REPUBLIC OF UGANDA
SUPREME COURT OF UGANDA
AT MENGO

(CORAM: **TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO, JJSC.)**

CRIMINAL APPEAL NO. 12 OF 2000

BETWEEN

1. STEPHEN WANZAMA)
2. MAINA JOHN)
3. SEPIRIYA MAKAYI) -------------------------------APPELLANTS
4. CHARLES WALUMOLI)
5. KOPULYANO WALUMOLI)

AND

UGANDA ---RESPONDENT

(Appeal from the decision of the Court of Appeal before MANYINDO DCJ, BERKO and TWINOMUJUNI, JJA, dated 2nd December, 1999 in Criminal Appeal No. 69 of 1999).

<u>JUDGMENT OF THE COURT</u>: On 31st May, 1999, the appellants Stephen Wanzama, Maina John, Sepiriya Makayi, Charles Walumoli and Kupulyano Walumoli were convicted by Maniraguha J, of the murder of Kusolo Wamatere and were sentenced to death. Their appeal against that decision to the Court of Appeal was dismissed. They have now appealed to this Court.

It was the case for the prosecution that on 19/1/1996, at about 5.30 p.m., at Shibanga Trading Centre, a group of people were drinking local brew known as malwa. The appellants were at the scene but there is no evidence showing that the appellants or any of them drunk malwa.The first appellant, Stephen

Wanzama, a Parish Chief of Bufuma Parish read to the group a statement purporting to be from a letter from the President of Uganda. The effect of the purported letter was that the President of Uganda had authorised the population to kill witches. The appellant Wanzama then incited people to start killing witches beginning with the deceased Kusolo Thomas Wamatere, an old man, who was then present at the scene. Wanzama was armed with a panga, a stone and a stick. The appellant Sepiriya Makayi was the first to assault the deceased by hitting him with a stone and a stick. The rest of the appellants and the other members of the crowd set upon the deceased and assaulted him with sticks and stones which were apparently collected from the scene. The assault went on from 5.30 p.m. till 6.30 p.m. when the deceased succumbed and died from the effects of the assault. Two sons of the deceased called Mutsentse James (PW1) and Stephen Mawuki (PW2) helplessly watched the assault of the deceased from the beginning of the assault till his death. These sons reported the killing to the Police. Subsequently, the five appellants were arrested from their home villages on various dates except Wanzama who was arrested on 26/4/1996 in Mbale Town.

During their trial, all the appellants put up the defence of alibi to the effect that they were not at the scene of the crime. Wanzama claimed that he spent the whole day of the incident carrying out his official duties, namely, enforcing the payment of graduated tax. He claimed that he learnt about the death of the deceased upon his return home at 7.30 p.m. He then proceeded to report the death to Bududa Police post.

At the conclusion of the trial, the first assessor, Wagabi, advised that Sepiria Makayi, Charles Wolumoli and Kopulyano Wolumoli be convicted of

manslaughter and that the other two should be acquitted. Mr. Makika, the second assessor, advised for the acquittal of all the appellants.

The learned trial judge accepted the prosecution evidence, disbelieved each of the appellants and in disagreement with both assessors he convicted all the appellants of murder and sentenced each of them to death. The appellants appealed to the Court of Appeal which dismissed the appeal on 2nd December 1999. The appellants have now appealed to this court. The appeal is founded on two grounds.

The complaint in the first ground is that the learned Justices of Appeal erred in law by failing to subject "the entire record to fresh scrutiny and evaluation thereby occasioning a miscarriage of justice".

Ms. Owor, counsel for the appellants, submitted that the learned Justices of the Court of Appeal ought to have scrutinized the record afresh and considered every ingredient of the offence charged. She contended that had the learned Justices of Appeal scrutinized and evaluated the evidence, they could have come to the conclusion that the following matters occasioned miscarriage of justice:-

1. Failure by the prosecution to produce in evidence a letter claimed to have been read by the appellant Wanzama. Because of that failure the Court should have made adverse unfavourable inference against the prosecution, namely, that the letter never existed and that Wanzama did not read any letter to the crowd.

2. None of the stones, clubs, sticks and knives alleged to have been used in assaulting the deceased were produced as exhibits. Counsel contended that non-production of these as exhibits in court affects proof of the

cause of death because it is not clear whether injuries causing death were inflicted by panga, sticks or stones or combination of the various types of the weapons.

3. The appellants and the relatives of the deceased drunk Malwa. Learned counsel submitted that the Court should have taken this into account in assessing whether the two prosecution witnesses were sufficiently sober to appreciate what was taking place during the assault of the deceased.

The second thrust of arguments by Ms. Owor, on the first ground of appeal, is identification. Learned counsel contended that had the Court of Appeal re-evaluated the evidence on identification, the Court would have found that the prosecution evidence was full of contradictions, which rendered identification unreliable.

The third thrust of learned counsel's arguments in effect is that the fact that the appellants did not run away from their villages after the killing of the deceased shows that the appellants were innocent.

Mr. Byabakama-Mugenyi, Senior Principal State Attorney, supported the decisions of the Courts below. He argued that the Court of Appeal gave the required fresh re-evaluation of the evidence and came to the proper conclusion.

With regard to non-production of pangas, stones or sticks, as exhibits, the learned Senior Principal State Attorney argued that although it is desirable and proper to produce such exhibits in court, non-production of the stones, sticks and pangas in this case did not weaken the prosecution evidence in regard to the commission of the crime. He contended that the weapons are the types with which the key witnesses Mutsentse (PW1) and Mawuki

(PW2) were familiar and that is why these witnesses were able to describe the weapons sufficiently to the satisfaction of the trial court.

Concerning non-production of the letter at the trial, Mr. Byabakama-Mugenyi submitted that the production of a physical letter, which had not been pinned up anywhere, was not relevant, contending that it was the contents of the letter, as read out, which were material and relevant. Counsel argued that the absence of the letter and other exhibits do not justify making adverse unfavourable inference against the prosecution.

He dismissed Ms. Owor's arguments that because the two key witnesses, Matsentse and Mawuki, were sons of the deceased, the credibility of their evidence would be affected. He contended that the relationship did not effect the quality of their evidence since there was no grudge between the appellants and the two witnesses.

Because the deceased was assaulted until he died, Mr. Byabakama-Mugenyi submitted that there was ample evidence to support the finding that it was the assault, which caused the death. On identification, he submitted that Mutsentse and Mawuki knew the appellants too well and that since the assault took place during broad daylight in the presence of the two witnesses, there was no possibility of mistaken identification. Counsel finally submitted that the Court of Appeal properly re-evaluated the evidence before it upheld the judgment of the trial court.

We are not persuaded by the arguments of counsel for the appellants. With respect, we do not think that the absence of exhibits can be referred to as contradictions. We note that the two key witnesses, Mutsentse and Mawuki, lived in the same parish as the appellants. The weapons

(stones, sticks and pangas), mentioned by these two witnesses, as those with which each of the appellants hit the deceased are commonplace objects. The record of the evidence clearly shows that the two witnesses were able to describe the weapons and neither was challenged as to the accuracy of the description and types of these weapons. According to the evidence of the two witnesses, the area where the deceased was assaulted is full of stones. It was easy for the appellants and other members of the crowd to pick up stones at the scene and use them to beat the deceased. The witness Mawuki went to the extent of describing the size of the sticks and stones. Since nobody in authority or any witness took possession of any of the weapons used in the assault, we find no sound basis upon which we can make adverse and unfavourable inference against the prosecution because of non-production of the weapons. Normally adverse unfavourable inference is made when a party in possession of relevant evidence fails or omits to adduce the available evidence. Indeed, Ms. Owor did not specify the type of adverse inference which we could make.

Equally, we do not have any rational ground on the basis of which we can make any adverse inference against the prosecution for failing to produce in evidence the letter whose contents were read or announced to the crowd by the first appellant, Stephen Wanzama. Wamatsentse said he saw Wanzama read out a letter. Mawuki amplified on Wamatsentse's evidence by saying that Wanzama in fact held the letter in one of his hands. Neither of them was cross-examined as to what happened to the letter after its contents were read out. There is no evidence showing that any prosecution witness took possession of the letter, and therefore the prosecution could not produce what it apparently did not possess.

We have read through the evidence with respect to the identification of the assailants of the deceased and therefore the participation of the appellants. It is clear that there were many people at the time when the incident took place. The scene was a market place and a Trading Centre. Members of the crowd had been drinking local drink. The second witnesses asserted that he had drunk malwa for about $1^1/_2$ hours and by the time of the incident, he was not affected to the extent that he could not identify people he knew so well. The two key witnesses were at the scene of the murder. There is no evidence disproving their presence. Mutsentse swore that he knew every one of the appellants. He named the villages of each of the appellants. He does not appear to have been challenged in the cross-examination about his detailed knowledge of the appellants. It was suggested that A2 was only mentioned by Mutsentse in cross-examination and not in the examination-in-chief. But Mutsentse explained that he had just forgotten. Apparently he was not taken to task on this by further cross-examination. The two witnesses do not appear to have been discredited in any way during cross-examination. Furthermore, it was never suggested that they gave evidence against any appellant because the deceased was their relative. There is no question of mistaken identification of any of the appellants. There is no evidence to show that the two witnesses testified against the appellants because of any grudge.

The two assessors who assisted the trial judge thought that the prosecution evidence did not establish murder. The first assessor advised for conviction of manslaughter in respect of A1, A2, and A4 and acquittal of A3 and A5 on the basis that there was no evidence pinpointing who murdered the deceased. Presumably he meant that none of the appellants was identified as the one who delivered the fatal blow. The second assessor appears to have been

influenced more by the uncoordinated conduct of the mob. He pointed out discrepancies and what he saw as inherent improbabilities in the prosecution evidence. His view was that none of the witnesses pinpointed any assailant "who threw the mighty stone that killed the deceased". Apparently the assessors were not satisfied with evidence proving intention to murder. The trial judge disagreed with the opinions of the assessors and gave reasons.

We have considered the evidence on the record and come to the conclusion that the Court of Appeal did re-evaluate the evidence, somehow.

We think that ground one must therefore fail.

The complaint in ground two is that the learned Justices of Appeal erred in law in passing an omnibus sentence of death on the appellants.

This ground of appeal was not clearly articulated by Ms. Owor, counsel for the appellants. Learned counsel cited the case of P/C Ogwang Vs. Uganda Court of Appeal, Criminal Appeal No.41 of 1996 to support the proposition that the trial judge passed an omnibus sentence because he did not say that each accused was sentenced to suffer death. Mr. Byabakama-Mugenyi submitted, and we agree with him, that the case of P/C Ogwang, is distinguishable because in that case the appellant had been charged with multiple capital offences. Therefore, it was necessary there to pronounce sentence on each count. We think that as the appellants in this case were charged with a single capital offence of murder, the learned trial judge adopted a correct procedure when he pronounced sentence. Ground two has no merit and the same must fail.

For the foregoing reasons, we find no merit in this appeal which must be dismissed

Delivered at Mengo this 15th day of August 2001.

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

E. L. M. Mukasa-Kikonyogo.
JUSTICE OF THE SUPREME COURT

5 Appellants present.
Owor for Appellant
Asubo SA for Resp.
Judgment of court delivered
in presence of the above.

JSC.