THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM; HON. JUSTICE A.E.N MPAGI- BAHIGEINE, JA
HON. JUSTICE S.G ENGWAU, JA
HON. JUSTICE S.B.K KAVUMA, JA

CRIMINAL APPEAL NO. 213/2002

TUMUSIIME ISAAC……..APPELLANT

VERSUS

UGANDA……..RESPONDENT

(Appeal from the decision of the High Court at Fort Portal (Kania J) dated 14th November 2000 in H.C.S.C No.13 of 2001)

JUDGEMENT OF THE COURT

The appellant, Tumusiime Isaac China, a UPDF soldier attached to the 59th battalion in Kasese was convicted in the High Court for murder contrary to sections 188 and 189 of the Penal Code Act. He was sentenced to death and has appealed against both conviction and sentence.

The case for the prosecution is that on 6th January 2000, at around 11:00pm, at TransAfrica Holiday Inn in Kasese District, one David Bitwire, the owner of the above mentioned inn, was shot by the appellant who was armed with a gun at the time. The

appellant and another suspect reported to the deceased at the said TransAfrica Holiday Inn at around 8:00pm on the fateful night claiming they had been sent there for guard duties. The deceased who was expecting some soldiers to come and assist in beefing up security at the Inn welcomed the appellant and his accomplice and gave them money to buy cigarettes. There was only one security guard, a one Isingoma James (PW8) in place at the time.

At around 11:00pm, the deceased was ready to leave for his residence in the company of his daughter, Arinaitwe Peninah (PW5), a one Byaruhanga Patrick and another Nathan. The group headed towards the deceased's vehicle and entered it. At this point, the accomplice ordered PW8 to put his gun down and the appellant ordered the deceased to come out of his vehicle.

The deceased begged for his life and even offered money to them but the appellant said he did not want his money. The appellant then struggled for sometime with the deceased but eventually fired rapid shots and killed him. The appellant and his accomplice then fled. The matter was reported to the police who visited the scene the same night at 1.00am and found the body of the deceased lying inside the bar.

According to the post-mortem report by Dr. Mugambwa (PW1), the cause of death was severe haemorrhage arising from gunshot wounds. The medical report, exhibit P2 was tendered in evidence.

The appellant who gave a sworn statement denied any participation in the commission of the offence. He set up the defence of alibi and stated that at the time of the incident he was on pass leave in Kampala. He further stated that he did not report to his station until the 16th January 2000. The trial judge, however, rejected the appellant's defence and found that he had unlawfully caused the death of the deceased and accordingly convicted and sentenced him. He has appealed on the following grounds:

1) ***That the learned trial judge erred in law and fact when evaluating the evidence on record by considering the prosecution evidence in isolation of the defence case prior to drawing the conclusion that the appellant had been placed at the scene of crime.***

2) ***That the learned trial judge erred in law and in fact when he failed to take into account the unfavourable conditions at the scene of crime as he evaluated the evidence of visual identification.***
3) ***That the learned trial judge erred in law and in fact when he failed to draw adverse inference from the prosecution's failure to call evidence disproving the alibi and that which related to the conduct of the identification parade.***
4) ***That the learned trial judge erred in law and in fact when he relied on the dock-identification of the appellant as evidence placing him at the scene of crime.***
5) ***That the learned trial judge erred in law and in fact when he found that the appellant's alibi had been disproved by the prosecution.***

Learned counsel, Stephen Mubiru appeared for the appellant on state brief and Andrew Odit, Principal State Attorney was for the respondent.

Counsel for the appellant argued grounds 1 and 2 separately and grounds 3, 4 and 5 together. Counsel for the respondent also chose to follow the same order. The court will, therefore, follow the same order.

Counsel for the appellant contested the trial court's conviction and sentence. Regarding ground 1, it was counsel's contention that the prosecution evidence was considered in isolation of the defence evidence in placing the appellant at the scene of crime. He argued that the learned trial judge did not consider the defence of alibi and that, therefore, a miscarriage of justice was occasioned.

Counsel for the state Mr. Andrew Odit supported the conviction and sentence. On the first ground, he argued that the evidence of the prosecution was not considered in isolation of the defence evidence but this could have been the style of the judge in writing his judgement. He submitted that there was no miscarriage of justice here.

On the second ground, counsel for the appellant submitted that the trial court did not consider the unfavourable factors when looking at the quality of identification evidence, which included the fact that the appellant was a stranger to the prosecution witnesses and secondly that the shooting had taken place suddenly. Thirdly, there was fright caused as

the shots were fired. In fact, counsel argued that Sam Rugwa, (PW9), a cashier at the bar, was also fired at which might have been a fertile ground for mistaken identification. He concluded that there was no proper evaluation of the evidence in that regard.

Regarding the second ground, counsel for the respondent submitted that the conditions for identification were favourable. He mentioned the fact that the assailants stayed at the Inn for close to 3 hours and were observed by prosecution witnesses including PW5, PW8 and PW9 who were at the same place.

Grounds 3, 4 and 5 were in relation to failure to draw adverse shortcomings in the prosecution evidence on the alibi and the police identification parades.

On the issue of the alibi raised by the appellant, counsel for the appellant submitted that this was disclosed at the earliest possible opportunity yet there was no effort to investigate the alibi. He submitted that Mugambagye Jackson, (PW3), and Lwere Peter, (PW4), supported the alibi since they saw the appellant in diverse places between 30th December 1999 and 15th January 2000. Counsel argued that the alibi was therefore not disproved.

Learned counsel further submitted that the identification of the appellant was also suspect since he and another, Pte. Kule Ali, (PW7) were arrested solely on the basis of their description, that is, because they were light skinned and had a gap between the teeth. Counsel also argued that the girls at the bar and other witnesses had failed to identify the appellant at the identification parades yet he was present and wondered how this could be possible soon after the incident. Counsel also pointed out that the prosecution never led any evidence about what happened at the identification parades.

He contended that since PW7 is a brother of PW8 who was a witness at the parade, he had a motive to exculpate his brother, PW7. His evidence should, therefore, have been considered with caution. He argued that the dock identification of the appellant by PW9 was not reliable. Counsel submitted that the conviction was unsafe and prayed that conviction be quashed and sentence be set aside.

Concerning grounds 3, 4 and 5, on the issue of the alibi, counsel for the respondent contended that PW3 and PW4 disproved the alibi instead of supporting it as claimed by counsel for the appellant. Counsel submitted that PW 3 in his evidence stated that he was at the village on 1st January 2000 when he met the appellant. On 2nd January 2000 the appellant left home for his work place at Kasese. The witness met him again on 10th January 2000 in Kampala. From 3rd to 7th January, however, the witness did not know where the appellant was. PW4 also saw the appellant leave Sembabule district on 2nd January 2000.

Counsel also submitted that exhibit P2, the statement of Okot Moses- the Intelligence Officer of 59th Battalion at Kasese, who did not testify, was admitted in evidence. In that statement, the officer said that he had learnt that the appellant was an escort of Captain Lubega but the captain did not know where the appellant was on the day of the incident. He looked for him but could not find him at his place of work.

On the issue of the identification parades, counsel submitted that three identification parades were held. Moreover, PW8 identified the appellant at the police. Counsel conceded that no proceedings of the parades were made available by the prosecution. He, however, prayed for the dismissal of the appeal, and for the conviction and sentence to be upheld.

Mr Mubiru in reply contended that the statement of Okot Moses was hearsay because Captain Lubega was not called.

This being the first appeal, it is our duty to re-evaluate the evidence ourselves and determine whether the conclusion reached by the trial court should be allowed to stand or not, bearing in mind that we have neither seen nor heard the witnesses as was stated in **Pandya Vs R [1957] EA 335**

The first ground concerns the identification and placing the appellant at the scene of the crime. We shall, therefore, consider the evidence of the three prosecution witnesses who were at the scene of crime on that night and observed the assailants. PW5 in her evidence stated:

"The assailants were dressed in green uniform. Where they were seated I could see them and I was looking at them. There was electricity on and the lights in the bar at the time the assailants came in. The compound was lit with fluorescent tubes on the tree in the compound, four lamps on the tree; there were also fluorescent tubes at the shed which is attached to the bar. There are two tubes."

PW 8 stated in his evidence:

"I saw (sic***) with the soldier for two and half hours. My guard post was lit with electric lights.***

When with the assailants, we were conversing and laughing and there were 7 bright lamps by the help of which I managed to see the accused laugh and I observed a gap in the upper teeth."

PW9 also clearly identified the assailants and even described them in appearance and what they were wearing on that fateful night. The learned trial judge in his findings considered the case of **Nabulere and Others Vs Uganda [1979] HCB 77**. In that case factors were laid out which are ordinarily used to decide whether the conditions under which the identification was made are conducive for positive identification without the possibility of error or mistake. They include,

1) whether the accused was known to the witness at the time of the offence,
2) the conditions of lighting,
3) the distance between the accused and the witness at the time of identification and
4) the length of time the witness took to observe the accused.

PW5, PW8 and PW9 admitted that the appellant was not known to all of them at the time of the incident but other conditions such as the lighting and the time taken to observe the appellant which was close to 3 hours existed. Indeed the learned trial judge was alive to the law when he stated that:

"I find that the conditions under which the accused was identified were conducive to correct and positive identification error (sic) ***or mistake and that the accused was correctly identified as that person who shot the deceased dead. I accordingly find that***

the prosecution has proved beyond reasonable doubt that the accused participated in causing the unlawful death of the deceased."

After carefully considering the evidence of the witnesses we entirely agree with the findings of the trial judge that the appellant was the assailant at the scene of the crime on the fateful night.

Considering the unfavourable conditions mentioned in ground 2. Counsel for the appellant mentioned factors such as the appellant being a stranger to the witnesses, the shooting being sudden and also that since PW9 was frightened at that particular moment since he had been shot at, there might have been mistakes in his identification. However, considering these issues, it should be remembered that since the appellant had been at the scene for close to three hours, the sudden shooting and the fright caused to the witnesses did not affect his identification since the witnesses had observed the appellant long before then.

Grounds 3, 4 and 5 cover various issues raised by both counsel. We will consider the issues one by one.

Regarding the alibi raised by the appellant, in his defence the appellant stated thus:

"On 29/12/99 I got pass leave and I proceeded to Mateete Sub- County in Masambya village in Sembabule District. I arrived at Masambya on 29/12/99 at night and I was there until 2nd January 2000 and proceeded to Kampala. I arrived at 7.30pm and left Kampala on 16th January for Kasese arriving the same day. I proceeded to the airfield and found my boss Captain Lubega Yusuf. He told me to hang around since I would be required to go to the police. I asked him why I was required at the police. He told me a man had been killed in Kasese by a child soldier popularly known as 'kadogo' and the killer wore army uniform and he was armed . He told me that was why the police required child 'kadogo' soldiers."

The prosecution relied on the evidence of PW5, PW8 and PW9 who all identified the appellant and observed him for close to 3 hours. PW3 also testified that the accused left

their village home on the 2nd January 2000 and informed him that he was going back on duty to Kasese.

The learned trial judge in dealing with this issue stated thus:

"In his testimony in chief, the accused stated that he left home for Kampala on the 2nd January 2000 arriving in Kampala in the evening at 7.30pm. In cross-examination he testified that he stayed with his sister at Nsambya for three days. After 3 days he went to Nakulabye but then returned the same day in the evening. He then spent another two days with his sister at Nsambya before leaving Makindye where he arrived on the 6th January 2000. The sum does not add up. If the accused spent a total of five days at his sister's place and he left his village in Masambya on the 2nd January 2000 *(sic)**. Considering that the accused had informed PW3 Jackson Mugambagye on the 2nd January 2000 that he was going back on his duty in Kasese and 3 prosecution witnesses having positively identified him at the scene of crime on the 6th January 2000, I find that the accused came back to Kasese on 2nd January 2000, murdered the deceased on the night of 6th January 2000 and then on the 7th January 2000 he fled to Kampala. The alibi of the accused is accordingly displaced by the evidence adduced by the prosecution. He has been squarely put at the scene of crime. The alibi raised is therefore of no consequence.*** *(sic)**"***

Regarding the defence of alibi, the law is that an accused person who sets up an alibi assumes no burden to prove the truth of his alibi. The burden to displace an alibi lies with the prosecution. The prosecution has to disprove the alibi by adducing credible evidence placing the accused at the scene of the crime at that particular time when the accused claims he was elsewhere. This was approved in **Batagenda Peter Vs Uganda S.C.C.A No. 10 of 2006**.

We therefore entirely agree with the trial judge that the alibi was properly disproved by the evidence produced by the prosecution and was of no consequence. We also agree with learned counsel for the state that the evidence of PW3 and PW4 in no way corroborated the alibi of the appellant but instead implicated him since they both saw him leave the village on 2nd January 2000 on the way to Kasese and PW3 saw him again on

10th January 2000. PW3 did not know where the appellant was on the night of the murder. No miscarriage of justice was occasioned on the appellant here.

On the issue of dock identification by the PW9 where he stated:

"Today I have seen one of the two assailants. He is the light skinned soldier who actually shot the deceased after struggling with him. It is the accused who is in the dock"

We find nothing wrong with this since the witness had already described the accused on that night and besides he did not attend the identification parades so he had no other opportunity to identify the appellant. Secondly, the learned trial judge did not entirely depend on the evidence of this witness to identify the appellant.

Concerning the statement by Okot Moses, counsel for the appellant argued, it was hearsay. According to **Halsbury's Laws Of England, Fourth Edition,** it is a fundamental rule of evidence that hearsay is inadmissible. The hearsay rule is that an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. The rule equally applies to documents, of which we might say the above mentioned statement is one. However, even without relying on this statement, there is other evidence to implicate the appellant like the testimony of PW3, the brother of the appellant, and the identification evidence given by PW5, PW8 and PW9.

Counsel for the appellant raised a point which the prosecution admitted on its failure to lead evidence on the identification parades. We find that this is not fatal to the prosecution's case since there was other evidence to incriminate the appellant. He was properly identified at the scene of the crime by 3 prosecution witnesses, two of whom did not attend the identification parades.

Lastly, regarding counsel's argument that the girls at the bar could not identify the appellant at the identification parade yet he was present and the incident had just taken place, we do not

find this unusual because these girls, having noticed nothing suspicious, did not have the opportunity to observe the appellant and his accomplice given that they were busy catering to the patrons. In addition they left early before the incident took place as stated in the evidence of PW8. It should also be noted that the said girls did not testify in court so their failure to identify the appellant did not affect the trail judge's decision in any way.

In the result, we dismiss this appeal for lack of merit, uphold the conviction and sentence by the trial court as the offence was brutally committed in heinous circumstances.

Dated at Kampala this 10th day of June 2009.

A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

S.G. ENGWAU

JUSTICE OF APPEAL

S.B.K. KAVUMA

JUSTICE OF APPEAL