IN THE SUPREME COURT OF UGANDA
HOLDEN AT MENGO

CORAM: ODER, TSEKOOKO, KAROKORA. MULENGA, KANYEIHAMBA, JJ.S.J.

CRIMINAL APPEAL NO. 54 OF 2000

BETWEEN

EUCHU MICHAEL::APPELLANT

AND

UGANDA::RESPONDENT

(Appeal arising from judgment of the Court of Appeal (Manyindo D.C.J., Kato and Mpagi-Bahigeine JJ.A) at Kampala, in Criminal Appeal No.97 of 1999, dated 28th November 2000)

REASONS FOR THE COURT'S DECISION.

Euchu Michael, the appellant, was tried and convicted by the High Court, for the murder of his brother. Emolu Robert, the deceased. He appealed to the Court of Appeal but was unsuccessful. He brought a second appeal to this Court. On 4.7.02, we dismissed the appeal but reserved our reasons for doing so. We now proceed to give them.

The three grounds of appeal in this Court were that:-

1. ***The learned Justices of Appeal erred in law in upholding the decision of the Trial Judge when the latter had erred by first concluding in favour of the prosecution before alluding to the defence of alibi.***
2. ***The learned Justices of Appeal erred in law in not applying correctly the principles of a single identifying witness in this case favourably to the Appellant***
3. ***The learned Justices of Appeal erred in law in not applying the principles of major contradictions in favour of the Appellant.***

The first ground was not considered in the Court of Appeal, but because it raised an important legal issue, we allowed that it be argued. **The** subject of complaint in the ground, was the finding as appears in the judgment of the learned trial judge, *"that the prosecution had proved beyond reasonable doubt that the accused participated in the*

murder of Robert Emolu". before consideration of the appellant's defence of alibi. Mr. Zagyenda, counsel for the appellant, noted that later in the judgment the learned trial judge had alluded to the appellant's defence, but argued that the said allusion was useless since the decision of his guilt had already been made. Counsel submitted that the judgment of the trial court had thereby occasioned injustice, and that it was an error in law for the Court of Appeal to uphold it. In reply. Mrs. Kagezi, Principal State Attorney, conceded that the learned trial judge appeared to have misdirected himself in that regard, but she contended that the misdirection did not occasion any miscarriage of justice, since the learned trial judge thoroughly considered the defence and gave reasons for rejecting it.

It is trite that in arriving at its decision in a criminal trial, the court must consider the evidence as a whole. See ***Okethi Okale vs Republic*** ***(1965) E.A. 555.*** It is a gross misdirection, for a trial court, to decide that an accused person is guilty after considering the prosecution case alone, without considering the defence, and thereby, expressly or by inference, to hold that the defence is consequently rejected. Such approach is tantamount to shifting the burden of proof in so far as the defence is looked at merely to consider if it disproves or casts doubt on the prosecution case. It is a cardinal principle, however, that, save for a few exceptions which are not relevant here, the burden of proof in a criminal trial never shifts from the prosecution. That burden entails adducing evidence which not only supports the prosecution case, but also disproves the defence case. For that reason the court has to take the defence into consideration, before it can determine that the prosecution has discharged the burden to prove its case and disprove the defence case, beyond reasonable doubt. However, in this country there is no set format in which the judgment must be written. Whether or not a judgment shows that before arriving at its decision the trial court took into consideration the evidence as a whole has to be discerned from the substance of the judgment.

In his judgement in the instant case, the learned trial judge first summarised both the prosecution and the defence evidence. He then analysed the evidence in relation to the ingredients of the offence of murder, which he correctly observed were all in issue by virtue of the plea of not guilty, and which had to be proved. On the only contentious issue, namely whether the appellant participated in the killing of the deceased, the learned judge

evaluated the evidence of the single identifying witness in detail, and concluded that the conditions at the time the deceased was attacked were conducive to correct identification of the assailant by that witness. He thereupon found that the prosecution had proved beyond reasonable doubt, that the appellant participated in the crime. After that he reverted to the defence evidence and gave reasons for rejecting it. It is this sequence that was the source of criticism as it gives the impression that the trial judge may have erred in regard to the burden of proof.

We anxiously considered the criticism because it appeared on surface to have substance. We. however, came to the conclusion that in reality, there was no shifting of the burden of proof. The defence was not rejected simply because the prosecution case had been accepted. The learned trial judge carefully detailed the considerations which led him to conclude that the defence of alibi was false. We were satisfied that the learned trial judge must have had those considerations in mind when he held that the appellant's participation in the crime had been proved beyond reasonable doubt, even though he recorded them after recording the holding. Accordingly, we found that in that regard, the Court of Appeal did not err in upholding the judgment of the trial judge, and that the first ground of appeal had to tail.

The appellant's counsel did not have much to say on the second and third grounds of appeal. He unreservedly conceded that both courts below had correctly considered the principles of lavs relating to :(a) a single identifying witness; and (b) contradictions in evidence. His contention was that those principles were not properly applied to the facts of this case. Under the former ground he sought to argue that the light at the time the deceased was attacked was not enough to enable the witness to identify the assailant. Under the latter ground, counsel contended that there was contradiction in the evidence describing the groaning of the deceased, and he criticised the absence of any evidence of investigation and in particular evidence of arrest to explain the delay of about 15 days in effecting the appellant's arrest.

Under section 6(1)(a) of the Judicature Act, 1996, the appellant had the right to appeal to this Court on a matter of law or mixed law and fact. While counsel

attempted to present the second ground of appeal under the guise of a matter of law. the substance of the complaint was on a finding of fact only. This Court has repeatedly held that except in the clearest of cases, it will not re-evaluate evidence in the manner as a first appellate court is required to do. For that reason this court will interfere with concurrent findings of fact by the trial court and the first appellate court only where it is satisfied that a miscarriage of justice has occurred. See *Kifamunte Henry vs Uganda,* Criminal Appeal No. 10 of 1997 and *Bogere Moses and another vs Uganda,* Criminal Appeal No. 1 of 1997 both unreported. In the instant case the courts below not only considered the principles applicable to the case correctly, but also respectively evaluated and re-evaluated the evidence properly. We did not find any reason to fault either court on the concurrent finding that the appellant had been correctly identified by the single witness. On that account, the second ground of appeal had to fail.

With regard to the so-called contradiction complained of in the third ground, we need only say that it was not raised in the first appeal, and in any ease it was utterly insignificant and immaterial. On the question of arrest of the appellant, we do not share the opinion of the learned Justices of Appeal that in this ease, evidence of arrest *"would not have assisted matters as the appellant was arrested in another district 15 days after the event"* However, we agree that the absence of that evidence was not fatal to the conviction. We would only add that the explanation for the delay in effecting arrest was that the appellant was not around, a fact he confirmed in his defence. That ground too had to fail.

It was for those reasons that we dismissed the appeal.

Dated at Mengo the 12th day of December 2002

A.H.O. Oder

Justice the Supreme Court

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