

Lutu v Uganda (Criminal Appeal No.82 of 2015) [2016] UGHCCRD 89 (27 June 2016)

[2016] UGHCCRD 89

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Count 1 and 2: Causing death by reckless driving Contrary to Section 108 (b), of the Traffic and Road safety Act, and Count 3: Causing bodily injury by careless use of a motor vehicle Contrary to Section 109 of the Traffic and Road safety Act, Cap – Laws of Uganda.

It was alleged on counts 1 and 2 that on 9th April 2012 at Kikiri, Busabala Road, Makindye in Kampala District, the appellant (accused) caused death of Bugembe Robert and Kusulume Namatovu by reckless driving of motor vehicle UAH 053H Toyota Hiace. On Count 3, it was alleged that on 9th April 2012 at Kibiri, Busabala Road, Makindye Division in Kampala District, the appellant (accused) caused bodily injury to Byomuhangi Daphine by reckless Driving of motor vehicle UAH 053H Toyota Hiace.

The respondent adduced evidence from 4 (four) witnesses. The accused/appellant gave evidence on oath in defence and called no other witnesses to certify on his behalf. In his judgment the trial Chief Magistrate found the appellant guilty and convicted him under Section 147 and 393 (1) of the Penal Code Act of being an accessory after the fact. The appellant was sentenced to 2½ years imprisonment.

The appellant, Lutu Abdul was not satisfied with the whole decision of the Chief Magistrate of Makindye by His Worship Mafabi Richard, delivered on 29th July, 2015. Hence this appeal.

2. Memorandum of Appeal

2.1 The appellant's appeal is based on the following grounds; that:-

1. The learned trial Chief Magistrate erred in law and fact when he failed to evaluate the evidence and thereby convicted the appellant.
2. The learned trial Chief Magistrate erred in law and fact in holding that the appellant participated in the offence without evidence of any eye witness.
3. The learned trial Chief Magistrate erred in law and fact when he convicted the appellant/accused solely on the evidence of one Mogul John who never testified in Court.
4. The learned trial Chief Magistrate erred in law and fact when he convicted the accused on the testimony of PW4 who refused to be cross-examined.

2.2 It is proposed by the appellant that this honourable Court:-

1. Allows the appeal.
2. The conviction be quashed and sentence set aside.
3. **The duty of the first appellate Court.**

It is the duty of the appellate Court to review and re-evaluate the evidence before the trial Court and reach its own conclusions, taking into account of cause that the appellate Court did not have the opportunity to hear and see the witnesses testify. See Pandya -vs- RE [1957] EA 336, Ruwala -vs- R [1957] EA 570, Bogere Moss & Another -vs- Uganda, [1996] HCB EA 555, Mbazira Siragi & Another -vs- Uganda, Supreme Court Criminal appeal No.7 of 2004. I shall do so accordingly in this instant case. The evidence of both the prosecution and the defence must be properly re-evaluated by this Court.

4. Resolution of this appeal by Court.

4.1 From the memorandum of appeal, it is not clear whether the appellant is appealing against conviction and sentence. There is no ground of appeal that faults the trial Magistrate on the sentence.

4.2 In his submissions, Counsel for the appellant, Mr. Kiwanuka Abdallah, argued the four (4) grounds of appeal together. In his written submissions, he criticized the trial Chief Magistrate for the failure to evaluate the evidence of the parties on Court record. He faulted the trial Chef Magistrate for convicting the appellant basing on the evidence of PW4, No. 39594 H/C Okwir Alfonse, who in his view refused to be cross-examined. That his evidence was unbelievable. He further submitted that the evidence of PW1 Byomuhangi Daphine, PW2, Nakibuuka Molly and PW3 Mbalanyi Annet, who all did not identify the appellant at the scene of crime, that their respective pieces of evidence amount to hearsay evidence. He submitted that such evidence of the prosecution witnesses is inadmissible. He referred to a number of authorities in support of his arguments in his written submissions.

Further, Counsel for the appellant in his written submission praised the defence evidence. He stated that the prosecution failed to connect the appellant with the charged offences. He said that the appellant was convicted on a fabricated story which was conjured up by the four prosecution witnesses. He prayed that this appeal be allowed, conviction quashed and sentence set aside. That the appellant be found not guilty of the charged offence, acquitted and set free.

4.3 In reply, Counsel for the respondent, Ms. Kyomugisha Barbra, does not agree with the submissions by Counsel for the appellant. In her brief written submissions, she evaluated the evidence on Court record and supported the judgment of the trial Chief Magistrate. She criticized the submissions by Counsel for the appellant in her written submissions. She prayed that this appeal be dismissed conviction and the sentence be upheld by this Court.

4.4 I reviewed and re-evaluated the evidence of both the prosecution and the defence on the Court record so that I come to my own decision on the matter. I note from the written submissions but both Counsel for the parties that they handled the four (4) grounds of appeal together in the respective written submissions. I shall also do the same.

In full analysis of the evidence on record as a whole, I am of the considered view that the evidence linking the appellant with the offences in question is mostly the testimony of PW4, Shs. 39594 D/C Okwir Alfonse. It is fairly short on this point and can be reproduced in extension.

“I know the accused. I came to know him on 7th May, 2012 when he was brought to me by CPL Patrick a Traffic Officer handed him to me and said he caused a fatal accident where two (2) people died and the other was injured on a boda boda. It was established that motor vehicle UAH 053H a taxi was given to him by Mugula John the owner of the motor vehicle.

***On 9th April, 2012 around 12:00 (mid night) the vehicle was being driven towards Busabaala and knocked a bodaboda UDS 064H carrying 2 passengers. At Kibiri junction the rider of the motor bike has stopped waiting for the taxi to pass but the taxi was reckless driven and it**

knocked them. The rider and one passenger died instantly, the other was rushed to Mulago. The driver of the car ran away abandoning the car. He was not identified immediately. The Traffic Officer visited the scene of crime and towed the vehicle to Katwe Police. Two days after the 9th April, 2012, Mugala John approached the traffic Officer demanding for his vehicle. The traffic Officer asked him to produce the driver. On 7th May, 2012 the accused was brought to me. I interrogated him. He denied driving the car on that date but his friend Ngobi. I gave him 2 (two) weeks to produce Ngobi but he failed. He said on 9th April 2012 he was in Butambala attending the father's burial.*

On 17/5/2012, I personally went with him to Butambaala to prove whether he was for burial. When I reached there I got people waiting for us. I asked a few of them, they did not give me information accused and an old woman who said was the mother took me to the grave yard. There were 2 graves one old, one new. The accused showed me an old grave of his father called Kanyizi Muhammed. The new grave was for another person. Accused refused to say whose grave of the old man told me the grave of accused's father was about 1 year ago.

The new grave was for a lady who died on 6th. Accused did not attend burial. On 9th April 2015 when he said he was at Butambala , no one saw him. I concluded that he was the one driving the car.”

The appellant/accused refused to cross-examine PW4 on his evidence in examination-in chief. He said that he had hired a lawyer who will be the one to cross-examine, PW4. Counsel for the accused/appellant never cross-examined PW4 on his evidence. On 15th May 2014, the trial Chief Magistrate, Nambayo Esta (as she then was) made an order:-

***“Upon prosecution failing to proceed today, prosecution case is hereby closed with the evidence on record. Upon perusal of the evidence, it is my finding that evidence is enough to require the accused to present his defence and has a case to answer, S. 128 of the Magistrate's Courts Act to apply. Case adjourned to 26th June, 2016 for defence. Accused's bail extended.”*

From the proceedings of the Court record, PW4 was never cross-examined by the defence. PW4's evidence, therefore, remained unchallenged. It is not true as submitted by Counsel for the appellant that PW4 refused to be cross-examined. Rather, the defence abandoned cross-examining PW4 and proceeded to give evidence in defence. **In the case of Sawabiri & Another – vs- Uganda, supreme Court criminal appeal No. 5 of 1990 as quoted in the case of Sebuliba Haruna –vs- Uganda, Court of Appeal Criminal appeal No. 54 of 2012, it was held that :-**

***“The law is now settled that an omission or neglect to challenge the evidence in Chief of a material point by Cross-examination would lead to an inference that the evidence is accepted subject to its being assailed as inherently incredible or palpably untrue.”*

REPRESENTATION

The appellant is in Court.

His lawyer Kiwanuka Abdallah from M/S Lukwago & C. Advocates is absent.

Mr. Senkeezi Stephen from M/S Senkeezi – Ssali Advocates & Legal consultants stands in for Mr. Kiwanuka Abdallah at the request of the Court.

Ms. Kyomugisha Barbra the State Attorney for the respondent is present.

Ms. Margaret Kakunguru the clerk is in Court.

Court: Judgment is delivered to the parties.

Right of Appeal is explained to the parties.

Joseph Murangira

Judge

27/6/2016.

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