THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 59 OF 2001

KASAIJA EMMANUEL……APPELLANT

VERSUS

UGANDA…….RESPONDENT

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE J.P. BERKO, JA.

(Arising from the Judgment of Hon. Zehurikize Vincent, Ag. Judge, delivered at Kasese on the 31/5/2001 in C.S.C No. 19 of 1999)

JUDGMENT OF THE COURT.

The appellant, Kasaija Emmanuel alias Sugusuga alias Biroto, was tried on indictment which charged him with murder contrary to ***Sections 183 & 184 of the Penal Code Act.*** He was convicted and sentenced to death. He was dissatisfied with the conviction and sentence, hence this appeal.

The brief facts, accepted by the learned trial judge, are that the appellant was seen sometime before the day of the incident sharpening a knife, which he had made himself. When asked why he was sharpening the knife, he gave different answers. He told one witness that it was for his security. He told another witness that he had work for it. On

the 2nd June, 1998 at around 7.30 p.m. the deceased was seen by both Edson Kule (PW2) and Wamala John (PW3) carrying the appellant on his boda boda motor cycle from Mubuku Trading Centre and heading for a place called Maliba. Soon after the deceased rushed to the home of Imelda Kabasita (PW4) and Jane Nahori, PW5, making an alarm that the appellant had stabbed him. The deceased's intestines were out. He was in great pain and weak, but he could talk. PW4 provided a bed sheet to tie the stomach; while PW5 provided another bed sheet in which the deceased was carried to Mubuku Trading Centre where a motor vehicle was obtained to take him to hospital. He died the same night.

On the following day, a postmortem examination was carried out on the deceased body by Dr Mugambwa to whom the body was identified as that of one Charles Muhuha, a boda boda operator. The doctor found that he died of shock and hemorrhage due to multiple small intestinal punctured wounds likely inflicted with a sharp knife. He was buried on 3.6.98.

After the death of the deceased, the appellant disappeared from the village. During police investigation, Detective Inspector of Police, Namabweine James, PW8, got information that the appellant had been seen boarding a motor vehicle going to Kamwenge. A few days later PW8 had information that the appellant had been seen at Army Officers' Mess at Kasese. PW8 went with a witness to the Officers' Mess where the appellant was identified to him. He was arrested and taken to Kasese Police Station. After investigation he was charged with murder.

At the trial, the appellant, in his unsworn statement, set up an alibi and stated that he joined the ADF Rebel movement on 5th May, 1998 and went to the bush. He was captured by the UPDF in Kamwenge on 4/6/98. He was brought to Muhoti Barracks in Fort-Portal by the UPDF. He was taken to Kasese Army Officers' Mess on 12.6.98. He was sent to Kasese Police Station on 12.6.98 where he found two men Baguma and Idi Swaleh who had been arrested in connection with this case. Idi Swaleh was husband to Jane Nahori, (PW5). Baguma was released on 11.6.98. One day, whilst he was in

custody, a police man came to the cell with documents and said they were Amnesty documents and asked him to sign them. He was committed for trial after one year in custody.

The learned trial judge, after reviewing the evidence on record, found that the prosecution had prove the case against the appellant beyond reasonable doubt; and that he killed the deceased unlawfully and with malice forethought. He was convicted and sentenced to death.

The memorandum of appeal contained three grounds. Ground two was abandoned, leaving grounds one and three. These are: -

> ***"(1) That the learned trial judge erred in law and in fact when he convicted the appellant of murder in the absence of sufficient evidence to prove the ingredients of murder beyond reasonable doubt.***
>
> ***(2) ……***
>
> **(3) *That the trial judge erred in law and in fact in failing to properly address himself to the defence of alibi thereby occasioning a miscarriage of justice."***

He prayed that his appeal be allowed, the conviction quashed and sentence of death set aside.

According to Fred Mukasa, learned counsel for the appellant, the ingredients for murder that were not proved are malice aforethought and the appellant's participation in the murder. It was his argument that to prove malice aforethought, the prosecution had to prove that the victim died from stab wound inflicted by the appellant with a sharp knife. He said that PW2 and PW3 had said that they had seen the appellant sharpening a knife, which was identified in Court. The medical evidence also shows that the deceased died of multiple wounds inflicted most likely by a sharp knife. The knife was recovered by

PW6, the LC1 Chairman and handed over to PW6, the police officer who produced it in Court. It was the submission of the learned counsel that the chain of movement of the knife was broken, as it was not produced in Court by the person who recovered it and therefore the judge was wrong to rely on the knife to infer malice aforethought. Mr. Elubu, for the respondent, has conceded, and quite rightly, that the chain of movement of the exhibits was broken. He, however, submitted that the judge did not rely on the knife, but rather on the injury found on the body and the part of the body where the injuries were found.

We do not agree with the argument of Mr. Elubu that the trial judge did not rely on the sharp knife when determining whether or not the killing was with malice aforethought. At page 7 of the judgment the learned judge said:

> ***"In deciding whether or not the death was caused with malice – aforethought, the following should be considered: -***
>
> **(i)** ***the weapon used;***
> **(ii)** ***the part of the body that was inflicted,***
> **(iii)** ***the number of injuries inflicted'***
> **(iv)** ***the conduct of the accused before and after the incident.***

He then continued:

> ***"In the instant case, according to the postmortem report the weapon which was likely to have been used on the deceased's body was a sharp knife".***

He then set out the injuries the doctor found and continued: -

> ***"A sharp knife is a dangerous weapon and anyone using it on a human being must be intending to kill or cause grievous bodily harm. <u>This knife</u> was used on the deceased's stomach which is a vulnerable part of***

the body and it led to the intestines coming out, loss of blood and shock, which caused death. I do find that the death of the deceased was caused with malice aforethought".

It is, therefore, clear from the above quotation that the judge relied heavily on the knife as the murder weapon. But we do not agree with contention of Mr. Mukasa that to prove malice aforethought the prosecution had to prove that the deceased died of stab wound inflicted with a knife. In our view, even if the evidence to connect the knife to the death of the deceased was broken, there is sufficient evidence on record to show that a sharp weapon was used to inflict the injuries sustained by the deceased. Further, from the nature of the injuries and the vulnerable part of the body, namely, the stomach, on which they were inflicted, whoever inflicted them must have had an intention to kill or cause grievous bodily harm.

We would like to point out that it is not a legal requirement for the prosecution to produce the weapon that was used to kill the deceased. A clear description of it by the witnesses who saw it is sufficient. We are fortified in this regard by the holding in the case of ***Komwiswa v Uganda (1979) HCB 86-87*** where it was held, inter alia, as follows: -

"When an exhibit .used as a weapon cannot be produced in evidence it should be described as carefully and exactly by the witnesses who saw it used".

In the case before us we note that PW2 and PW3 testified that prior to the murder they saw the appellant sharpening a knife. The medical evidence revealed that the injuries sustained by the deceased and which caused his death were most likely caused by a sharp instrument, like a sharp knife. The deceased, in his dying declaration, which was believed by the court said that he had been cut with a knife by the appellant. Shortly before the incident the deceased was heard asking the where-abouts of the appellant and were later seen together on the deceased's motor cycle.

As a first appellate court, we find that the evidence on record sufficiently establish the fact that the injuries on the deceased's stomach were inflicted with a sharp weapon most likely a knife. The break in the chain of movement of the knife was not fatal to the prosecution case.

Further, as the former Court of Appeal of East Africa held in the case of ***Mungai and others vs Republic (1968) E.A. 782-787*** there is no burden on the prosecution to prove the nature of the instrument which was used to inflict the harm, nor was there any obligation to prove how the instrument was obtained. This statement of the law was approved by the Supreme Court in ***Kooky Sharma and Another v Uganda, Criminal App. No. 44 of 2000.***

What the prosecution set out to prove, as per the particulars of the indictment, was that the appellant murdered one Muhuda Charles. As was said by ***Viscount Sankey LC in Woolmington v D.P.P. [1935] A C at 482:***

> ***"When dealing with murder, the Crown must prove (a) death as a result of a voluntary act of the accused and (b) malice of the accused".***

What the judge has to decide, so far as mental element of murder is concerned, is whether the appellant intended to kill or do serious bodily harm. In order to reach that decision the judge must pay regard to all he relevant circumstances, including what the appellant himself said and did: - See ***R v NEDRICK [1986] 1 WLR. 1025 and R v HANCOCK [1986] 2 WLR 357.***

We are satisfied that, having regard to the relevant circumstances, the learned trial judge was right in finding that malice aforethought had been proved. Ground one, therefore, fails.

The participation of the appellant can conveniently be considered together with defence of alibi. To prove that the appellant committed the offence the prosecution relied

mainly on circumstantial evidence. The first of evidence came from PW2 and PW3. The evidence of PW2 was to the effect that himself, John Wamala (PW3) and the appellant had been at the Mubuku Trading Centre earlier in the day. The appellant left him around 6 p.m. Then around 7 p.m. the deceased came looking for the appellant alleging that the appellant owed him Shs.500/=. PW2 advised the deceased to forget about money and go home. Then about 7.30p.m. PW2 said he saw the deceased carrying the appellant on his boda boda motor cycle and heading towards Maliba. This witness had known the appellant for ten years and had worked with him at the same place. It is, therefore, reasonable to accept his claim that he actually saw the appellant on the 2.6.98 at Mubuku Trading Centre and again when the deceased was carrying him on his boda boda.

PW3 also said that he saw the appellant on 2.6.98 at the Mubuku Trading Centre. They were together from 3.00 p.m. to about 7 p.m. After the appellant had left, the deceased came and asked him if he knew where the appellant was. He directed the deceased to a hotel where the appellant was. He later saw the deceased and appellant heading towards Maliba side. This witness and the appellant were village mates having been born at Mubuku. He had been working in the same garage with appellant, according to his evidence, for a long time. It is, therefore, reasonable to accept his evidence when he said that he actually saw the appellant at Mubuku Trading Centre on 2.6.98.

Learned counsel for the appellant has invited us to accept the evidence of PW2 and PW3 with caution on the grounds that the two contradicted themselves on the work the appellant was doing. Whilst PW2 said that the appellant was a bicycle repairer, PW3, on the other hand, said he was a watch repairer. The argument of learned counsel was that since the two witnesses claim to know the appellant very well, they could not be mistaken about what the appellant did for his living. As they had disagreed on the work the appellant did, they are not reliable witnesses.

The general approach to inconsistencies and contradictions is that where the court finds them grave, unless resolved, the evidence must be rejected. If they were minor,

they would normally not have that effect except where they are found to be pointing to deliberate falsehood. See ***Alfred Tajar v Uganda EACA. Cr. Appeal No. 69 of 1969 and Uganda v Bikamikire and Another C S C No. 63 (1972) HCB 144.*** We agree with he learned State Attorney that the inconsistencies and contradictions complained about do not go into the root of the prosecution evidence. They are minor. It is not the prosecution case that the appellant killed the deceased in the course of the appellant's work. Therefore what the appellant did for living is not relevant to the proof of the prosecution case. We find the evidence of PW3 and PW2 credible.

The other circumstantial evidence relied upon was what, in our view, a dying declaration the deceased made to PW4 and PW5. Imelda Kabasita, PW4, is the mother of Jane Nahori, (PW5). The evidence of PW4 was that she knew the appellant as a village – mate. She saw the appellant on the 2.6.98 during the day. In the evening, while at home, the deceased came making an alarm that he had been stabbed by Birato, one of the several names the appellant is known by. She saw a cut around the umbilicus area with the intestines out. He was bleeding profusely and in great pain. The deceased could still talk. He fell down in her compound and pleaded with her to take her to hospital. The same declaration was made to PW5.

Learned counsel has invited the Court to reject the evidence of PW4 and PW5 on the ground that they had interest to serve and so not reliable witnesses. The basis of the argument is that during investigation into the case two people were arrested before the appellant was arrested. They were Baguma and Idi Swaleh. These people were released after the arrest of the appellant. According to counsel, Idi Swaleh is husband of Jane Nahori, PW5 and consequently son-in-law of PW4. It was the contention of counsel that the intention of PW4 and PW5 in testifying against the appellant was motivated by a desire to protect Idi Swaleh.

At the trial both PW4 and PW5 gave evidence. They were cross-examined by counsel who represented the appellant. The relationship between Idi Swaleh and PW4 and PW5 was not put to them. Indeed, the name was not even suggested to them. The

alleged marriage between Idi Swaleh and PW5 came from the appellant for the first time when he gave his unsworn evidence. We think the alleged marriage between PW5 and Idi Swaleh was put up by the appellant for the purpose of discrediting the witnesses. Learned counsel, who represented appellant at the trial, never raised that issue. In our view, there is no foundation for the allegation of interest. The learned trial judge found PW4 and PW5 credible witnesses. We agree with him.

The circumstantial evidence we have been at pains to set up above clearly placed the appellant at the scene of crime at the time the crime was committed. All the witnesses were positive that they saw him on 2.6.98 at Mubuku Trading Centre. He disappeared from the place after the incident. The witnesses were positive that the appellant was not a rebel before the incident. If he did join a rebel group, then he might have done so when he was a fugitive running away from justice. The learned trial judge, was, therefore, right to reject his alibi as untrue. Ground three therefore fails.

In the result the appeal is dismissed. The conviction and sentence are upheld.
Dated at Kampala this ……17th ……day of ……February……..2003.

L.E.M. Mukasa-Kikonyogo
Deputy Chief Justice.

A.E.N. Mpagi-Bahigeine
Justice of Appeal.

J.P. Berko
Justice of Appeal.