THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

CORAM: TSEKOOKO. J.S.C, KAROKORA, J.S.C, MULENGA, J.S.C
KANYEIHAMBA, J.S.C.. KIKONYOGO, J.S.C.)

CRIMINAL APPEAL NO. 10 OF 1996

BETWEEN

BOGERE CHARLES……..…..APPELLANT

VERSUS

UGANDA……RESPONDENT

(Appeal from the Judgment of Court of Appeal by (G.M Okello, JA. , J.P. Berko, JA. , S.G. Engwau, JA. ,) dated 2nd July, 1996 in Court of Appeal Criminal session case No. 7 of 1997).

JUDGMENT OF THE COURT.

The appellant, Charles Bogere, was indicted and convicted of Aggravated robbery on the 1st count and of murder on the 2nd count. He was sentenced to death on the 1st count. The sentence of death on the 2nd count was suspended. His appeal to the Court of Appeal was dismissed on both counts and the sentence of death was confirmed. He now appeals to this Court against the decision of the Court of Appeal.

ine brief facts of the case as accepted by the trial court and the Court of Appeal are as follows

The deceased was an aunt of the appellant and the two were neighbours, living in Kiswera village, in Masaka District. However, on the morning of 24th of January i994, the body of the deceased was found lying a few meters behind her house, in a banana plantation with multiple injuries. The post mortem report on the body of deceased stated that the cause of death was due to head injury.

Her properties in the house were found to be in disarray and her radio which was her constant companion was missing.

There was no eye witness to the incident. when the neighbours including the appellant gathered at the scene of crime, one of the neighbours suggested that a search should be conducted around. During the search a red hand bag identified as belonging to the appellant was found hidden in bean husks in a banana plantation, behind the deceased's house. That bag contained the following items: deceased's missing radio, the appellant's graduated tax tickets for 1993 and a wedding invitation card addressed to the appellant. when the bag was discovered containing the above items, a member of the search party suggested that the appellant should be arrested. The appellant ran away. He was chased but could not be arrested. This was around 3:00 p.m. He was later arrested in the evening at Nakawanga in a neighbouring village in a bar drinking.

At his request, the appellant was taken to the Local authorities of his village who led him to the police. He was subsequently indicted for the aggravated robbery and the murder of the deceased.

In his defence at the trial, the appellant stated that he had previously lent his hand bag to the deceased, who was his aunt, when she was going for shopping and had forgotten to remove his personal effects from it. He denied having robbed and murdered the deceased. He explained that he ran away after his bag was recovered in the search and found to be containing deceased's missing radio and other documents which belonged to him, because he feared mob justice as the mob would not give him a chance to explain the circumstances in which his bag was found.

However, the learned trial Judge rejected the appellant's story and convicted him. His appeal to the Court of Appeal was dismissed. Hence this appeal.
There were four grounds of appeal. However, two of the grounds were abandoned during the hearing of the appeal. The remaining two grounds state as follows:-

1. The learned Justices of Appeal did not apply appropriately the legal test of circumstantial evidence on the facts of the case upon which the conviction was based.

2. The learned Justice of Appeal erred in law when they confirmed the conviction of the appellant which was based on the apparent weakness of the appellant's defence rather than on the strength of the respondent's case.

Mr. Tusasirwe Counsel for appellant in this Court argued the grounds of appeal separately. we snail also deal with them in the same pattern.

On the 1st ground Mr. Tusasirwe argued that the Court of Appeal had a duty as a first appellate Court to reconsider the entire evidence on record and subject it to a fresh and exnausitive scrutiny and make its own conclusion. This, he contended, was the position of the law as laid down in Pandya v R (1957) E.A. 336. See also section 33i(l) of the Criminal Procedure Code. He further contended that if they had re-evaluated the entire evidence as required of them, they would have found that the circumstantial evidence upon which the High Court relied to convict the appellant fell short of the standard of proof required of prosecution to prove the guilt of appellant. He referred us to the case of Simon Musoke V ft (1956) E.A. 715 and Teper V R (2) (1952) AC 460 and concluded that there were coexisting circumstances which weakened the prosecution case.
These were, he submitted, firstly, the appellant being a relative and a neighbour to the deceased it was possible for him to lend his bag to the deceased. Secondly, from the evidence on record, it appeared that the deceased used to hide her radio in

the evenings. She could have put the radio in the bag and hidden it under the bean husks.

In view of the above, he submitted that it was possible that when the appellant lent his bag to the deceased, he forgot to remove his graduated tax tickets and the wedding invitation card addressed to him from the bag.

Mr. Tusasirwe, further contended that the finding by the trial Judge that it was impossible for people in rural areas to walk without tax tickets ignored evidence or the fact that previously when the appellant paid surcharge he had been walking in the village without graduated tax tickets. In the circumstances, he submitted that we should accept the inference that appellant forgot his graduated tax tickets in the bag he had lent to the deceased.

On the question of running away, after deceased's missing radio was found in the appellant's bag which contained appellant's personal documents, Mr. Tusasirwe, contended that running away was no evidence of guilt. To support this contention Counsel, referred to the direction of the trial Judge to the assessors where she stated as follows:-

> "what is left is the accused's subsequent conduct in running away. But an innocent man may run away too. You have to consider all the circumstances of the case and determine whether it was natural and perhaps there was nothing negative to it."

Therefore, he contended that the facts did not conclusively prove that the appellant had committed offences charged, because if she used to hide her radio at night, she could have hidden her radio in the bag she had borrowed from the appellant.

Counsel submitted that the appellant could not have robbed and murdered the deceased and hidden the radio just near the scene of crime.

Mr. Opolot, Principal State-Attorney, for the respondent argued both grounds together. He submitted that the Court of Appeal had gone into greater details in re-evaluating the evidence adduced before the lower Court and properly applied the .law on burden of proof as expounded in the case of Gkena V Republic (1972) E.A 32.

We think that the thrust of Mr. Tusasirwe's submission on this ground was that the Court of Appeal failed in its duty to carefully re-evaluate the evidence and that if it had done so it would have come to a different conclusion.

It must be noted that Rule 29(1)(a) of the Rules of the Court of Appeal enjoins the first appellate Court to re-appraise the evidence and draw inferences of fact.

we agree that on the first appeal from a conviction by a Judge, the appellant is entitled to have the first appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and reconsider the materials before the trial Judge. Thereafter, the first appellate Court must make its own conclusion, but bearing in mind the fact that it did not see the witnesses. If the question turns on demeanour and manner of witnesses the first appellate Court must be guided by the trial Judge's impression. See: Pandya V R (1956) E.A. 336 at page 337 where the case of the Glannibanta (2) (1576) 1 PD 263 was cited with approval and quoted the following passage:-

> "Now we feel as strong as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of first instance whenever, in conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well

> on question of fact as on question of law, to demand the decision of the Court of Appeal, and that the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

we have held in the case of Kifamunte v Uganda Cr. Appeal No. 10/1969 (unreported) that at this stage we are not required to rehear and re-appraise the entire evidence and make our own decision on the case except in the clearest of cases where the first appellate Court clearly failed to do what was required of it to do. See: Henry Kifamunte V Uganda Criminal Appeal NO. 10/1997 (SC) (unreported) and Bogere Moses and Anor V Uganda Cr. Appeal No. 1 of 1997 (SC) (unreported). On second appeal, it is sufficient to determine whether the first appellate Court followed the principles of law as laid in Panaya V R (1956) Supra Henry Kifamunte V Uganda (supra) and determine whether the Court applied or failed to apply such principles.

We think that failure by the first appellate Court to rehear and re-appraise the evidence and draw its own conclusion on the case as a whole constitutes an error of law. See Panaya V ft (supra) Bogere Moses & Anor v Uganda) (supra). In the instant case, the Court of Appeal considered the appeal in the following words:- "This Court as a first appellate Court, is under a duty to re-examine the evidence on record to determine whether the inference drawn by the trial Judge can be supported.

> The scrutiny of the evidence in the case, revealed that the importance of graduated tax ticket in rural areas for identifying strangers was one of the reasons for which the trial Judge doubted the appellant's story. This reason was drawn from the evidence of Pw'5. The evidence emphasized the importance of graduated tax tickets in their village for identifying strangers following the insecurity which existed in the village. That reason was not the decisive factor for rejecting the appellant's story. Appellant's story was rejected because of his conduct after his hand bag containing his graduated tax ticket, wedding invitation card addressed to him and the missing radio of the deceased were unearthed. He felt implicated and ran away. His explanation that he had ran away for fear of mob justice was rejected by the trial Judge again, because of the appellant's conduct. Instead of running to the nearest police or to the LC for his protection against the threatened mob justice, the appellant ran to a neighbouring village where he was found drinking in a bar.
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> When asked by the LC officials in the area
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> why he had come to the village the appellant lied that he had gone to report the death of his aunt to his grand father Mzee Tegula. when asked to be taken to Mzee Tegula, the appellant refused."

The Court of Appeal thereafter cited a passage in the judgment of the trial Judge on how she dealt with the appellant's story where she held as follows

> "The only remaining evidence to consider is the finding of the bag containing the radio, tax tickets and the wedding invitation card addressed to him, **Exh.** P5, P6 and P7. His explanation was that he had lent his bag to his aunt, the deceased with whom they were on good terms. He never removed the contents. This is a little puzzling especially regarding tax ticket for the year 1993 while Exh. P7 was the original graduated tax ticket for 1993 grade V. In rural area or even in urban areas where a person has no other identity card it is impossible for a person to move without his tax ticket on him or his possession. This brings to what I

> consider to be important factor. It is his conduct subsequent to the discovery of the bag…….. The accused ran away as a result of his tax ticket and the bag including deceased's radio."

The Court of Appeal alluded to another passages from the judgment of the trial Judge and observed at page 5:

> "It is clear that from the above passage that the trial Judge was decisively influenced by the appellant's conduct subsequent to the discovery of the bag. The importance of graduated tax ticket was not the decisive factor in the trial Judge's decision."

As it appears to us, the conviction was founded on purely circumstantial evidence, but in our view, the evidence fell short of the standard of proof required to prove the guilt of the appellant beyond reasonable doubt.

we think that the learned trial Judge had failed to expressly direct the assessors and herself that in a case depending exclusively upon circumstantial evidence, she must find, before deciding upon conviction, that inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotness.is than that of guilt. See Simon Musoke V R (1956) EA 715 and also Taylor on Evidence 11th Edition page 74 which provides as follows:

> "The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."

In our considered view, whereas it is possible that the appellant ran away because he felt implicated, we think that the evidence did not rule out the probability that he ran away for fear of mob justice as the mourners could not give him a chance to explain or even listen to him, after deceased's missing radio was found in the appellant's bag containing his graduated tax ticket and wedding invitation card addressed to him.

We think that the Privy Council's decision in the case of Teper VR (1952) AC 460 at page 469 is relevant here.
There, the Privy Council held, while dealing with a conviction which exclusively depended on hearsay and circumstantial evidence as follows

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inferences."

The brief facts in Teper's case were as follows:- The appellant had been charged and convicted of maliciously and with intent to defraud by setting fire on 9tn October, 1950 to a shop belonging to his wife in Regent Street, Georgetown in which he carried on the business of dry goods store. He was sentenced to 7 years imprisonment. It was proved that the appellant having insured the building and stock for a sum in excess of their real value, set fire to them with intention of claiming against the insurance companies.

The prosecution witness was police constable Cato. At 2:00 a.m. of October, he reported on duty and walked along Camp Street towards Regent Street. He heard a shout of fire and then one fire engine passed and after it, a second fire engine passed. Both were going along Regent Street. From where he was, he saw crowds going East and west along Regent Street to and from the fire. He heard a woman's voice shouting. Your place burning and you are going away from the fire. Immediately a black car which was proceeding west along Regent Street turned North into Camp Street; in the car was a fair

man resembling appellant. She did not observe its registration number. At the trial, the woman was never a witness.
The Privy Counsel held that the identification of the appellant depended on the hearsay evidence of the woman and its admission went far beyond anything that had been authorised by any reported case. Secondly, the Board observed that the prosecution case had relied on circumstantial evidence only to connect the appellant with the commission of the crime; and then held that circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another, but concluded that the circumstantial evidence fell short of conclusiveness and a properly instructed jury having it alone would have had a more than usually difficult decision to make.

In the instant case, we think that there were different inferences to be made. For instance, considering the appellant's explanation and the prosecution evidence, it was possible that the appellant could have lent his bag to the deceased, who was a neighbour and an aunt before the fateful night. Secondly it was possible that she could have hidden her radio in the borrowed bag outside her house as she used to hide her radio outside at night. Thirdly, it was possible that when the appellant lent his bag to the deceased he forgot to remove his personal effects, i.e. graduated tax ticket and wedding invitation card, addressed to him. Fourthly, it was possible that after his personal effects and deceased's missing radio were found in his bag, hidden near the scene of crime, the mourners could descend on him and administer mob justice without giving him a chance to explain. Fifthly, assuming that his explanation that he had lent his bag to the deceased was true, we think that the appellant would be dump-founded if deceased's missing radio was found in the appellant's bag, hidden near the scene of crime.

We therefore think his explanation that he ran away for fear of mob justice as the mob would not listen to him after that discovery was quite plausible.

In our view, the above possibilities raise co-existing circumstances which would weaken or destroy the inference of appellant's guilt. The circumstantial evidence upon which the prosecution case exclusively depended fell short of conclusiveness. In the result, the 1st ground of appeal would succeed. In our view, this disposed of the appeal as there is nothing of substance that is left except perhaps to repeat what we have already discussed whilst dealing with the 1st ground of Appeal.

In the circumstances this appeal must be allowed, conviction on both counts quashed and sentence of death set aside. The appellant must be released forthwith unless he is held on any other lawful ground.

Dated at Mengo this 15th day of January 1998

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

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT.

J. N. MULENGA
JUSTICE OF THE SUPREME COURT

G.W KANYEIHAMBA
JUSTICE OF THE SUPREME COURT.

L. E . M. KIKONYOGO
JUSTICE OF THE SUPREME COURT.