THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: TSEKOOKO, J. S.C., KAROKORA, J. S.C.., MULENGA, J. S.C., KANYEIHAMBA, J.S.C. AND MUKASA-KIKONYOGO, J.S.C.)

CRIMINAL APPEAL NO. 10/1997

BETWEEN

KIFAMUNTE HENRY …………………………………………………………APPELLANT

AND

UGANDA……………………………………………………………………….. RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala (Manyindo, DC.J., Byamugisha, J. and Kania, J. dated 29th June 1997 in Criminal Appeal No 39/1996)

JUDGMENT OF THE COURT:

This is a second appeal from the decision of the Court of Appeal which in exercise of its appellate jurisdiction dismissed the appellant's appeal against his conviction for murder by the High Court. A second appeal lies to this Court by virtue of Section 6(1) of the Judicature Statute, 1996, on a matter of law or mixed law and fact where the Court of Appeal has confirmed a conviction and sentence of death passed by the High Court.

The case for the prosecution as accepted by the trial Court and the Court of Appeal is as follows: The deceased, Nkangari Yowana, was a brother of the father of the appellant called Henry Kifamunte Ssalongo. He (Ssalongo) predeceased Nkangari. Before his death Ssalongo was sub county Chief and had a kibanja on which he had a house in a village called Njaza village, the same village where the deceased lived in his own house. The deceased had a wife called Tonifasi Bafurukyeri (P.W.1). Upon the death of Ssalongo, his brother called Kakooza Balinabe (PW.5) took charge of Ssalongo's properties in Njaza village. It appears that prior to the death

of the deceased, the appellant worked and most times lived with his maternal relatives at a place called Nabutongwa in Masaka District estimated by P.W.3 to be 20 miles away. It also appears that before the death of the deceased the appellant harboured some illusion that the deceased and wife of deceased (P.w.1) had bewitched him (appellant)

According to Mugenyi Daudi (P.W.2), on 1st October 1992 the appellant visited their home. At about 8.00 p.m., P.W.2 while inside their home heard the appellant announce to one Kamya that the appellant would kill the deceased and two other persons. According to P.W.4 and P.W.5, about 16th October 1992 the appellant declared separately to P.W.4 and P.W.5 that he intended to kill the deceased and some other persons including deceased's wife (P.W.1) by cutting them with a panga. This threat was based on Suspicion or delusion that these two had bewitched the appellant. As a result of these declarations P.W.4 and P.W.5 informed the deceased and warned the deceased to take care. It appears that the deceased and P.W.1 did not take that information seriously.

On the night of 23rd October 1992, the appellant while armed with a torch and a panga invaded the home of the deceased. P.W.1 first saw torch light. Then she realised that the door of the house had been opened. She saw the Appellant armed with panga in right hand and a torch in the left hand. The appellant cut the deceased once on the neck. The deceased got hold of the panga and Struggled with the appellant P.W.1 joined the struggle. The appellant abandoned the panga and fled. The deceased then addressed the appellant saying –

"Kifamunte you have killed me and I was born with your father and my blood will haunt you".

Thereafter the deceased and P.W.1 got out of the house and raised alarms. The alarms were answered by relatives and other villagers. Among those who answered the alarms were P.W.3 and P.W.5. The deceased informed them that he was cut by the appellant. These people attempted to take the deceased to hospital.

Somewhere on the way the deceased felt too weak. He requested to be returned home. He was returned home where he died the same day. Following the death, P.W.4 and P.W.5 looked for the appellant arrested him and handed him over to authority.

For his part the appellant denied killing the deceased. He denied making threats as testified by P.W.4 and P.W.5. He denied ownership of panga and the torch. He agreed he had attempted to escape from prison but explained that he did so because he had overstayed on remand (one and half years) and not because of fear of the murder charge.

At the conclusion of the trial, the sole assessor believed the prosecution and advised conviction. The learned trial Judge accepted the prosecution version, disbelieved the appellant whom he convicted and sentenced to death. The appellant's appealed against the conviction to the Court of Appeal and was dismissed. He has now appealed to this Court against the decision of the Court of Appeal. There are two grounds of appeal to this Court. These are:

(1) The learned Judges of the Court of Appeal erred in law and fact in confirming the conviction of the appellant when the appellant had not been properly identified.

(2) The learned Judges erred in law when they failed to subject the evidence of the Prosecution witnesses to fresh scrutiny evaluation, thereby coming to the wrong conclusion, namely confirming the conviction of the appellant.

At the commencement of the hearing of the appeal we pointed out to Mr. Turyakira, Counsel for the appellant, that the first ground offended Section 6(1) of the Judicature Statute 1996. Mr. Turyakira abandoned the first ground.

In arguing the appeal, Mr. Turyakira contended that the Court of Appeal failed in its duty to review the evidence of the trial Court, scrutinize that evidence and make its own conclusions, lie cited the case of Pandya vs. R. (1957) E.A. 336 as authority. Learned Counsel submitted, quite correctly, that the case for the prosecution depended on correct identification of the person who invaded the home of and killed the deceased. Learned Counsel then contended in summary that the conditions prevailing during the attack and assault of the deceased were not favourable for correct and unmistaken identification of the assailant by P.W.1; that there were major contradictions in the evidence of P.W.1 which the Court of Appeal erroneously held to be minor. That P.W.1 should not have been believed. In effect he further contended that the evidence of the dying declaration and the alleged threats were not reliable and could not constitute corroboration of the evidence of P.W.1. Finally Mr. Turyakira appears to argue that because the Judgement of

the Court of Appeal in this case is not long, ipso facto the learned Judges of the Court of Appeal did not re-evaluate the evidence adduced before the trial Court. Mr. Ngolobe, Senior Principal State Attorney, supported the conclusions of both the trial Judge and the Court of Appeal that –

(a) P.W.1 correctly identified the appellant as the person who killed the deceased and she was justifiably believed by the Courts below,

(b) the appellant uttered threats to kill the deceased and those threats corroborated the evidence of P.W.1;

(c) that the dying declarations by the deceased to P.W.3 and P.W.4 were reliable and corroborated the evidence of P.W.1;

(d) the conduct of the appellant of fleeing the village where the murder was committed incriminated him;

(e) that contradictions in evidence of P.W.1 were minor and not major, and

(f) that the Court of Appeal adequately evaluated the evidence of the trial Court.

We shall first dispose of the last argument by Mr. Turyakira by stating that the length or brevity of a judgment is not evidence of the quality of that judgment. There is no standard form of judgment of a Court of Appeal. It has been held that a first appellate Court does not have to write a judgment in a form appropriate to a Court of first instance. It is enough, in questions of fact, if, after the first appellate Court having itself considered and evaluated the evidence and having tested the conclusions of the trial Court drawn from the demeanour of witnesses against the whole of their evidence, it is satisfied that there was evidence upon which the trial Court could properly and reasonably find as it did. That the appellate Court's conclusions are merely expressed in such terms, in itself, is no indication that it has failed to make a critical evaluation of the evidence: See S.M. Ruwala vs R. (l957) E.A.570. These principle in essence are reflected in Rule 29 (1) (a) of the Rules of the Court of Appeal 1996 (Legal Notice No. 11 of 1996); Section 137 of the Trial on Indictments Decree, 1971 and Section 331(1) of the Criminal Procedure Act. The said Section 331(1) which is particularly instructive reads as follows

"331. (1) The appellate court on any appeal against Conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred'

We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its 0own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire ys Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 331(i) of the Criminal Procedure Act.' It does not seem to us that except in clearest of cases, we are required to reevaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles: See P.R. Pandya vs. R. (1957) E.A. (supra) Kairu vs. Uganda (1978) FI.C.B. 123.

Section 6(i) of the Judicature Statute, 1996 which confers appellate jurisdiction upon this Court in respect of this type of case states –

> '6(i) In Criminal matters, in the case of an offence punishable by a sentence of death an appeal shall lie to the Supreme Court as follows –
>
> (a) Where the Court of Appeal has confirmed a conviction and sentence of death passed by the High Court, the accused may appeal as of right to the Supreme Court on a matter of law or mixed law and fact".

We would observe that this right of automatic appeal enjoyed by a person sentenced to death after trial is a reflection of the requirements of Article 22(1) of the provisions of the Constitution. The right of appeal to this court does not give an appellant the same latitude to reopen the case as an appeal to the Court of Appeal does. Thus the provisions of S. 131 of the Trial on Indictments Decree, 1971 which allow appeals Co the Court of Appeal provide that

> "131(1) Subject as hereinafter provided, any person convicted on a trial held by the High Court and,
>
> (a) sentenced to death may appeal to the Court of Appeal, (i) against the conviction on a question of law or of fact or of mixed law and fact".

Clearly, a comparison of the two provisions of the law (S. 6(1) of Statute 13 of 1996 and S. 131(1) of Decree No.26 of 1971) would suggest that normally it is the Court of Appeal as the first appel1ate court which has a duty to reevaluate the evidence of the trial Court. This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale we will assume the duty of the first appellate Court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in its consideration of the appeal as a first appellate Court, misapplied or failed to)apply the principles set out in such decisions as Pandya (supra) Ruwala (supra) Kairu (supra) . It might also be helpful to compare Rule 29 of the Court of Appeal Rules and Rule 29 of the Supreme Court Rules. These two rules support our view that as a second court of appeal we do not have to reevaluate the evidence.

Rule 29 of the Court of Appeal Rules states –

> “29. (1) On any appeal from a decision of High Court acting in the exercise of its original jurisdiction, the Court may
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> (a) re-appraise the evidence and draw inferences of fact; and
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> (b) in its discretion, for sufficient reason take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

(2) When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross- examination of any deponent.

(3) When additional evidence is taken by the trial court, it shall certify the evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; and when evidence is taken by a commissioner, he or she shall certify the evidence to the Court, without any such statement of opinion”.

Rule 29 of the Supreme Court Rules states –

> “29. (1) Where the Court of Appeal has reversed. Affirmed or varied a decision of the High Court acting in its original jurisdiction, the Court may decide matters of law or mixed law and fact, but shall not have discretion to Cake additional evidence.
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> (2) When an appeal emanates from a decision of the Constitutional Court—
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> (a) in the case of an appeal on a petition to the Constitutional Court, the Court may appraise the evidence and decide matters of fact, or law, or mixed law and fact, and may in its discretion take additional evidence;
>
> (b) in the case of an appeal on a reference to the Constitutional Court, the Court may decide the question of law or mixed law and fact submitted in the reference’.

The marginal note to Rule 29 of Supreme Court Rules is clearly inapplicable to Rule 29 (1)

The following grounds of appeal were considered by the Court of Appeal.

"1. That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence thereby occasioning miscarriage of justice.

2. That the trial judge erred both in law and fact when he merely disbelieved the appellant's alibi against the weight of evidence on record.

3. That the trial judge erred when he found that the contradictions in the prosecution's case were minor whereas they were very fundamental and irreconcilable thereby occasioning a miscarriage of justice.

4. That the learned trial Judge erred in law and fact when he believed the evidence of a single identifying witness when circumstances for correct identification were not favourable.

5. That the learned trial Judge erred when he believed the dying declaration made under the influence of alcohol thereby prejudicing the appellant's defence of an alibi.

The learned Judges of the Court of Appeal considered the above grounds and submissions thereon at pages 3 to 5 of their judgment in the following words –

"The thrust of the submission by the appellant's Counsel, Mr. Kiiza Mugambe was that the conditions did not favour correct identification by the single eye witness, P.W.1, and that the prosecution evidence was contradictory in material respects. The evidence of P.W.1 was to the effect that the appellant broke into their house while flashing a torch which he held in his left hand. In his right hand was a panga. P.W.1 recognised the appellant with the assistance of the torch light. As the appellant cut the deceased the latter said:

> "Kifamunte you have killed me and I was born with your father and my blood will haunt you'. (sic)

According to P.W.1 the deceased struggled with the appellant for a while. P.W.1 assisted the deceased in the struggle but they did not overcome the appellant who threw his panga down and ran away. Like the trial Judge and the Assessor, we are satisfied that P.W.1 was in position to

recognise the appellant that night as she had known him for six years and as there was plenty of light from his torch which he flashed about in the room while attacking the deceased. We are also satisfied that she did in fact recognise him. There was also the evidence of Joseph Mukasa (P.W.4), the village Council Chairman, which showed that a week before the murder the appellant went to his house at Njaza village and informed him that he intended to kill the deceased as he was bewitching him. The appellant uttered a similar threat to Bulunabe Kakooza (P.W.5), an uncle of the appellant. On 16th October 1992 Daudi Mugenyi (P.W.2) had also heard the appellant make same threat before one Kamya at Njaza village. It is not clear why Kamya was not called as a witness.

The trial Court believed the evidence of P.W.2, PW.4 and P.W.5 regarding the previous threat by the appellant to kill the deceased, despite denials by the appellant that he had made such threats. The learned trial Judge had the advantage of seeing those witnesses testify. We have no reason to doubt his findings that they were truthful witnesses. Evidence of previous threats is relevant and, as was pointed out by the Court of Appeal for East Africa in Okecha s/o Olilia v R (1940) Vol. 7 E.A.C.A. 74, as such evidence shows an expression of intention, it goes beyond mere motives and tends to connect the accused person with the killing. Also see Waibi and Another v. Uganda (1968) E.A. 228.

Finally, there was the evidence of P.W.5 that when he rushed to the scene of crime in answer to the alarm which was raised there, the deceased informed him that he had been attacked by his own son, the appellant. P.W.5 put the deceased on a bicycle and headed for hospital but had to return the deceased home after travelling for a short distance as the deceased's health was failing fast. The trial Judge was of the view that the evidence of P.W.1 corroborated the dying declaration. We think that the reverse is also true.

We are satisfied that the evidence of P.W.1 the dying declaration and the circumstantial evidence of the previous threats to kill left no doubt that it was the appellant who attacked and killed the deceased. We do not think that the contradictions relied on by Mr. Mugambe are material. In our opinion they were minor and did not affect the credibility of the prosecution witnesses. The appellant's alibi did not raise any doubt in the prosecution case. His claim that he had never been to Njaza village was clearly false in view of the evidence of P.W.2, P.W. 4 and P.w.5 that he

was in the village a few days before the incident. It was not denied that the house of the late appellant's father was at Njaza village, very near that of the deceased who was his brother. The alibi was rightly rejected. The conviction was proper".

From this portion of the judgment of the Court of Appeal, it is abundantly clear that the Court did consider, as it was entitled to do, being the first Court of Appeal, the points raised before that Court and now before us.

We have not been persuaded that the learned judges erred in law or in mixed fact and law to justify our intervention.

Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the court of first appellate Court has wrongly held that the trial Court correctly directed itself, yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view R. Mohamed All Hasham vs. R (1941) 8 E.A.C.A. 93.

On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: R. vs. Hassan bin Said (1942) 9 E.A.C.A. 62.

In Uganda vs. Kabali (1975) E.A. 185 a decision by East African Court of Appeal on second appeal; the Court considered the matter in the following words:

"It is true as Mr. Omondi has submitted that the first appellate Judge does not seem to have treated the evidence to independent scrutiny as he should have done. See Pandya vs. R. (1957) E.A. 336. He contended himself with satisfying himself that the Magistrate's finding as to the respondent's intention could be supported. But in concluding his judgment, the judge made it clear that he agrees with the Magistrate's evaluation of the evidence and with his finding as to intention. In our view although the form of the first appellate judgment is open to

criticism, we think that the Judge did in fact make his own evaluation of the evidence and came to the same conclusion on it, so far as intention is concerned, as the Magistrate, although he does not say so in terms. Even accepting the prosecution evidence in toto, we see no reason to doubt the validity of the findings of the two Courts

The position now, on second appeal, is that the Court is faced with the concurrent findings by the two Courts below that the respondent's intention was innocent and not criminal.

There is no reason why this court should depart from the concurrent findings of fact as to the respondent's innocence, findings which were reasonable and supportable on the evidence'. The above statements apply to this appeal and arguments made by Mr. Turyakira. We have not been persuaded that the Court of Appeal as a first Appellate Court erred or erred in such a manner as to occasion miscarriage of justice.

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

Delivered at Mengo this 15th day of May 1998.

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. Kanyeihainba,
Justice of the Supreme Court.

E.L.M. Mukasa-Kikonyogo
Justice of the Supreme Court.