IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., ODER, J.S.C., TSEKOOKO, J.S.C.)

CRIMINAL APPEAL NO. 7 0F 1994

BETWEEN

MUKWAYA MANASSE ……………………………………………...………….. APPELLANT

AND

UGANDA………………………………………………………………………... RESPONDENT

(Appeal from Convictions an

sentence of the High Court at

Kampala (Mrs. Justice L.E.M. Mukasa-Kikonyogo) dated 25th day of March, 1994)

IN

CRIMINAL SESSIONS CASE NO. 177 OF 1992

JUDGMENT OF THE COURT,

The appellant Mukwaya Manasse was indicated for murder contrary to S.183 of Penal Code in the first Count arid for capital Robbery contrary to Ss. 272 and 273 (2) of Penal Code in the second Count.. He was tried and convicted on both Counts and sentenced o death against which convictions he has appealed to this Court,

Briefly one Solomon Nsimbi, a driver of the Ministry of Health motor vehicle Beg. No. UM 0707, Toyota Minibus, carried passengers in the said vehicle on 21/7/1990 and, at 9.30 p.m. after dropping some of his passengers at Lwasa stage in Buziga village along Salasma Road in Kampala, he was confronted by two armed thugs who demanded for the keys of the vehicle. The deceased resisted as a consequence of which he was shot in the chest and died at the scene. The thugs sped off in the vehicle. Five hours later, that is at 2.30 a.m. On 22/7/90, the same vehicle was intercepted by two Tanzanian Policemen at Kakoba Police Road Block in Kyaka area, Bukoba Region, Tanzania about 12Km from Uganda/Tanzania police, customs and Immigration Border Post of Mutukula.

The two Policemen are D/C Maulid Omara, (PWII), and Station/Sgt. Saidi Ameri (PW12). There were two people in the vehicle whom PW11 and PWI2 named as the appellant and one Katongole. According to the two policemen, the vehicle appeared not to have passed through the Mutukula Uganda/Tanzania Border Police, Customs and Immigration formalities at Mutukula. Because of lack of these formalities, and absence of the registration card for the vehicle, the men and the were detained by PWII and PW12. After some persuasion the appellant was released ostensibly to collect the requisite papers f the vehicle from friend of the appellant in Kyaka.

The appellant failed to return to Kakoba. So police followed him up and brought him back under arrest. He did not produce the documents. He was charged in Tanzania Courts for entering Tanzania illegally or being in possession of a vehicle in Tanzania without proper documents. The appellant was subsequently extradited to Uganda where he was charged with the offences for which he was duly tried and convicted.

during the trial the appellant denied the offences and raised an alibi t the effect that between 20/7.90 and 23/7/90 he was in Bukoba residing at Super Rose Hotel and therefore he never participated in the murder and the robbery at Buziga and maintained that he could not have been at kakoba when the vehicle arrived there on the night of 22/7/90 (at 2.30 a.m.) The effect of his evidence is that the vehicle in question, UM0707 was driven to Kakoba by his friend called France Nsubuga who then sent a message for the appellant to deliver to Nsubuga some petrol and money for payment to the customs. That when he was delivering the petrol and the money he was arrested by PWII and PW12 allegedly because he was a friend of Nsubuga who had disappeared.

The three grounds of appeal state:—

“1. That the learned trial judge eared in law and in fact by finding that the inconsistencies, discrepancies and contradictions were minor and explained.

2. That the learned trial judge erred in law and fact by rejecting the appellant’s alibi.

3. That the learned trial judge erred in law and fact by finding that the inculpatory facts were incapable of explanation on any other reasonable hypothesis that the appellant’s guilt.”

At the hearing of the appeal, Mr. Babigumira, learned counsel for the appellant argued the three grounds together.

He submitted and we agreed with him that none of the witnesses who testified identified the appellant at the scene as one of the two thugs who murdered the deceased and robbed him of the vehicle at Lwasa stage in Kampala. Mr. Babigumira submitted that the witnesses who were at the scene of murder and robbery did not describe the features of the attackers so as (probably) to enable C.urt decide whether the appellant fits such description. The evidence against the appellant was therefore entirely circumstantial.

Learned Counsel quite correctly in our view con.dd that the learned trial judge properly directed herself and the Assessors on the law on alibi generally on the burden of proof and on circumstan1.al evidence. Mr. Babigumira, however, criticised the trial judge en findings of fact. We observe that as a first Court of Appeal we have the duty to reappraise the evidence and draw our own conclusions bearing in mind that we have not had the opportunity of hearing and seeing the witnesses when they testified.

Learned counsel criticised PW1I and PWI2 that their evidence contained contradictions and inconsistencies. For example, whether the two people in the vehicle at Kakoba had one or two passports; whether the appellant came to the scene on 23/7/90 in a police vehicle or by privately hired vehicle belonging to his friend as the appellant claimed; whether one Nsubuga the alleged friend or the appellant was present or not. Learned counsel put forward the theory advanced by the appellant in his evidence at the trial that the police made false entries in the appellant's passport to make up for their ineptitude in allowing a suspect (Nsubuga) to escape and consequently the same police planted this case on the appellant. Counsel criticised the prosecution for its failure to call the policeman who received the passport to testify and for the prosecution's loss of Super Rose hotel Register of guests in which the name of the appellant appeared. In counsel's view all these matters raised doubts in the prosecution case which doubts should have been resolved in favour of the appellant.

We have considered these submissions and are satisfied that the learned trial judge adequately considered the matters raised in this appeal. She found the contradictions minor and not intended

to deceive or mislead the Court. She rejected the theory that the appellant was framed by the police as an afterthought. We are unable to say that she came to the wrong conclusions. We agree that the office acted carelessly in that it lost the Super Hotel Register of guests. The evidence about the Register was given by A.C.P. Jumbe Sultan, (PWI3) the then Regional police commander, Kagera Region, Tanzania who had earlier been the CID officer in the Region. According to PWI3, in 1992 he was asked to check on the appellant's claim that between 20th July and 23rd July 1990 he stayed at Super Rose Hotel at Bukoba. PW13 inspected entries in the register for the period 1st July 1990 to 21st June, 1991. His evidence n this is as follows:—

'On checking on the date of 2Oth/7/90 I found the name written Mr. Mukwaya but on an erased background. The name was superimposed on top of another name. There was another name called Binamungu. That was the name under Mukwaya. I records (sic) was a Tanzanian who came to Bukoba Karangwe and was supposed to check out of Bukoba or the Hotel of July 2lst, 1990. On 21/7/90 there was an attempt of superimposing the name of M. Mukwaya but again without success. The background showed another name on which the second one was superimposed, on 20/7/95 I found a name of Manasse Mukwaya again superimposed. In the register the name was a Tanzanian Businessman P.O. Box 33 (sic) coming from Rwanda visiting Bukoba and expected to leave Bukoba on 23/7/90. After inspecting the register and taking into account the superimposition of the name Mukwaya, I reached a conclusion that Manasse Mukwaya, was never at Super Rose Hotel on July 20 1992 (199O I took the register wrote a statement and handed it to Mr. Balaba who at that time was Regional CID Masaka."

The witness could not produce the register because it wasn't available at that time when he testified. It was reported to be with the DPP.

At the request of Mr. Ekirapa, the then defence counsel, cress examination of PW13 was put off pending search of the register which was never traced by the time the trial of the appellant ended. Cosequent1y, and most unfortunately, the evidence of PWI3 was not tested in cross—examination. So it remained unchallenged. We think it was incautious on the part of the defence counsel not t. have cross—examined PW13 even if the register couldn't be traced. PWI3, a very senior police officer, apparently made his statement soon after examining the register. That

statement must have been available when he testified. It could be used as a basis of testing his credibility.

On the evidence we are unable to fault the learned trial judge's finding that the register was tampered with casting doubts upon the appellant having been booked at the Super Rose Hotel between 20th July and 23rd July, 1990. We would further observe that the appellant, who claimed to be booked at the Super Rose Hotel between 2lth July, and 23rd July, 1990 was on his own evidence, at the Kakoba Road Block at 2.30 a.m. on the 22nd July, 1990 delivering fuel for a vehicle driven from Uganda. There is evidence that the stolen vehicle which was in Kampala at 9.30 p.m. on the 21st July, 1990 was at Kakoba Road block in Tanzania in a matter of five hours. In these circumstances we doubt whether registration of the appellant at the Hotel per se necessarily rec1uded his presence in Kampala at the times referred to. That being so the evidential value of the register 4 considerably diminished. We find in the circumstances that less of register could not have caused the appellant to suffer any prejudice or to have caused a miscarriage of justice.

We think, however, that the learned trial judge misdirected herself on the burden of proof of an alibi in the course of her judgment. At page 15 of the judgment she stated:-

"Further the accused testified that the Tanzania police refused to give the receipts issued to him by the Super Rose Hotel Lodge as it was ordered by the magistrate's court of Bukoba. PWI2 who attended the proceedings in the Magistrate's Court at Bukoba testified that there were no such receipts. In any case this being a matter of death and life although the onus to disprove the alibi was on the prosecution it would have assisted the defence to raise a doubt in the Court's mind if duplicates were sent for and produced before Court.

We understand the learned judge to have criticised the appellant for his failure to produce duplicate receipts. It is trite law that whenever an accused person sets up an alibi, he does not thereby assume any burden of proving its truth: see Raphael Vs Republic (1973) E.A. 473 and Sekitoleko Vs Uganda (1967) E.A. 531. The burden is on the prosecution to disprove or destroy the alibi, as the learned judge had earlier in her judgment observed, but not the accused to raise a doubt in Court's mind by producing duplicate receipts so as establish the truth of the alibi. We

are however, satisfied that despite ‘.he misdirection the judge was justified in rejecting the appellant’s alibi.

We are also satisfied that the suspicious dates in the passports do not have any material bearing on this case. PW1I and PW12 would not gain anything by inserting the alleged false dates in the passports. In any case the evidence of the appellant in answers during cross-examination demonstrates that he certainly moved between Tanzania and Burundi during May 1990.

We are satisfied that the learned trial judge correctly applied the doctrine of recent possession of stolen property to convict the appellant. The doctrine of recent possession was applied by the Uganda, Court of Appeal in Criminal Appeal No. 3 of 1981 (K. Lubinga Vs Uganda (1983) HCB 6 and by this Court in Supreme Court Criminal Appeal No. 12 of 1991 (Erieza Kasaija Vs Uganda) Unreported). Lubinga’s case is basically similar to the case before us.

There a taxi was hired from Kampala on 9/3/1980 at 10.00 a.m. Three and half hours later the appellant was seen in that taxi 17 miles away from Kampala. At 3.00 p.m, on the same day the appellant was still in the taxi. The taxi driver’s body was later found in a shallow grave 100 yards away from appellant’s home. The Uganda Court of Appeal affirmed the conviction of the appellant for murder and robbery and stated that:—

“The inference is irresistible that it was the appellant who hatched the plan to steal the oar. The possibility that he merely received innocently the stolen car is excluded by the facts of the case. The subsequent behaviours of the appellant, all bear testimony that he had stolen and not received it.”

The evidence shows that at the scene of the robbery in the present case there were two robbers (PW2). Thereafter PW3 saw only two people speeding away in the robbed vehicle.

Five hours later, PWII saw only the two people driving the same vehicle at an awkward hour of the night under extremely suspicious circumstances at Kakoba in Tanzania. The appellant and his confederate failed to explain their suspicious presence leading to their immediate arrest and detention by PW11 and PW12. In all these circumstances we are satisfied that the inculpatory

facts are incompatible with the innocence of the appellant, and incapable of explanation upon any other hypothesis than that of the guilt of the appellant.

We accordingly see no merit in this appeal which is dismissed

Dated at Mengo this 21st day of December 1994.

S.W.W. WAMBUZI
CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY
OF THE ORIGINAL.

J. MULANGIRA.

For: REGISTRAR SUPREME COURT.