THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.36 OF 2000

(Arising from Criminal Case No. 23 of 2000)

KABATUSABE EDWARD…….. APPELLANT

VERSUS

UGANDA…… RESPONDENT

Before: The Hon. Mr. Justice E. S. Lugayizi

Judgment

This is an appeal. It is against the decision of Her Worship the Chief Magistrate of Masindi (C.K.Mudhasi) dated 14th June 2000 in which she convicted the appellant of arson contrary to section 307 (a) of the Penal Code Act and sentenced him to 5 years imprisonment. The appellant was dissatisfied with that decision. Hence this appeal. The background to the said conviction and sentence was briefly as follows. During the night of 12th January 2000 at Miirya village, in Masindi district, at around 3.00 a.m. when the complainant (Barugahara Soteri PW1) and his family were asleep, their house was set on fire. The complainant went to the back part of the house to see what was happening. He opened the back door and saw a fire near it. There was a bench behind the door. Therefore it could not open easily. For that reason, the complainant went to the front part of the house and opened the door. He saw the appellant running away. The complainant and the members of his family then raised an alarm that was answered by some of the neighbours. The fire was contained. Later on, the complainant reported the matter to the authorities implicating the appellant. The appellant was arrested and prosecuted for arson. During the hearing of the case the prosecution called five witnesses who substantially narrated the same story as the one above. On his part, the ppellant gave sworn evidence and set up an

alibi. He called two witnesses who supported his alibi. After warning herself of the danger of basing a conviction on the evidence of a single identifying witness, the learned trial magistrate was satisfied that the complainant could not have been mistaken in identifying the appellant as the culprit. He knew the appellant before the incident; and he flashed bright torchlight upon him as he ran away from the scene of crime. The learned trial magistrate therefore convicted the appellant of arson and sentenced him to 5 years imprisonment. The appellant was aggrieved by that decision; and in his Memorandum of appeal he cited three grounds. They are as follows,

1. The learned trial magistrate erred in law and fact when she relied on the evidence of single identifying witness, in the absence corroboration, to conclude that the appellant was correctly identified.

2. The learned trial magistrate erred in law and fact in failing to properly consider the defence of alibi that was raised by the appellant.

3. The learned trial magistrate erred in law and fact in failing to properly evaluate the evidence on record.

At the time of hearing the appeal, Mr.Ruyondo represented the appellant and Mr.Gatana represented the DPP. However, during submissions Mr. Ruyondo abandoned the last ground of appeal and concentrated on the first two grounds. With regard to the first ground of appeal Mr. Ruyondo submitted that the evidence of identification fell short of the required standard in that it was doubtful and unreliable. The offence in question took place in the dark, at 3.00 a.m. and the complainant only saw, at a distance and by weak torchlight, the back part of some one running away from the scene of crime and thought that it was the appellant. Secondly, in Mr. Ruyondo's opinion, that evidence was not corroborated in any way and therefore the learned trial magistrate should not have relied upon it to convict the appellant.

With regard to the second ground, Mr. Ruyondo submitted that the learned trial magistrate erred in thinking that the appellant bore the burden of proving the defence of alibi, which he set up. According to him, the burden of disproving the alibi rested upon the State, which failed to discharge that burden. For that reason, Mr. Ruyondo submitted that the learned magistrate should have acquitted the appellant of the offence in question. All in all, Mr. Ruyondo called upon Court

to quash the conviction and set aside the sentence of 5 years imprisonment that the learned magistrate passed against the appellant.

On his part, Mr. Gatana opposed the appeal. Firstly, he submitted that the evidence of identification was quite reliable and it could safely stand on its own. It did not require corroboration. The complainant knew the appellant as his neighbour before the offence in question took place. He saw the appellant at close range (i.e. 15 meters away) as he ran away from the scene of crime; and he was able to recognise him because he flashed bright torchlight upon him. Mr. Gasana relied upon the case of **Abdulla Nabulere & Others v Uganda Criminal Appeal** No. **9 of 1978 reported in the (1979) HCB at page 77** in support of the above submission.

With regard to the defence of ***"alibi,"*** Mr. Gatana submitted that the complainant's good evidence of identification disproved or destroyed that defence. Therefore, he called upon Court to dismiss the appeal. Court will address the two grounds of appeal taking into account the law, the submissions of counsel and the contents of the lower court's record.

With regard to the first ground of appeal, Court has this to say. Courts have time and again insisted that the evidence of identification by a single witness, especially, in difficult circumstances must be tested with greatest care before it is relied upon for a conviction. The reason for this insistence is the obvious danger of the likelihood of victimising an innocent party as a result of mistaken identification. Therefore where a court is faced with such evidence it must, first of all, warn itself of the above danger. If, it is satisfied that conditions existing at the time of the offence were conducive to correct identification of the culprit it would safely proceed to act upon that evidence. If, it is not satisfied that such conditions existed at the time of the offence, it would then find out whether there is ***"other evidence"*** circumstantial or direct which goes to support the correctness of identification before convicting on that evidence alone. (See **Abdalla Bin Wendo and Another v R (1953) 20 E.A.C.A. 166; Roria v Republic (1967) E.A. 583; and Nabulere & Others v Uganda (supra)** which are the leading authorities in this area of criminal law.)

The question to ask at this point is whether the learned trial magistrate's finding that the complainant was in a position to identify the appellant correctly, was well founded? According to the evidence on record, the factors that favoured correct identification of the culprit were as follows. The complainant knew the appellant before the offence was committed, for he was his neighbour. Secondly, as the appellant ran away from the scene of crime the complainant flashed bright torchlight upon him and saw him. However, against that background there were factors that were unfavourable to correct identification of the culprit. For example, the offence took place at night, at 3.00 am. Secondly, at the time the complainant allegedly saw the appellant running away the two were at a distance of 15 meters from each other. Thirdly the foregoing must have happened in a fleeting glare when the culprit was not facing the complainant, for he was at that point running away from him. That means that the complainant only saw the culprit's back part. Therefore, considering the factors favouring correct identification and those against it, Court finds that the learned trial magistrate's finding that the complainant was in a position to identify the appellant correctly was not well founded. She should have found that it was doubtful that the conditions obtaining at the time of the offence were conducive to correct identification of the culprit.

Consequently, she should not have based the conviction solely on the complainant's evidence of identification. That brings Court to the final question in respect of this ground of appeal, which is whether there is, on record, ***"other evidence"*** circumstantial or direct which goes to support the correctness of identification of the appellant? There are two pieces of evidence on record that Court will consider in answering that question. Firstly, the appellant did not answer the complainant's alarm soon' after the offence was committed. So would that fact now be ***'other evidence"*** which goes to support the correctness of identification of the appellant? In Court's opinion, the answer to that question is "No" There is no law in Uganda that compels a citizen to answer an alarm when it is raised. Even if there was, the appellant's defence that he was drank that night and did not hear the alarm, was reasonable. That defence was supported by a number of witnesses. Secondly, according to Sam Asiimwe (PW3) the appellant visited him after the offence was committed. That visit took place in the complainant's presence. Asiimwe, then, informed the appellant that the police wanted him on suspicion of having burnt the complainant's house. In reply, the appellant requested the complainant to drop the matter. If, the complainant

confirmed that piece of evidence, it would have, perhaps, qualified as some form of admission on the part of the appellant that would have amounted to ***"other evidence"*** which goes to support the correctness of identification of the appellant. (See **Minani Joseph v Uganda (Supreme Court) Criminal Appeal No. 30 of 1995.)** However, the complainant did not confirm that piece of evidence. Instead, he materially contradicted it in two areas. Firstly, where it claimed that the appellant visited Asiimwe in the presence of the complainant, the complainant denied that fact. Again where it claimed that the appellant asked the complainant to drop the matter, the complainant denied that fact. He pointed out that Asiimwe simply informed him that the appellant wanted the matter to be handled by the local council of the village as opposed to the police. Obviously, Asiimwe's version is not at all in harmony with the complainant's version; and it is a matter of speculation as to who of those two witnesses was telling the truth and who was lying! All in all, Asiimwe's evidence does not qua1if,' to be called ***"other evidence"*** which goes to support the correctness of identification of the appellant. That means that the first ground of appeal has succeeded.

With regard to the second ground of appeal, the law in respect of the defence of ***"alibi"*** is that an accused person has no burden to prove an alibi. It is the prosecution that bears the onus to disprove or destroy the accused person's alibi. It does so by adducing cogent evidence of identification that places the accused at the scene of crime at the time of the offence. **(See Sekitoleko v Uganda (1967) E.A. 531; and Leonard Aneseth v R (1963) E.A. 53).** The question to answer therefore is whether there is such evidence on record? Needless to say, Court earlier on concluded that the complainant's identifying evidence was unreliable; and there is no ***"other evidence"*** on record circumstantial or direct, which goes to support the correctness of identification of the appellant. It follows therefore, that the answer to the above question is a firm "No". That means that the second ground of appeal has also succeeded.

In conclusion, Court has no choice but to find that this appeal has succeeded; and it is so ordered. It is further ordered that the appellant's conviction for arson is hereby quashed; and the sentence of 5 years imprisonment that was passed against him set aside. The appellant is free to go home, unless he is being held on some other lawful charges.

E.S. Lugayizi

JUDGE

28/2/2001