Judgment of the Court.

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, JJSC)

CRIMINAL APPEAL NO. 33 OF 2000

BETWEEN

LIVINGSTONE SIKUKU ..... APPELLANT

AND

UGANDA ..... RESPONDENT

(Appeal from a decision of the Court of Appeal of Uganda at Kampala (before The Hons. Kato, Berko, Engwau, JJA) dated the 21st day of August 2000 in Criminal Appeal No. 119 of 1999)

JUDGMENT OF THE COURT

The appellant Livingstone Sikuku, was indicted on two counts for murder of Concy Achan, his sister-in-law, the 1st deceased and of his mother-in-law, Josephine Agik Wanton, the 2nd deceased, contrary to Sections 183 and 184 of the Penal Code. He was convicted on each count and sentenced to death. The sentence in respect of second count was suspended. His appeal to the Court of Appeal against conviction and sentence was dismissed, hence this appeal.

The brief background of the prosecution case was that the appellant was married to Margaret Arach, the daughter of Josephine Agik Watmon, the 2nd deceased. He had not yet completed payment of the bride-price. Concy Acham, the 1st deceased, was the daughter of the 2nd deceased, and a sister-in-law of the appellant. The marriage between the appellant and Arach Margaret was not a happy one. They were always quarrelling and fighting. In July 1998 Margaret Arach left the appellant's home and

returned to her mother's home, at Laroo Forest Ward, Gulu. The appellant was summoned by his in-laws to find out from him about payment of the balance of the bride-price and about his constant assault of Arach Margaret. During the meeting the appellant requested for his wife to go back to their matrimonial home; but the parents refused, demanding that he first pays the balance of the bride-price.

On the evening of 23rd September, 1998 shortly before the murder of the deceased persons, Perezi Auma (PW5) saw the appellant pass by his house going towards the home of the deceased. Perezi Auma recognised the appellant by means of moonlight. After the appellant had passed, Auma Perezi heard cries and noise coming from the home of the deceased. Both Achan Concy and Agik Josephine later died. Appellant was subsequently arrested and charged with the murder of both victims.

That night of 23rd September, 1998 at around 8:00 pm; Margaret Arach was in her mother's house together with her sister, Aryemo Vicky (PW3), the 1st deceased, the 2nd deceased and one Lutabo Everlyn (PW6). The door of the house was closed. There was a wick-lamp (tadoba) burning in the room. The appellant demanded that the door be opened. Margaret Arach recognised his voice. He (appellant) eventually kicked the door open and entered the house. Arach Margaret, (PW2), Aryemo Vicky (PW3) and Latabo Everlyn (PW6) who knew the appellant before, saw and recognised him. The appellant held a torch in his left hand and a panga in his right hand. Margaret Arach and Aryemo Vicky saw the appellant cut each of the deceased persons.

When this was going on, Aryemo Vicky blew out the tadoba light and escaped from the house. The appellant flashed his torch on her and chased her. Meanwhile, Margaret Arach (Pw2) also managed to dash out and ran and hid herself in a nearby potato garden. Aryemo ran and

reported the incident to the neighbours, Kilara Benson (PW4) and Peter Latigo (PW7) both of whom went to the scene and found Achan Concy and Agik Josephine severely injured with cut wounds. Neither Kilara nor Latigo found the appellant at the scene.

At the trial the appellant pleaded alibi, stating that he left Gulu for Kitale in Kenya, on 21/9/98 and returned to Gulu on 6/10/98. He reported himself to Gulu police station after his wife Chesio Jackline (DW4) informed him that he was a suspect in the murder of the deceased persons. The police arrested him and charged him with the murder. As we have already stated above, he was convicted by the High Court. His appeal to the Court of Appeal was dismissed. He has now appealed to this court on the following three grounds:-

(1) The learned Justices of Appeal erred in law and fact when they confirmed the conviction of the appellant which was based on the uncorroborated and unreliable evidence of identification by PW2, PW3, PW5 and PW6.

(2) The learned Justices of Appeal erred in law and fact when they wrongly rejected the appellant's defence of alibi, thereby coming to a wrong conclusion.

(3) The learned Justices of Appeal erred in law and fact when they failed to subject the evidence on record to fresh scrutiny and re-evaluation and thereby reached erroneous decision.

Mr. Kunya, Counsel for the appellant, argued the three grounds in the order they appear. We shall consider them in the same order. He submitted on all the three grounds. On the first ground Mr. Kunya submitted that the evidence of Arach Margaret (PW2) Aryemo Vicky

(PW3) and Perezi Auma (PW5) who were either relatives or neighbour of deceased persons, should not have been believed, because they had motive to tell lies against the appellant. He submitted that both Arach and Aryemo were sisters of the first deceased and daughters of the 2nd deceased whilst Perezi Auma (PW5) was a close neighbour of the deceased. That argument was raised before the trial court and the Court of Appeal. Both courts held that the appellant had been properly identified at the scene of crime by Arach (PW2) and Aryeno (PW3) who were his wife and sister-in-law respectively. They heard his voice calling from outside before he entered and recognised it to be his voice, because they were familiar with it and they saw him when he entered the room where they were and they were able to identify him with the aid of tadoba light.

We found no merit in the first ground and agreed with the view of the Court of Appeal that there is no law that prevents relatives or neighbours of a victim of crime from giving evidence in court on facts they witnessed. We would reiterate what was stated in *Yofesi Piri vs Uganda Criminal Appeal No. 9 of 1992 (SC)* that in order for such evidence to be disregarded it has to be shown that it was biased, exaggerated or falsified on that account. In this case it was not shown that the evidence of Arach (PW2), Aryemo (PW3) and Auma (PW5) was biased, exaggerated or falsified, on account of their being relatives and/or neighbour of the deceased or on any other account.

In the result ground one has no merit and it must fail.

Mr. Kunya, submitted on the second ground that the alibi had been raised before the trial Judge by the appellant. Counsel contended that it was incumbent upon the trial Judge under Section 37 of the Trial on Indictments Decree (TID) to summon officials from the Immigration

Offices at Busia border station to come to court and disprove the genuineness of Exh D3 which was a purported movement permit instead of dismissing that defence merely because he had believed the evidence of Arach, Aryemo and Auma. Mr. Kunya further submitted that the Court of Appeal erred because it failed to exercise its statutory powers to subject the evidence to fresh and exhaustive scrutiny and that if they had done so, they would have come to a different decision. He relied on cases of ***Bogere Charles vs Uganda Supreme Court Criminal Appeal No. 10/98*** and ***Kagundu vs Uganda Supreme Court Criminal case No. 4 of 1995.***

Mr. Wamasebu, Principal State-Attorney, conceded that the Court of Appeal misdirected itself on proof of alibi but submitted that misdirection was not fatal to the conviction because there was evidence on the record to support the conviction.

We agree with the submission of Counsel for the appellant that alibi was in fact raised by the appellant during investigation on 6th October, 1998 when he first appeared in Gulu. PW9 stated that when the appellant appeared before him on 6/10/98 and was asked about the murder of the two victims he (appellant) told him that he left Gulu on 19/9/98 for Kitale in Kenya and returned on 6/10/98. PW9 stated that when he asked the appellant for travel documents, permitting him to pass through the border station, the appellant told him that travel documents for people travelling between Uganda and Kenya were no longer required because of the intended resumption of the East Africa Co-operation. So PW9 stated that he did not find it necessary to verify the alibi. However, at the trial the appellant raised it and tendered travel document as Exh D3 stating that he was in Kenya as from 21/9/98 and returned on 6/10/98. The travel document (Exh D3) which he tendered had stamps of Immigration Offices at Busia (Uganda/Kenya) border station.

The trial Judge rejected the alibi, because he had accepted the prosecution evidence and as regards Exh D3, the learned trial Judge held inter alia:-

> *"There is no way I can place any evidential value on it in light of the overwhelming evidence adduced by the prosecution witnesses, who ably, properly and correctly identified the accused at the scene of the crime. Furthermore, the document itself appears to be forged. In the first place it is not clear who stamped the permit on 21/9/98 whether it was Uganda or Kenya Immigration Authority or any other person. It is also not clear whether it was for exit or coming in from which Country. Even 21/9/98 is filled by hand.*
> *The said document created an impression that it could have been obtained in suspicious circumstances. My fears was consolidated by the fact that the officer who issued the same could not be available. In the premises I find that the prosecution has proved its case beyond reasonable doubt."*

It is apparent from this passage that the learned trial Judge rejected the defence of alibi primarily because the prosecution witnesses had identified the appellant at the scene of crime and additionally, because the document produced by the appellant to support the alibi appeared to be false. In upholding the decision of the trial Judge, the Court of Appeal stated:-

> *"There is overwhelming evidence of the eyewitnesses PW2, PW3 and PW6 who put the appellant at the scene of crime ..... Besides, there is evidence of PW5, a close neighbour who recognised the appellant with the help of moonlight shortly before the incident. The learned trial Judge considered this matter very well. Like the trial Judge we find that conditions were favourable for correct identification of the appellant and the defence of alibi was rightly, rejected. The alibi did not raise any doubt on the evidence of the prosecution witnesses which was straight forward and un-contradicted. Once the appellant was put at the scene of crime, Exh D3 became irrelevant. However, the trial court properly considered the document but found that it was suspect. (emphasis added).*

The Court of Appeal, like the trial court, considered the evidence on identification of the appellant and accepted it in isolation of the defence and then considered whether the defence of alibi rebutted or cast doubt on it. Mr. Wamasebu conceded that this was a misdirection on the part of the courts but contended that the misdirection was not fatal to the prosecution case.

In *Suleiman Katusabe v Uganda (SC) Criminal Appeal No. 7 of 1991 unreported)* this court held inter alia.

"It is the duty of the trial Judge both when he sums up to the assessors and when he gives judgment to look at the evidence as a whole. 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 no single piece of evidence should be weighed except in relation to all the rest of the evidence."

We reiterate the above principle. We think that in the instant case the defence of alibi was rejected mainly on the basis that through the evidence of the prosecution witnesses, *"the appellant had been put at the scene of crime"*. With due respect, we would once again stress what we held in regard to that expression in *Bogere Moses & Another v Uganda* (SC) *Criminal Appeal No. 1 of 1997* unreported) when we said inter alia that:-

"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime, and

the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."

Clearly, the learned Justices of Appeal misdirected themselves as did the learned trial Judge, in considering the defence of alibi. Consequently we anxiously considered whether a court properly directing itself would come to the same or to a different decision.

It is trite that an accused person who raises the defence of alibi does not thereby assume any burden to prove it. The burden remains on the prosecution to disprove it. In the instant case the alibi was raised as early as 6/10/98 when the appellant was first questioned about the murders. He stated to the police officer, PW9, that on the date of the crime, he was in Kitale, Kenya. He repeated this in court at his trial. He tendered his travel document through the border station of Busia, Exh D3. He called witnesses who included Okoya, DW2 who escorted him (appellant) on 19/9/98 to the bus park when he was travelling from Gulu.

In our view, the evidence of Margaret Arach, Aryemo Vicky, Perezi Auma and Venansio Olak dealing with identification must be considered carefully together with the defence of alibi. Margaret Arach was the wife of appellant. Aryemo Vicky was the sister-in-law of the appellant. These two witnesses knew the appellant's voice and recognised it when he

spoke from outside their house as that of appellant when he asked them to "*open the door*". These two witnesses were in the sitting room together with the two deceased persons. There was a lamp (tadoba) burning in the sitting room. Aryemo Vicky was reading from that light. When the appellant eventually kicked the door open and entered, they saw him armed with a panga in his right hand and a torch in his left hand. On entering, they saw him cut their mother with a panga. Aryemo Vicky decided suddenly to blow out the light. She immediately thereafter dashed out of the house. Appellant flashed his torch at her and chased her. Aryemo Vicky also dashed out and ran through a garden of potatoes and hid herself within the garden. Perezi Auma who knew appellant, having worked for him in carrying bricks to the building site where the appellant was a contractor, saw him in the evening between 8:00 – 8:30 pm of 23/9/98 while walking towards the victims' home, after which he heard cries at the victim's home. Venansio Olak, who worked for appellant as a mason, saw him in the evening of 24/9/98 at Tegwana in Gulu. He spoke to him. At that time he had not yet known about the death of the victims. He learnt about the deaths and of appellant being a suspect on 25/9/98 when he was at the Holy Rosary Church.

The three witnesses Margaret Arach and Aryemo Vicky, wife and sister-in-law of appellant respectively and Perezi Auma a neighbour of the victims could not have been mistaken as to the identity of the appellant. Further, although the appellant claimed that he was in Kitale – Kenya at the material time in question, having left Gulu on 19/9/98 and returned on 6/10/98, Venansio Olak, who knew and worked for him as a mason in Gulu met and greeted him (appellant) on 24th September, 1998 at Tegwana, Gulu in the evening around 6:00 pm, before he had known about the death of the victims. This witness could not have been mistaken as to the identity of appellant at around 6:00 pm.

Furthermore, although the appellant stated that at the material time in question he was in Kitale, having passed through the border station of Busia and having been issued with travel document dated 21/9/98, (Exh D3) as the date when he passed through the Immigration Offices at Busia, the evidence of Marius Obitta (PW9) the investigating police officer, which remained unchallanged, was that when the appellant appeared before him on 6/10/98 and questioned about the murder of his mother-in-law and his sister-in-law on 23/9/98, he (appellant) told Obitta (PW9) that he had left for Kitale on 21/9/98. When he (appellant) was asked about whether he had any travel document issued to him by immigration officials at Busia border station, the appellant told him that there was no document issued to him because travel documents were no longer required for people travelling between Uganda and Kenya following the on-going negotiations for resumption of the East African Co-operation, and upon that answer, Marius Obitta (PW9) did not find it necessary to check on the alibi which the appellant had set up at the commencement of the investigation of the case.

Both the trial judge and the Justices of Appeal believed the prosecution evidence and concluded "once the appellant was put at the scene of crime, Exh D3, became irrelevant". With due respect, we think that this statement amounted to a misdirection on the part of the lower courts in view of the decision in *Bogere Moses & Another v Uganda* (supra).

In our view, once the document was tendered in court at his trial as evidence of his movement through the border post, despite his earlier denial of the existence of such document as having been issued, it was incumbent upon either the prosecution to seek adjournment and summon officials from Immigration Offices to verify the genuineness of Exh D3 or the court itself could have invoked Section 37 of T.I.D and summoned immigration officials from Busia border station to verify the

genuineness of Exh D3. This was necessary, because it is no longer sufficient, See *Kagundu Fred v Uganda (SC) Criminal Appeal No. 14 of 1998* to believe that once the accused is placed at the scene of the crime by the prosecution witnesses, anything said by him (or her) or his or her witnesses concerning where he or she was at the material time of the crime, should be brushed aside as no longer relevant. Justice demands that evidence of both the prosecution and the defence must be equally and fairly evaluated even if at the end of the evaluation a court is entitled to believe one side or the other and come up with a rational decision.

We think that it was erroneous on the part of the trial judge to hold that the document (Exh D3) itself appeared to be forged and thereafter disregard it without getting evidence of Immigration Officials from Busia border station to verify it. Likewise the Court of Appeal misdirected itself by holding that because the appellant was put at the scene of the crime, Exh D3 became irrelevant.

However, despite the misdirection by the lower courts on the issues of the alibi and Exb D3, on full consideration of the whole evidence, we think that the appellant's claim that he was in Kitale – Kenya at the material time was rightly rejected as an after thought in view of the overwhelming evidence of his identification at the scene of crime by PW2, PW3 and PW5. The above evidence of identification is reinforced by the unchallenged evidence of Venansio Olak (PW8), who independently, without prior knowledge of what had taken place at the home of deceased persons, saw the appellant on 24/9/98 at 6:00 pm at Tegwana – Gulu.

As regards Exh D3, in our view, considering the evidence of Obitta (PW9) which was never challenged, we think that Exh. D3 was produced as an afterthought and would have been rejected as not being genuine. Accordingly, we reject it on that account.

Consequently, ground 2 must fail.

In view of our conclusions on grounds one and two, which dispose of this appeal, we see no need to consider arguments on the third ground.

In the result this appeal must fail. Accordingly, it is dismissed.

Delivered at Mengo this ..22nd..... Day of .November, 2001.

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A.O.H. ODER,
JUSTICE OF THE SUPREME COURT

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

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A.N. KAROKORA,
JUSTICE OF THE SUPREME COURT

.....
J.N. MULENGA,
JUSTICE OF THE SUPREME COURT

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G.W.KANYEIHAMBA,
JUSTICE OF THE SUPREME COURT