrested at his home in Chekswata village, Kapchorwa district while prosecution maintained he was arrested in Kenya. In dealing with the absence of evidence of arrest, the learned trial judge rejected the idea that its absence made the testimony of the accused uncontroversial. He explained thus:

"I do not agree but assuming for the time being, that were so, what would be the effect of that testimony? All it shows is that the accused was at his home at the time he was arrested. That would not however, reduce the evidential value of the evidence of identification of the accused at the scene of crime. But that aside, I agree the evidence of arrest would have been useful. What was adduced was the evidence of PW3 Chelimo Charles."

On this issue we will consider the case of ***Alfred Bumbo and another Vs Uganda Sc. Cr. App. No 28/94*** where it was held that while it is desirable to have evidence of the arresting officers, it is not always necessary unless the circumstances so require. The learned trial judge correctly held that while this evidence would have been useful, its absence was not fatal to the prosecution case as there was other evidence to support the guilt of the appellant. We therefore find nothing more useful to add.

Counsel for the appellant submitted that the aspect of the grudge was not considered by the trial judge yet the appellant in his evidence mentioned that he had grudges with PW1 and PW3. On this issue, counsel brought to the attention of court the case of ***Sabiiti Vincent and Others Vs Uganda CACA 140/01***. In that case it was mentioned by the judge,

"The submission by appellants' counsel that the existence of a grudge must have led to the concoction of evidence against the first appellant is appreciated. The prosecution witnesses might have implicated the first appellant on mere suspicion because of the grudge." What should be noted in the above case is that there was evidence as to the existence of the said grudge between the appellant and some of the prosecution witnesses though it had not been considered by the trial judge.. In this case however, we find that there was no evidence as to the existence of the grudges and that this was just another lie by the appellant. We find that this ground of appeal must also fail.

Lastly, we will deal with the defences that the appellant could have raised but did not. Where the appellant does not raise all probable defences, it is the duty of the court to raise the defences that could have been available and to evaluate them against the available evidence. One defence which could have been considered by the appellant was intoxication**.** ***According to Smith and Hogan , Criminal Law Eighth Edition pages 225-235***, intoxication can be raised where it can be proved by the accused that due to intoxication mens rea was negatived and secondly that the accused/ appellant was intoxicated to the point of insanity. The learned author explains that it is a defence for the offences of specific intent of which murder is one. The burden of proof is on the appellant and the standard of proof is on a balance of probabilities. In the instant case, prosecution evidence shows that the appellant was seen on the fateful evening at a bar drinking beer with other people. The appellant therefore could have raised this defence. However this defence would not have stood because the appellant, before his drinking spree that night had already formed the intention to kill a person, (Moses Mwanga) the 2nd victim.

The learned authors in ***Smith and Hogan*** at page 235 explain the concept of intoxication induced with the intention of committing crime with the case of ***AG for Northern Ireland Vs Gallagher [1963] AC 349***, ***[1961] 3 ALL ER 299.*** In that case D having decided to kill his wife, bought a knife and a bottle of whisky. He drank much of the whisky and then killed his wife with the knife. He raised the defence that he was either insane or so drunk as to be incapable of forming the necessary intent at the time he did this act. It was found that the accused was guilty of murder since he formed the intention prior to getting drunk. This is exactly what the appellant did when he killed Moses Mwanga.

Another probable defence that could have been available to the appellant is the defence of mistake. In dealing with this point, the trial judge stated,

"It was immaterial whether the killing of Beatrice was by mistake when Mwanga Moses was the intended victim, as the intention to cause death was present. There was no mistake any way because Beatrice was 5 metres in front of the gunman while Moses was being held down."

The defence of mistake is negatived by the concept of transferred malice mentioned by the judge above. This concept as explained in ***Smith and Hogan*** is to the effect that if D with the

mens rea of a particular crime does an act which causes the actus reus of the same crime, he is guilty even though the result in some respect, is an unintended one. So if D intending to murder O, shoots at a man who is in fact O but misses and kills P who unknown to D, was standing close by. He is in every respect guilty of murder. Applying this principle, we find that the learned trial judge properly dealt with this issue.

Counsel for the appellant prayed for a lenient sentence since the appellant is apparently a first time offender and has a very large family to take care of. However, given the circumstances of the case and the gravity of the offence, we find that the sentence ought to stand.

In the result we hereby dismiss this appeal for lack of merit, uphold convictions and sentence meted on the appellant.

Dated at Kampala this 20th day of May 2009.

A.E.N MPAGI-BAHIGEINE
JUSTICE OF APPEAL

S.G ENGWAU
JUSTICE OF APPEAL

A. TWINOMUJUNI
JUSTICE OF APPEAL