THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM : **HON. MR. JUSTICE S.T. MANYINDO, DCJ;**
HON. MR. JUSTICE G.M. OKELLO, J.A.'
HON. MR. JUSTICE S.G. ENGWAU, J.A.

CRIMINAL APPEAL NO.10 OF 1998

BETWEEN

STEPHEN KAREKONA ::APPELLANT

AND

UGANDA ::RESPONDENT

(Appeal from the decision of the High Court
(V.F. Musoke-Kibuka J.) at Mbarara in
Criminal Session Case No. 262/94.)

JUDGMENT OF THE COURT

The appellant was on the 9th March, 1998, convicted by High Court (V.F. Musoke-Kibuka J.) at Mbarara of aggravated Robbery and was sentenced to death. He appealed to this court against conviction.

The facts as found by the trial Court were that on the night of 3rd June, 1994, the appellant and another robbed the complainant, Bernard Mazima (PWI) of his cash of 200,000/= and a weighing scale. In the course of the robbery, the appellant used a panga on the complainant. He was arrested at the scene. His colleague who had escaped that night was also arrested the following morning. Both were taken to authorities and were eventually indicted for aggravated Robbery. The appellant's colleague however, died before trial, so only the appellant was tried.

His defences were firstly an alibi: that at the material time he was asleep in his house with his wife and children at his home. Secondly, that the case was framed up against him as a result of a grudge between him and one Mrs. Rwekwaso, a relative of the complainant. The trial judge rejected the appellant's defences and convicted him as stated above.

There are five grounds of appeal, namely:-

> [1] That the trial judge erred in fact and law when he failed to evaluate the evidence of both the prosecution and the defence thereby coming to a wrong decision to the prejudice of the appellant.
>
> [2] That the trial judge erred in law and fact when he believed the evidence of the prosecution witnesses before considering the evidence of the defence which action caused a miscarriage of justice.
>
> [3] The trial judge erred in fact and law when he ignored contradictions and inconsistencies in the prosecution case which contradictions and inconsistencies if adequately considered, would have resolved the case in favour of the accused and would have entitled the appellant to an acquittal.
>
> [4] The trial judge erred in fact and law when he merely dismissed the appellant's alibi and considered the appellant's past record to convict the appellant which action occasioned a miscarriage of justice to the prejudice of the appellant.
>
> [5] The trial judge erred in fact and law when he failed to find that there was a break in the chain of movement of a panga the central part in the indictment which error occasioned a miscarriage of justice to the prejudice of the appellant.

At the hearing of the appeal, grounds 1 and 5 were abandoned. Only grounds 2, 3, and 4 were argued.

The complaint raised in ground 2 was that the trial judge considered the prosecution case in isolation of the defence, believed it and made a finding that the person who stole cash and the weighing scale from the complainant had common intention with the appellant. Only after that

finding the trial judge turned to consider the defence case as to whether or not the appellant took part in the robbery. Mr. Mugambe, learned Counsel for the appellant, submitted that the procedure adopted by the trial judge was wrong and that it occasioned a miscarriage of justice. Ms Lwanga, Principal State Attorney, who appeared for the state conceded that the procedure adopted by the trial judge was wrong but contended that it was not fatal. She argued that as there was no fault with the trial proceedings, and judgment was severable from those proceedings, this court as a first appellate court, call, as it is its duty so to do, re-evaluate the evidence on record as a whole and come to its own conclusion. In counsel's view, if that was done, the court would come to the same conclusion as the trial judge because there is overwhelming evidence in support of that conclusion.

The trial judge dealt with this issue in his judgment in this way:-

> "In his sworn statement, the accused denied any knowledge of the theft. He also challenged the evidence relating to the missing weighing scale and the money especially since none had been recovered.
>
> It is my view that both PW1 and PW2 told this court the truth when they testified that a weighing scale and Shs.200,000/= were stolen from their shop on 3rd June, 1994. I also believe the evidence of PW3 and PW4 who testified to the effect that those items were actually stolen. I find that it was during the robbing activity in which the accused was involved that the money and weighing scale were stolen. Alternatively, I find that the weighing scale was stolen from PW1's shop by someone who was executing a common intention with the accused within the meaning of Section 22 of the Penal Code Act. See: ***Agustino Orete and others Vs Uganda [1966] EA 430***. The accused is therefore equally guilty of that theft. "(emphasis ours)

Then later, the learned judge went on:-

> "In the instant case, therefore, the burden is upon the prosecution to prove that the accused was the one who carried out the theft or that he participated in its execution."

Clearly, the approach adopted by the learned trial judge was, with respect, fundamentally wrong. As was stated by the defunct Court of Appeal for East Africa in ***Ndege Maragwa Vs Republic /1965/ EACA Criminal Appeal No. 156 of 1964*** and followed in ***OKETHI OKALE AND OTHERS VS REPUBLIC [1965] EA. 555 at 559,*** the burden of proof in criminal proceedings is save for a few exceptions on the prosecution. The court further said:—

"----it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence."

We could not agree more with the above remarks. We would add that it is even worse to accept the prosecution case in isolation, make a finding on it and then turn to consider the defence whether it raises doubt to the prosecution case. This amounts to shifting the burden of proof to the accused to prove his/her innocence. In ***Okale and others case (supra)*** the appeal was allowed because there were grave inconsistencies in the prosecution case.

Ms Lwanga submitted that the error in the instant case is not fatal since the trial proceedings are faultless. In her view, the defective judgment can be severed from the trial proceedings and the error corrected by the court writing afresh judgment. She could not supply any authority for her proposition.

In our view, that proposition raises the question: where does trial end? We have not been able to find any decided case directly to the point. But from the appellate judgment of ***Sir Udo Udoma (CJ)*** as he then was, in ***De Sauza Vs Uganda [1967] EA 784*** it can be deduced that trial in the Magistrates court ends with the close of the defence case. In that case the trial Magistrate at the close of the defence reserved his judgment to a date. Before that date, he went to visit the locus in quo. The learned chief justice then held that it was irregular for the Magistrate after having concluded a trial and reserved judgment to a date, to visit the locus in quo and thereafter to call a witness.

In other jurisdictions, for example in England, available authorities show that trial on indictment ends with the summing up to the jury. In ***R Vs Sullivan [1923] IK B 47,*** the appellant was being

tried for the murder of a woman. After an address by counsel for the prisoner to the jury and before summing up to the jury, the trial judge directed that certain two witnesses be recalled.

On appeal, it was held that the witnesses were properly recalled even after the counsel for the prisoner had made his speech to the jury.

By analogy, it can be concluded that for our purpose, trial before the High Court ends with the summing up to the assessors. Judgment is therefore not part of a trial proceedings. It is a decision on the trial and therefore is severable from the trial proceedings.

In the instant case, the trial proceedings including the summing tip to the assessors are faultless. We have considered the evidence on record and are satisfied that the appellant's alibi and frame up defences cannot stand in view of the evidence of the complainant (PWI), of his wife (PW2) and of the Secretary for defence Local Council I of that village (PW3). All testified that the appellant was caught red handed at the scene and was kept at the scene until the Chairman Local Council 1 of the area (PW4) arrived and directed that they be taken to the sub-county Headquarters. The Chairman (PW4) also confirmed that when he went to the scene, he found the appellant at the scene and under arrest.

We also considered the contradictions in the prosecution case which counsel for the appellant complained of in ground 3. They are:

> [I] while the Chairman Local Council 1 testified that the complainant (PWI) and two other boys went to report the matter to him, the complainant testified that the Chairman came and found him with the appellant at, the scene.
>
> [2] While the complainant stated at one point that he had known the accused for four years since the robbery, he later stated that he had seen the appellant for the first time on the robbery day. (We find no contradiction here).
>
> [3] While the complainant's wife testified that both the attackers assaulted the complainant, the complainant himself told court that he struggled only with the appellant who pierced him with the pointed side of the panga.

Counsel for the appellant submitted that the above contradictions were grave. We do not agree. In our view, these contradictions are minor and do not affect the credibility of the prosecution witnesses given the fact that the appellant was arrested at the scene. The position would perhaps have been different if the appellant had not been arrested at the scene.

Another complaint raised by counsel for the appellant was about the remark, made by the trial judge regarding the appellant's previous detention in connection with an allegation of another robbery case before this one. Mr. Mugambe submitted that the trial judge was influenced by that remark in rejecting the appellant's alibi. This complaint was raised in ground 4.

We have pointed out earlier in this judgment, but we shall repeat for clarity that the trial judge made in his judgment the following remark:

> "----the fact that the accused, three weeks before 3rd June, 1994, had been discharged from another robbery charge in which one Mrs. Rwekwaso was a complainant does not work in the accused's favour in this case as indeed counsel for the accused submitted. On the contrary it could very well assist to show the accused's propensity towards the wrong side of the law."

We think that the above remark was bad and prejudicial to the appellant. It is difficult to tell if it was not operating in the mind of the trial judge when he decided the appellant's case. Ms Lwanga submitted that the point was brought tip in the submission of Counsel for the appellant at the trial. We agree, but that is no excuse for the judge making such prejudicial remark. The fairer thing the trial judge could have done was not to comment on it at all.

On a full consideration of the evidence on record, we are satisfied that had the trial judge properly evaluated the evidence before him as a whole and had made no misdirections in his judgment, he would have come to the same conclusion. We agree with Ms Lwanga that there is overwhelming evidence to support that conclusion. In our view, the appellant was therefore properly convicted.

In the result, we dismiss the appeal and uphold the conviction.

Dated at Kampala this 29th day of July 1999.

S.T. MANYINDO,

DEPUTY CHIEF JUSTICE.

G.M. OKELLO,

JUSTICE OF APPEAL.

S.G. ENGWAU,

JUSTICE OF APPEAL.