THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram:* Barishaki, Gashirabake & Kihika, *JJA*]

CRIMINAL APPEAL NO. 0317 of 2019

(Arising from the judgment of the High Court of Uganda [Batema N.D.A., J], in Criminal Session Case No. 0069 of 2015 at Soroti, delivered on 11th July 2019)

OLOBO JULIUS ==========Appellant

VERSUS

UGANDA ==========Respondent

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted on two counts of murder contrary to section 188 and 189 of the Penal Code Act Cap 120 and one count of attempted murder contrary to section 204(a) and (b). The particulars of the offense were that on 1st December 2014, the appellant and others while at Abola A Village, Bululu Sub-County in Kaberamaido District, with malice aforethought, unlawfully caused the death of Egengu David and Oriokot Francis, and further attempted to murder Oriokot John.

[2] On 3rd July 2019, the learned trial Judge acquitted all the accused of the offense of attempted murder. The appellant was convicted on the two counts of murder while his co-accused were all acquitted. On 11th July 2019, the learned trial Judge sentenced the appellant to serve 40 years imprisonment on each count to run concurrently. The trial

judge deducted the period the appellant spent on remand and ordered that he serve 38 years and 5 months in prison.

[3] The appellant appealed against the conviction. Two grounds of appeal were raised.

i) *That the learned Trial Judge erred in Law and fact when he failed to evaluate the evidence on identification and participation of the appellant at the scene of crime thereby arriving at the wrong conclusion hence occasioning a miscarriage of justice.*

ii) That the learned Trial Judge erred in law and fact when he rejected the appellant's defense of alibi thereby shifting the burden of proof to the appellant hence occasioning a miscarriage of justice.

[4] The respondent opposed the appeal on the grounds that the learned trial judge properly evaluated the evidence of the single identifying witness after cautioning himself of the danger of relying on such evidence. That the defense of alibi was not raised and if it was, it was raised late and was not genuine.

Submissions

Appellant's Submissions.

[5] At the hearing of this appeal, Mr. Francis Turyamuhebwa an Advocate on Private Brief appeared for the appellant while Ms. Samali Wakooli Assistant Director of Public Prosecutions appeared for the respondent.

[6] Counsel for the appellant contended that the learned trial Judge ought to have cautioned himself about the correctness of the evidence of a single identifying witness—Pw1, Oriokot John, before relying on it. He relied on the authority of ***Lt Jonas Ainomugisha V Uganda,***

Supreme Court Criminal Appeal No. 19 of 2015 where the court held that a judge should warn himself and the assessors of the special need for caution before he convicts the accused in reliance on the correctness of the identification(s) because of the possibility of a mistaken witness appearing convincing. The court provided a guide to aid the quality of identification evidence including; the length of time, the distance, the light, and the familiarity of the witness with the accused.

[7] He submitted about paragraph 5 of page 95 of the record, that the judge doubted the elaborate evidence of Pw1 recounting how he saw everyone who assaulted Egengu and the weapons used. Because Pw1 testified that he was cut on the neck by the appellant and that he ran away to hide in the swamp, he could not have seen how the deceased were killed because his power of observation was compromised hence the reason his evidence could not pin the co-accused leading to their acquittal.

[8] Counsel further contended that the evidence of Pw1 was biased and untruthful because of a grudge over a long-standing land dispute, a grudge acknowledged by the learned trial judge on page 2 paragraph 5 of his judgment, where he wrote . . . "**because of this grudge, the surviving eye witness may have named all the people he wanted in prison because of the land dispute.**" The appellant had filed D EX2, a defense filed by Egengu David in a case where the appellant was seeking compensation for injuries and loss suffered as a result of previous attacks by Egengu.

[9] That Pw1 mentioned the appellant because of existing grudges and as such his evidence was tainted with falsehood. He cited the case of ***Livingstone Sikuku V Uganda, SCCA No. 33 of 2000*** where the court stated that the evidence of a relative will be disregarded if it is shown to be biased, exaggerated, or falsified. Counsel for the respondent prayed that the evidence of Pw1 be disregarded because of falsehood, including the denial that the appellant was injured and the later admission of the injuries during cross-examination. He prayed that the appeal be allowed.

Respondent's submissions.

[10] The respondent submitted that the trial judge cautioned himself on the need for caution before relying on evidence of an identifying witness. Counsel referred the court to page 95 of the record of appeal 2nd last paragraph on the line . . . "**I will treat this identification with a lot of caution in light of the defense case.**" In addition to the caution, the court considered the evidence of 7 other witnesses and evaluated it as against the evidence of defense witnesses. She cited the case of ***Bogere Moses & Another Vs Uganda, SCCA No. 001 of 1997*** which gives guidelines for dealing with evidence of identification by eyewitnesses to rule out mistaken identity. That no piece of evidence should be weighed except in relation to all the rest of the evidence.

[11] The defense further cited the case of ***Nabulele and Another Vs Uganda, SCCA 1979 [HCB]*** in which the court held that when the quality of identification is good, for example, identification made after

a long period of observation, in satisfactory conditions, by a person who knew the accused before, court can safely convict even though there is no other evidence to support identification evidence, provided the court adequately warns itself of the special need for caution. Counsel contended that the offence occurred at 10 am as reflected on page 94 of the record of appeal and this left no room for mistake in identification. That court acknowledged on page 95, that pw1 could easily identify his village mates because he was familiar with their faces and names and it was on a clear morning.

[12] On the ground of alibi, the defense submitted that none was raised by the appellant and if it was, the court did not at any time shift the burden upon the appellant but that the conclusion of the court placing the appellant at the scene was based on the totality of the evidence of both the prosecution and defense witnesses, including the appellant himself who on page 42 admitted being armed during the attack and admitted sustaining injuries. Counsel cited the case of ***Androa Asenua and Another Vs Uganda, Criminal Appeal No. 1 of 1998*** where the Court of Appeal observed that an accused raising a defense of alibi should bring it at the earliest because if he does not until months later, there is naturally doubt as to whether he has not been preparing it in interval, and bringing it at the earliest affords the prosecution an opportunity of inquiring into that alibi, and if they are satisfied as to its genuiness proceddings will be stopped.

[13] The defense further challenged the appellant's averment that he was not at the scene when the deceased died. He cited the case of

Kato John Kyambadde Vs Uganda, SCCA No. 030 of 2014 where the court held that being at another place after the occurrence of the murder was not believable as an alibi since there was nothing to prevent him from moving from place to place. The defense further stated that the trial court did not shift the burden upon the appellant to prove that he was not at the scene. The court considered the totality of evidence for and against the defense of alibi and found the evidence of the respondent more cogent. She relied on the case of ***Baguma Fred Vs Uganda, SCCA No. 007 of 2004*** where the court held that in determining which witness to believe and the question turns to the demeanor of a witness, the court of appeal must be guided by the impression of the judge who saw the witness. The defense prayed that the appeal be dismissed.

Court's consideration.

[14] The first appellate court must re-appraise the evidence at the trial court and come to its conclusion. See **Rule 30(1)(a) of the Judicature(Court of Appeal) Rules.** However, we have to bear in mind that we did not have the opportunity to see and hear the witnesses as they testified. See **Bogere Moses Vs Uganda[1998]UGSC 22**; **Selle & Another Vs Associated Motor Boat Co[1968] E.A 123, Pandya Vs R[1957]E.A336 and Kifamutwe Henry Vs Uganda [1998]UGSC 20.** It is also trite law that an accused person is convicted on the strength of the prosecution's case and not on the weakness of the defense. See ***Israel Epuku S/O Achouseu V R [1934]***

EACA 166 and Akol Patrick & Others V Uganda, Court of Appeal Criminal Appeal No. 060 of 2002.

[15] Bearing in mind, the above principles of law, we shall proceed to determine the appeal. As indicated, the appellant raised two grounds. The first ground challenging the evidence concerning the identification of the appellant by Pw1 and the 2nd ground faulting the trial judge's rejection of the defense of alibi raised by the appellant. The two grounds of appeal are linked and shall therefore be handled concurrently.

[16] Pw1 was the only prosecution witness who allegedly saw the deceased being killed. The other two people Pw1 was with, Egengu David and his son Oriokot Francis, were killed on 1st December 2014. Pw1 testified that they were cutting grass at about 09:00 am, to reconstruct the house of Egengu David, when they saw Okello Peter standing nearby, holding two spears. Egengu David reported to Ekinu Julius on the phone about the person with a spear. On instructions of Pw1, Egengu David also rang Auko Beatrice, Pw1's sister who is a Police Officer to notify her as well. Pw1 testified that after the phone calls, Okello Peter disappeared.

[17] The trio (Pw1 and the two deceased) went to the former home of Egengu David which had previously been burnt by all the accused. They then heard people blowing whistles from all directions and saw people advancing towards them. Pw1 named the people and weapons they held. Those mentioned were; Okello Peter with spears, Olobo Julius with an axe, Oyugi with a panga, Ochom Tom with a panga,

Elasu Peter, Enyutu Micheal with a hoe, Ayola David, Egou Alfred, Akwenyo Jane, Ejagu Emmanuel with a panga, Ebelu Isaaya with a stick, Ewoku Sam. Pw1 testified that Oriokot Francis started crying while the father started reading a small blue bible.

[18] Pw1 testified that the group first attacked Oriokot Francis. That Enyutu Alfred beat him using sticks. That Egom Alfred cut him with a panga on the forehead and Ariokot died on the spot. Olobo and Oyugi George struggled with Pw1. Olobo hit Pw1 with an axe on the left side of the neck while Feri s/o Okunyi Peter cut Pw1 on the left 2nd toe. Pw1 fell and they left him bleeding and went to Egengu David.

[19] Pw1 testified that Okello Peter speared Egengu on the neck. That Enyutu cut him with a hoe and those who had pangas concentrated on cutting the head of Egengu. Pw1 listed those with pangas to include Eyugu, Elasu, Enyutu, Aduwe, Egou, Okello, and Ayoru David. Others beat him using sticks until he was weak. That the deceased called out to Pw1 to help him but Pw1 couldn't help. That Pw1 raised his hand helplessly until he passed away/died. Pw1 stated that when the appellant and Ayola, noticed that Egengu was dying, they attacked him again and killed him.

[20] Pw1 testified that when he fell after being attacked, he went to hide in the swamp. That he was bleeding from the leg and he had a swollen neck. He was witnessing the attack on Egengu while hiding. Pw1 hid until 3:00 pm when he got out of the swamp and went to the home of Okweje, his brother-in-law, where he slept till the next day when he went to report to the police at Kalaki in Kaberamaido. Pw1 testified

that the events leading to death occurred for about an hour up to 11 am. That all attackers were villagemates known to him. The deceased are Pw1's brother and nephew. Pw1 testified that he was not aware of the reasons for the attack because they lived peacefully with all the accused and that he loved them. He also testified that he rang his sister, Pw2, a police officer to notify her that that her brother and nephew had been killed.

[21] The defense challenged the identification evidence of Pw1 on the ground that it was tainted with bias owing to the long-standing grudges the family of the appellant had with the deceased. The appellant testified that he was the one attacked by the deceased and Pw1. When he went home crying to seek help having been cut on the head and wrists, people gathered to prevent the deceased and Pw1 from running away. Counsel for the appellant submitted that the trial judge error in relying on evidence of Pw1. We note from the record that the trial judge found the evidence of Pw1 unreliable when it came to the identification of the appellant's 4 co-accused. The trial judge however relied on the same evidence to convict the appellant.

[22] The motivation for giving false testimony was evident on record. First, Pw1 and his brother had admittedly not lived in Abola village for over 5 years because their homes had been torched and the arson case was still ongoing in Soroti Chief Magistrates Court. On page 14 of the court record, Pw1 admitted during cross-examination that he had not lived in that village for over 5 years. Secondly, Pw1's brother and his nephew had been killed before Pw1's eyes, as they returned to

reconstruct their homes. The evidence from Dw1(appellant) and his mother Dw2, showed that the deceased, Egengu, had lost land cases before the LC3 committee when he attempted to take over land Dw2 inherited from her late husband. The deceased was Dw2's brother-in-law and a paternal uncle to the appellant. Contrary to the evidence of Dw1, that he lived in the same village peacefully with the accused whom he allegedly loved, the evidence on record shows animosity and long-standing grudges over land.

[23] The learned trial Judge observed rightly in our view, that "*The long-standing land dispute gave rise to a grudge that explains the motive behind the murder. At the same time, because of this grudge, the surviving eyewitness may have named all the people he wanted in prison because of the land dispute.*" See Page 94, the judgment of the Court under the heading 'land dispute'. Because of this prior grudge, the evidence of Pw1 needed to be treated with utmost caution. For example, Pw1 stated that the appellant was not beaten/injured while at the scene. But in cross-examination, he acknowledged that the appellant was injured on the very day and sought medical attention at Bululu Health Centre 3. The evidence of injury was corroborated by the testimony of Dw7 a health worker who attended to the appellant at Bululu Health Centre before referring him to Soroti Regional Hospital. It was also confirmed by Dw6, a police officer who was attached to the Bululu police unit at the time. Dw6 referred to the appellant as the victim of the crime.

[24] Dw6 testified that when the appellant went to report a case of attempted murder, he had injuries (a cut on the right hand and head) and was bleeding, therefore Dw6 decided to first refer the appellant to Bululu health center in the company of a crime preventor. The referral letter and outpatient notes made by Dw7 were admitted in evidence as

DEX4. Further evidence of an attack on the appellant was provided by his mother Dw2, to whom the appellant went crying while bleeding, Dw10 Ekudu Moses who provided transport to take the appellant to police and hospital, and Dw4 who followed the appellant to Soroti Hospital where the appellant had been refered by Dw7.

[25] It is therefore not contested that the appellant had a brawl with the deceased at the scene. But the appellant contests being present when the deceased were killed. The appellant testified that he had gone to cut grass to thatch his house when Pw1 and the deceased attacked him. The deceased cut the appellant on the head, and when Pw1 tried to cut the appellant on the head too, the appellant protected his head with his hand and pw1 cut the hand injuring his wrist. As Dw1 ran crying to seek help people were gathering to prevent the deceased and Pw1 from running away.

[26] Pw1 the only survivor and eye witness testified that they first heard whistles being blown before they were attacked. This evidence is consistent with that of Dw1(appellant) who testified that when he ran away to escape while bleeding, people came. The appellant testified that because he was covered in blood he couldn't see who had come. Dw1 went to the health center around 10 am. Dw7 testified that he worked on the appellant around 10:48am-see page 61 line 2 of the record of proceedings. Dw6, a police officer received the appellant at about 10:00 am before he referred him for treatment.

[27] Was the appellant in his condition able to cause death to the deceased? Why was the appellant the only alleged attacker injured yet

Pw1 described the attackers as many? The evidence of Pw1 reflected on page 12 paragraph 8 of the record of proceedings states about the death of Oriokot Francis "***They first attacked Oriokot Francis, others beat him using sticks like Enyutu Alfred. His forehead was cut using a panga. It was Egom Alfred who cut him. At that time, Oriokot died on the spot."*** From this evidence, there is nothing to pin the appellant for the death of Oriokot, the victim in count 2. Both Egom Alfred and Enyutu, mentioned by Pw1 were not arrested.

[28] About the death of David Egengu, Pw1 testified that "***Okello Peter speared him on the lower neck, Enyutu cut him with a hoe, and those who had pangas concentrated on cutting the head. Those mentioned are Oyugi, Elasu, Enyutu, Aduwe, Egou, Okello and Ayoru David. They beat him using sticks until he became weak. He called me for help but I could not help him. Then he raised his hand helplessly till he passed away.*** All this Pw1 testified that he witnessed while lying down injured. Pw1 further testified that when the appellant and Ayola noticed that Egengu was dying, they attacked him again and killed him. Given the state Pw1 was in, injured on the neck and toe, bleeding, and hiding in the swamp, it is not possible that he could observe what every attacker was doing. This explains why the trial judge on page 95 paragraph 5, doubted Pw1's accuracy of the details of the attack and weapons used considering that Pw1's life was equally in danger.

[29] In acquitting the appellant's co-accused, the learned Judge doubted the evidence of police officers noting that the co-accused emerging from the bush where the crime was allegedly committed was not sufficient and that such evidence was doubtful. The trial Judge also believed the alibi set up by the co-accused and quashed the evidence concerning identification. He stated on page 98 of the judgment that . . . ***"Pw1 casually mentioned them(A1, A 2 and A3) in his doubted identification and it was never corroborated"***. About A4, the trial Judge stated that ***" Oyugi has put up a very strong alibi accounting for his movements that fateful day. He cannot have been the same person seen at the scene of the crime by John Ariokot(Pw1). He cannot be convicted by a reasonable court. He is acquitted too."***

[30] In convicting the appellant, however, the trial Judge stated on page 100 in his judgment, "***In my opinion, the appellant implicates himself. He attacked and killed the deceased. Egengu injured him before he died. Olobo reported nowhere because he feared arrest. The cut wounds are a good corroboration to the identification by Pw1. He was arrested as he escaped to Kampala for treatment***. **Olobo is convicted of the murder of the two deceased in count 1 and count 2 where he actively participated."**

[31] We have reviewed the conclusion of the learned trial judge in light of the evidence. Pw1 did not implicate the appellant in the death of Oriokot Francis. He indicated that Oriokot was killed by Ogom

Alfred who cut him on the head killing him on the spot. Refer to Page 12, paragraph 8. In respect to Egengu, Pw2 described the attackers who used pangas and spears. Pw1 had stated that the appellant had an axe. He did not state the Egengu was hurt using an axe. He stated that the appellant attacked the deceased again when he noticed that he was dying. But this was after Pw1 said the deceased raised his hand helplessly until he died. He did not state the manner of attack occasioned by the appellant the way he did with the others. I doubt that Egengu would be cut by several mentioned people(excluding the appellant) using pangas and all targeting the head and survive, only for the appellant to kill him.

[32] The judge disbelieved the evidence of Pw1 in respect to Oyugi—A4. Yet Pw1 had alleged that he saw Oyugi among those who had a panga hitting Egengu on the head. In rejecting Pw1's evidence, he noted that A4 had a strong alibi. If Pw1 could lie about seeing the other co-accused at the scene, why would he not lie about seeing the appellant? And yet there is evidence of previous grudges among them. If pw1 was observing from the same vintage point, then his evidence concerning identification ought to have been found cogent for all the accused. Moreover, the appellant had in our view stronger alibi because at the time that Pw1 recounted the deceased to have been killed, Dw1 had gone to the police and the clinic as the evidence of Dw2, Dw6, Dw7, and Dw8 shows.

[33] In the case of ***Livingstone Sikuku Vs Uganda, SCCA No. 33 of 2000*** court noted that for evidence of a neighbor or a relative to be

disregarded, it has to be shown that it was biased, exaggerated, or falsified. The trial judge had already cast doubt on the accuracy of Pw1's evidence. Pw1 did to pin the appellant to the death of Oriokot. The learned trial judge erred in finding the appellant guilty of murder on count 2.

[34] The learned trial judge also errored in concluding that the appellant provided self-incriminating evidence. Far from it, the appellant's evidence shows that he was attacked by Pw1 and the deceased. He ran for help and Dw2, Dw6, Dw7, and Dw10 provided the needed help. That he did not report to the police is not factual. Police at Bululu decided to refer the appellant to the hospital before entering his report in the station diary book because as testified by Dw6, the police officer, he needed to first save a life. Dw6 described the appellant as the victim of the crime.

[35] This is more believable considering that of all alleged attackers it's only the appellant who was injured. Indeed even Dw7 upon realising that the injuries sustained by the appellant could not be managed at the Health Centre 3, referred him to soroti hospital. In Soroti, the appellant's relatives decided to take him to the clinic from where he was referred to Kampala. The undisputed evidence of injuries rebut the evidence of Pw1 that the appellant was not attacked. It also casts doubt on the credibility of Pw1's evidence.

[36] The appellant testified that he heard about the killing of the deceased while at the hospital. Although he was initially at the scene, upon being attacked the appellant ran for help. To conclude that

because he was injured then he is responsible for the murder is erroneous. Pw1 testified that the attack took over an hour up to 11:00 am. Dw6 testified that he received the appellant at the police at around 10:00 am. Dw6 sent the appellant to the hospital. Dw7, the health practitioner received the appellant at about 10:48 am. Dw2 and Dw10 got transport for the appellant at about 10:00 am. This evidence provided strong corroborative proof that Dw1 may not have been involved in the murder. It is more plausible that the deceased attacked the appellant leading to mob action against them.

[37] It renders credence to the appellant's evidence that as he ran for help, many people were gathering as the deceased tried to run. Pw3 and Pw6 both police officers, testified in cross-examination on pages 32 and 36 of the record, that over 22 people were suspects. That over 18 suspects were at large. This goes to show that the deceased were victims of mob justice and this explains the failure of Pw1 to point with exactness, the role played by many of those arraigned hence their acquittal.

[38] The evidence of pw3 that he recovered a blood-stained shirt and a hoe from the appellant is also doubtful because these alleged exhibits were not tendered in court nor identified. The trial Judge further concluded that the appellant was arrested as he was escaping to Kampala. But there is no evidence of any arresting officer who arrested the appellant. The appellant admits that he went to Kampala for medical treatment. He handed himself over to police at Kireka, escorted by his brother, because he was notified that he was needed

in Soroti over murder charges. He testified that the police at Kireka referred him to Kira police for onward transmission to Soroti. This evidence of willing surrender was not rebutted.

[39] It was established during cross-examination of Pw1 on page 15 of the record that there was another Olobo Julius. Pw1 stated that two persons named Olobo Julius were at the scene and participated in the crime. He mentioned the second Olobo Julius to be s/o Enyutu Micheal. But in the evidence, the appellant doesn't differentiate which Olobo performed which act. Pw1 further stated in cross-examination on page 15 of the record that he identified Olobo during an identification parade at Soroti. No other prosecution witness testified to the participation or organization of an identification parade. Why would Pw1 be summoned to identify culprits yet he testified that he knew all of them? In the case of ***Stephen Mugume Vs Uganda, Criminal Appeal No. 20 of 1995*** the Supreme Court held that;

> " ***It is, we think, common sense that a witness would normally not be required to identify a suspect at a parade if the witness knows the suspect whom he/she saw commit an offense. Identification parades are, as a practice held in cases where the suspect is a stranger to the witness or possibly where the witness does not know the name of the suspect. In such a case the identification parade is held . . . to enable the identifying witness to confirm that the person he has identified at the parade is the same person he had seen commit an offense."***

[40] The evidence of an identification parade was scanty, mentioned by Pw1 only. Since no police officer gave testimony concerning an identification parade being conducted, the evidence of Pw1 was incredible, because if he knew the offenders there would be no reason to ask him to identify the offender/s.

[41] The totality of the evidence does not prove the charges of murder against the appellant to the required standard. We quash the conviction of the appellant and set aside the sentence imposed on him. We order the immediate release of the appellant unless he is being held on some other lawful charges.

Dated at Kampala this .....23rd.....day of .....Sept.....2024.

Cheborion Barishaka
Justice of Appeal

Christopher Gashirabake
Justice of Appeal

Oscar J. Kihika
Justice of Appeal