THE REPUBLIC OF UGANDA

 IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: WAMBUZI CJ, TSEKOOKO, KAROKORA, KANYEIHAMBA AND

MUKASA-KIKONYOGO, JJ.SC.)

CRIMINAL APPEAL NO. 23 OF 1999

BETWEEN

SEMANDE JAMES :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

AND

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the Decision of the Court of Appeal at Kampala (Okello, Berko and Engwau JJA) dated 12th May, 1999 in Court of Appeal Criminal Appeal No. 67 of 1997)

JUDGMENT OF THE COURT

This appeal is against the decision of the Court of Appeal dated 12/5/1999 by which that Court dismissed the appellant’s appeal against his conviction by the High Court for murder contrary to section 183 of the Penal Code.

It was the prosecution case that Eliva Alibala, the deceased, who was sister to Kazibwe Livingstone anlaunt of Semande James, (the appellant) lived with these two people at the same village at Jjumbi Lwagala, Mpigi District. It appears that prior to the death of the deceased on 1/5/1997, there was a land dispute between Kazibwe and the deceased. Kazibwe lived with his wife Perusi Nantumbwe in his own homestead. The appellant lived in his own house. The deceased’s house was made of poles and mud. The inside walls reached the ceiling. The deceased, her daughter, Adija Namale (PW1) and a small child called Babirye lived in her own six bedroomed house. On the night of 1/5/1997, the deceased who was sick lay in her bed in one of the bed rooms being nursed by her daughter, Namale. At about 1.00 a.m. while Namale was giving medicine to the deceased, she heard two bangs on a door of the house.

After the banging of the door, two people entered. There was a "tadoba" a small paraffin lamp, which lit the inside of the room. Namale claimed she recognised the attackers as Kazibwe and the appellant. Each was armed with a panga. As the appellant raised his panga to cut the deceased, Namale got hold of the appellant and held him for about five minutes while advising the deceased to run away. The deceased got up and went outside through the front door. As the deceased was fleeing, Kazibwe got a brick (or block) and threw it at the deceased who fell down. It is not clear whether she fell because she was hit with the brick or not but she fell down in the compound of her house. Namale claims that she saw Kazibwe throw a metal spare part of a motorcycle at the deceased and that it hit the deceased. She further claims that she saw Kazibwe cut the deceased on the back three times and on the right arm. The appellant went out. When Namale came out raising an alarm, she found the deceased dead. Her brother Zawukana Nkata (PW2) answered her alarm. Zawukana testified that when he arrived at the scene he found Kazibwe and the appellant fleeing the scene. He flashed a torch and was able to recognise the two. He and Namale chased Kazibwe and the appellant up to a place called Kisenyi where both Kazibwe and the appellant disappeared. According to Namale and Zawukana, apparently Kazibwe and the appellant returned to the scene where the deceased lay dead. Zawukana and Namale proceeded to report the matter to RC1 Chairman Asan Sempebwa (PW3). There he found Kazibwe who had already made a report to Sempebwa of the death of the deceased.

Muwonge (PW4) LC Secretary for defence arrested Kazibwe and the appellant that night. Namale and Zawukana (PW2) and RC1 Chairman, Sempebwa (PW3) testified for the prosecution. None of the other people who are alleged to have answered the alarm testified.

The appellant testified on oath. The case for the appellant which was fully supported by Kazibwe, his father, and the mother, Nantumbwe (DW3) was that on the material night his father and mother (Kazibwe and Perusi Nantumbwe) woke him up from sleep and asked him to accompany them to answer an alarm emanating from the home of the deceased which home was one kilometre away. They all went there and found the deceased dead. There were many other people who had answered the alarms. These included Edward Seddi, Abdu Senyonga, Ntale Tamuzade, Musoke and others. Each of these, including Namale (PW1) and Zawukana (PW2) joined in raising an alarm and wondered as to who had killed the deceased. Then Kazibwe who was RC1 Secretary for Information was asked to report the murder to the RC 1 Chairman, Sempebwa, which Kazibwe did. The appellant remained at the scene. Later Namale and Zawukana reported to the Police that it was the appellant and Kazibwe who had killed the deceased. The appellant was arrested by Muwonge (PW4) and the Police. The appellant denied the offence. His mother, Perusi Nantumbwe (DW3) testified in support of the appellant.

The learned trial Judge believed part of the evidence of Namale and the rest of the prosecution evidence. He rejected the evidence of Kazibwe and that of the appellant. The learned Judge disregarded the evidence of Nantumbwe on grounds that she had been in court during testimony by prosecution witnesses. The defence was referred to as "a pack of lies". The assessors gave conflicting opinions. The learned Judge in effect accepted the opinion of the assessor who advised conviction though the judgment in not clear about this. He disagreed with the other assessor who advised acquittal and convicted the appellant and his father Kazibwe ^and sentenced both of them to death. The two appealed to the Court of Appeal. Kazibwe died before his Appeal was heard by the Court of Appeal. The Court of Appeal dismissed the appeal of the appellant but struck out that of Kazibwe.

We think that striking out Kazibwe’s appeal was irregular. By virtue of Rule 70 of the Rules of the Court of Appeal, Kazibwe’s appeal abated upon his death. This error has no practical consequences for purposes of this appeal.

The appellant has now appealed against the decision of the Court of Appeal. The appeal is based on two grounds. These two grounds were argued separately. For convenience we shall consider the second ground first.

The objection in the second ground of appeal is formulated in the following words -

The learned Judges of appeal erred in fact and in law as did the learned trial Judge in failing to evaluate the evidence on record that left the appellant’s defence of alibi unshaken.

A minor point to correct. In this appeal, as in most other appeals that have been argued in this Court, memoranda of appeals refer to Justices of the Court of appeal as Judges of the Court of Appeal. Advocates who present these memoranda are expected to know, or must know, that according to the Constitution and the Judicature Statute, 1996, members of the Court of Appeal, apart from the Deputy Chief Justice, are called Justices of Appeal.

In arguing ground two, Mr Kafuka-Ntuyo, criticised the trial Judge on grounds that the learned Judge failed to evaluate the appellant’s defence of alibi. He contended that the learned Judge erred when he rejected the evidence of Perusi Nantumbwe (DW3) purely on the basis that she had been sitting in Court throughout the period when other witnesses gave evidence.

Mr Michael Wamasebu, the Principal State Attorney, submitted that the Court of Appeal considered these matters. He appeared to support the course adopted by the learned trial judge.

We would like to point out that apart from practice, there does not appear to be any rule of law or of procedure or of evidence which requires that potential witnesses for defence (or indeed for the prosecution) must not sit in Court and listen to the evidence of other witnesses prior to giving their own testimony.

At page 86 of his book Criminal Procedure and Law in Uganda. (1986), Ayume F. stated that -

"In order to ensure that a witness testifies only to facts within his knowledge and is not influenced by what others may have said earlier in the course of the trial, it is obviously desirable in the interest of justice that both prosecution and defence witnesses waiting for their turn, are asked to leave the Court while a witness is giving evidence. But failure to leave the court should not disqualify a witness from giving evidence. As was held in **Any war and another vs. Rex** (1936- 51) 6 U.L.R 264, while it is advisable that persons whom the prosecution and the defence intend to call as witnesses should not be present till it is desirable to call them, there is no rule of law which either precludes them from giving evidence or vitiates their evidence although the weight to be attached to such evidence is a matter for the trial court".

The order of Edwards CJ and Pearson, J in Any war’s case is short and reads as follows:

"One of the grounds of appeal is that the learned resident Magistrate refused to allow the appellants to call P.C Ombayo as a defence witness. The Magistrate has noted on the record - ’Both accused 1 and 2 desire to call P.C Ombayo as a witness but I observe that P.C Ombayo has been sitting in Court all the afternoon and has heard evidence of the accused. In these circumstances I cannot entertain calling Ombayo as a witness. P.C Ombayo was originally down as a prosecution witness but was not then called’. Now, while it is advisable that persons whom the prosecution or defence intend to call as witnesses should not be present in Court till it is desired to call them, there is no rule of law which either precludes them from giving evidence or vitiates their evidence although the weight to be attached to their evidence is a matter for the trial Court. We refer to the words ’the court shall then hear the accused and his witness’ in line 10 of section 210(1) Criminal Procedure Code. We also refer to Stone’s Justices’ manual (1951), Vol. 1, page 320 - a person in Court although not subpoenaed, is bound to give evidence if called **R vs Sadler** (1830)4 C&P 218.

We, accordingly, hold that the learned magistrate erred in not allowing the two appellants to call this police constable as a witness. We, therefore, for the foregoing reasons, direct the District Court of Ankole at Mbarara to take the evidence of constable Ombayo in the presence of the two accused. The police prosecutor will be allowed to cross-examine Ombayo. We are acting under section 336, Criminal procedure Code, 1950".

In Gamalieri Mubito vs. R (1961) EA 244 the appellant had been convicted of unlawful possession of elephant tusks contrary to section 22(1) of the Game (Preservation and Control) Ordinance, 1959, and his appeal to the High Court was dismissed. A game ranger who had police powers and had investigated the case acted as prosecutor in the Magistrates’ Court and also gave evidence. On a second appeal to the Court of Appeal it was argued that the appellant had been prejudiced by the investigating officer acting as prosecutor and giving evidence, and that the appellant had discharged the onus placed on him by s 23 of the Ordinance, having given an explanation of the possession of the tusks which might reasonably be true.

The East African Court of Appeal held that-

"(i)

1. That the game ranger had taken part in the investigation and was also prosecuting went to the weight of his evidence, not to his competency to
2. In a criminal case a person who is known to be a witness should usually be ordered out of court, but if he gives evidence, that evidence is competent, though objection could be made to the weight of it.
3. There is no provision in the Evidence ordinance which disqualifies a person from giving evidence merely because he is in court when other witnesses are testifying".

The law that permits courts to exclude people from court proceedings is article 28(2) of the Constitution but the exclusion is discretionary, otherwise no specific law excludes a potential witness from court proceedings. S 37 of the Trial on Indictments Decree, 197 ^suggests that a judge can order a person present in court to testify. S 116 of the Evidence Act makes every person a competent witness to give evidence in Court. S 119(1) of the same Act makes Nantumbwe a competent witness on behalf of Kazibwe and even the appellant.

Perusi Nantumbwe testified on oath and was cross examined at length. The learned trial Judge dismissed the evidence of Perusi Nantumbwe, wife of Kazibwe, and mother of the appellant, in the following words,

"I do not accept the stories of the accused persons as regards events that took place at the scene that they came together to answer the alarm. DW2 and DW3 frantically tried to save accused persons but DW3 was in this court held (sic) when all the prosecution witnesses gave evidence as per the report by the State Attorney. So she framed her story after hearing the case for the prosecution".

With all due respect to the learned trial Judge, these conclusions constitute a very serious misdirection and we think they were very prejudicial to the appellant’s defence of alibi resulting in a miscarriage of justice.

The so called report by the State Attorney, Miss Nandawula, appears at page 53 of the record and it was just an utterance made without naming "the offending" witnesses, after the close of the prosecution case and following a statement by the defence counsel that the accused would testify on oath and would call witnesses. Ms Nandawula then uttered the following words-

"I wish the Court to note that the witness (sic) that the accused intend to call as

witnesses have been in court all the time when prosecution were giving evidence".

No witness was named. There is nothing to show that witnesses had been told to stay outside the court. Defence does not appear to have been asked to make any comment. Indeed the Judge did not make any ruling on the complaint. Subsequently, Kazibwe, the appellant and Nantumbwe all testified on oath and each was extensively cross-examined. In particular Nantumbwe was subjected to searching cross-examination for two days during which she said she swore to say the truth. It was never suggested to her that her evidence was based on or influenced by what the prosecution witnesses had said. The record of the proceedings no where reflects any evidence suggesting that either the appellant or Perusi Nantumbwe "frantically tried to save accused person".

On the facts of this case, there was a lapse on the part of the trial Judge, the State Attorney and defence leading to the presence in Court of Nantumbwe when witnesses for the prosecution gave evidence.

From Any war’s case (supra) and Avume (supra) it is clear that the action by the two courts below is not supportable. Andiazi vs Rep (1967) EA 813 shows that this lapse is just irregular, calling for Court considering the evidence of the witness to warn itself. The trial Judge should have warned himself and noted the presence of Nantumbwe in court during the hearing of the case. The learned Judge should then have given this fact due allowance in considering the defence of the appellant, in particular the weight to be given to the evidence of Perusi Nantumbwe.

On the basis of Henry Kifamunte Vs Uganda Supreme Court Cr. App. No. 10 of 1997 and Bogere Moses and Another Vs. Uganda - Supreme Court Cr. Appeal No. 1 of 1997 (both unreported) we are obliged to review the evidence in this appeal.

Perusal of the record of the evidence of Perusi Nantumbwe along side the rest of the evidence suggests that this was a straight forward witness, a woman aged 48 years, who could not be contradicted in spite of a lengthy and searching cross-examination. The Judge had no sound reason for finding DW3 a liar. After assessing her entire evidence we find the witness was reliable. Her evidence shows that the night of the murder was dark. She is supported by Sempebwa (PW3) to that effect, i.e, that the night was dark. This may explain why Zawukana (PW2) had to flash a torch at the attackers on arrival at the scene. He had to flash a torch to examine cut wounds on deceased’s body. The evidence of Nantumbwe

thus gave full support to the alibi of the appellant that he was at home at the time the deceased was murdered. In these circumstances, we think that the trial Judge failed to give due weight to the defence evidence before he dismissed the defence as a pack of lies.

It is the duty of a trial judge to give sound reasons for severance of evidence of an unreliable witness; see Francis Kutosi vs. Uganda (1979) HCB 84 (CA). The Court of Appeal relied on Alfred Taia/vs Uganda EA Criminal Appeal No. 67/69 and on F. Takarwa vs. Uganda EA CA Criminal Appeal 67/72, in upholding the trial judge. The Court of Appeal assessed

the evidence on the defence alibi on the basis that Najja Namale and Nkate Zawukana knew the appellant and Kazibwe well and therefore the two witnesses properly identified the appellant and Kazibwe. The two courts did not appreciate the fact that Namale could have problems in identifying the appellant. The same can be said of Zawukana on the fact that there was moonlight. But Sempebwa contradicts this as does Nantumbwe. The Court of Appeal also relied on the statement of the deceased to the effect that it was the appellant and Kazibwe who cut her. The attack took place at night. Unfortunately the Court of Appeal did not address itself to the prejudicial misdirection of the trial judge who disregarded the evidence of Perusi Nantumbwe. The Court of Appeal did not allude to that evidence at all and gave no reasons for that failure. We are unable to say that had the Court of Appeal evaluated Nantumbwe’s evidence they would have upheld the decision of the trial Judge.

Namale does not explain how she held the appellant who was able to cut her at the back and on the shoulder before she could release him. We notQ^ that the second assessor who assisted the Judge during the trial and is in a way a finder of fact, did not believe that Namale, a small person could hold the appellant for five minutes. He found her and her brother liars and therefore advised acquittal. The trial Judge gave no reasons for disagreeing with this assessor. Although Namale and her brother claim that there was blood on the feet of Kazibwe, yet Sempebwa (PW3) to whom Kazibwe reported apparently immediately after the murder did not see anything. These contradictions which appeared material were not resolved. The trial Judge attached importance to allegations that Kazibwe had the trousers’ legs folded. We do not think that the folding of the trousers’ legs by Kazibwe is evidence of guilt. It is significant, and we think it is in the appellant’s favour, that neither Kazibwe nor the appellant fled the scene, or attempted to run away, when accusations of the killing of the deceased were levelled against them by Namale and her brother, at the home of Sempebwa and at the scene. Nor did any of them resist arrest.

The fact that Najja Namale lied about certain activities which she ascribed to Kazibwe, whom she had not seen do those acts, does raise the real prospect that Namale, as witness, was capable of implicating Kazibwe and her son, the appellant, because of the recent land and property dispute between the deceased on the one hand and Kazibwe and the appellant on the other. This point was not eliminated by the courts below. Namale referred to property dispute in her evidence. Zawukana said in his evidence that her mother was killed because of land dispute. Thus these two witnesses’ minds could have been prejudiced against the appellant because of property wrangles.

The deceased had been sick (according to Namale) for two weeks. She appears to have been quite sick on the night of the attack. This explains giving her medicine in the dead of night. Her flight from bed could in the circumstance not be easy and simple so that she was able to identify the attackers. That night was dark, so it is probable she could not recognize herattackers in-flight. She appears to have died instantly. In the circumstances and considering the bad relationship between them, there was great temptation for the deceased to name Kazibwe and the appellant as her attackers because of the property dispute, and the alleged theft of coffee by the appellant. Therefore the statement by the deceased naming the appellant as her attacker is of little probative value, if any. We think that the circumstances under which Zawukana allegedly sighted the attackers are unconvincing. First he claims he found Kazibwe fleeing from the scene. He attempted to beat Kazibwe. But later he suggests he found Kazibwe standing. Further he claims the appellant came out of the house running and run away. He and Namale chased these two. In the same breath he examined the deceased before he chased the two attackers. He was obviously and naturally concerned more with the deceased.

Considering that the evidence of Namale is partially false and that the defence evidence was ostensibly consistent, we are unable to say that the prosecution had discharged the burden of proof in this case, which is beyond reasonable doubt.

In our view the failure by the two courts below to give due allowance to the evidence of Nantumbwe in support of the alibi raised by the appellant, which was fully supported by the evidence of Nantumbwe, which evidence was not discredited, amounts to a miscarriage of justice. Consequently we think that ground two must succeed.

We find it unnecessary to deal with the first ground of appeal.

This appeal is allowed, the conviction quashed and the sentence set aside and unless the appellant is held on some other lawful charge, he must be released forthwith.

Delivered at Mengo this 2nd day of March 2000

S.W.W WAMBUZI

**CHIEF JUSTICE**

J W N TSEKOOKO

JUSTICE OF THE SUPREME COURT

A N KAROKORA

JUSTICE OF THE SUPREME COURT

G W KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

E L M MUKASA-KIKONYOGO

 JUSTICE OF THE SUPREME COURT