

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

5 **CORAM: HON JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON JUSTICE C.N.B. KITUMBA, JA**

CRIMINAL APPEAL NO. 10/2003

10 1. **BYAMUKAMA F.**
2. **BARYAYEBWA JOHN**
3. **NDYANABO** **JAMES**
.....APPELLANTS.

VERSUS

15 **UGANDARESPONDENT.**

*[Appeal from the decision of the High Court sitting at Fort Portal
(Zehurikize, J) dated 14-1-2003 in criminal session case No. 0015
of 2002]*

20 **JUDGEMENT OF THE COURT.**

The appellants, Byamukama Federiko, Ndyanabo James and John Baryayebwa, hereinafter referred to as the 1st, 2nd and 3rd appellants were indicted before the High Court at Fort Portal (V.T Zehurikize, J) for the offence of murder which they denied. They were, however, convicted and sentenced to death. Hence this appeal.

The facts as accepted by the learned trial Judge were that on 14-03-01, at Oburawa village, Biguli Parish, Bwizi sub-county in

Kamwenge District, the deceased, Rwanzana George, was in his house with his family when their dogs started barking continuously. The deceased then instructed his 15-year-old son, Bidobozi Stephen, (PW2) to go out and find out what was
5 happening. When Bidobozi failed to see anything, the deceased went out to check for himself. Thereupon, the assailants seized and dragged him away. He raised an alarm, which was answered by Bidobozi and Rwabutontori Geoffrey (PW3). They saw their father running towards the house being
10 followed by the assailants. They went out to follow their father with a torch. As the deceased approached the door the 1st appellant pushed him down. He (the 1st appellant) with other assailants dragged the deceased away. As both sons followed they heard the deceased crying that he was finished and that
15 they should not bother following. They, thus, ran into hiding until morning.

The following day, PW2 and PW3 found their father's body with a panga and a rugabire (tyre sandal) by its side. They had
20 identified the assailants with the aid of a tadooba light (small wick lamp) which was burning in the house and which illuminated outside as well as the house, which had no door. They also had a torch which they were flashing. The matter was reported to the local authority and the police. The 1st
25 appellant was arrested at the deceased's home as he went for the vigil. The others were arrested from their respective homes. They were all charged with the deceased's murder which offence they denied setting up various alibis.

The memorandum of appeal which is dated 17th June 2004 comprises the following seven grounds namely that:

1. **The learned trial Judge erred in law and fact in relying on the evidence from witnesses who had grudges against the appellant.**

2. **The learned trial Judge erred in law and fact when he failed to consider that there were other people besides the appellants who had the motive and opportunity to commit the alleged murder.**

3. **The learned trial Judge erred in law and fact in relying on mistaken identification evidence.**

4. **The learned trial Judge erred in law and fact when he rejected the appellants' defences.**

5. **The learned trial Judge erred in law and fact in relying on the prosecution evidence, which was full of lies, contradictions and inconsistencies.**

6. **The learned trial Judge erred in law and fact when he failed to judicially evaluate the evidence before him thereby coming to a wrong decision.**

7. **The sentence was wrongly passed in the circumstances.**

Mr. Maxim Mutabingwa, learned counsel for the appellant argued all the grounds together on the ground that the only issue before us was that of identification. He contended that
5 the learned Judge erred to hold that the conditions favoured correct identification by the witnesses. Learned counsel argued that identification was erroneous since PW3 testified that they were attacked at around 10:00 p.m. and that it was very dark, though they had a torch. He pointed out that the
10 assailants who were in a big group could not be properly identified though PW2 was flashing the torch at them. Moreover, as they were running away from the witnesses, they could not identify anybody. They were running following the deceased. They had their backs at the witnesses who were
15 trying to follow their father. Mr. Mutabingwa submitted that the learned Judge cited the law properly but misapplied it. He prayed court to dismiss the appeal.

Ms. Jane Adobo, learned Senior State Attorney, disagreed with
20 Mr. Mutabingwa. She supported the conviction contending that the conditions for identification were favourable. She submitted that all the witnesses knew all the appellants, as they were villagemates.

25 Regarding the lighting, learned counsel submitted that there was sufficient lighting whose source was the torch PW2 was flashing at the assailants coupled with the wick lamp in the sitting room whose light illuminated the outside as well since

the house had no door. Learned counsel acknowledged that it had been very dark at first before the moon came but that it eventually appeared by the time the assailants were walking back to the deceased's home after they had murdered him.

5 They could then clearly be identified by PW3 who was hiding in the kraal. They were walking in different directions.

Regarding the assailants' proximity to the witnesses, learned counsel, submitted that it was very short. The assailants were
10 following the deceased. The witnesses could clearly see the attackers as they were chasing him and he was trying to resist by running back into the house where he fell in the doorway. They were thus facing each other. They identified the 1st, 2nd and 3rd appellants amongst the group.

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The foregoing apart, Ms. Adobo pointed out that the incident lasted for some considerable time. PW2 and PW3 followed the attackers leading away their father until he told them to go back. Learned counsel argued that PW3 spent more time
20 hiding in the kraal observing them as they were going their separate ways. There was moonlight after the murder. She submitted that the conditions were favourable. There was no question of after thought. PW2 and PW3 reported, at the first opportunity, the identity of the assailants to PW5, the local
25 council chief. The appellants were arrested the following day. Ms. Adobo prayed court to dismiss the appeal.

The learned Judge observed:

“Their house did not have a door as it is said it had always to be open so that they could easily see the cows. When the deceased was pulled away as he was trying to enter the house PW4 was able to see only A1 by means of a tadooba in the sitting room whose light reached the entrance. PW2 and PW3 were able to see the person who pulled away the deceased, as he was about to enter the house, as A1, by means of light from a torch in possession of PW2. PW2 and PW3 followed the attackers for some distances as the attackers led away their father until he told them to give up. They were flashing the torch against the attackers. PW3 testified that he hid himself among the cows and could see the attackers as they went to their house, after killing the deceased. He said he was able to identify the accused persons and others, as there was some moonlight.

The operation appears to have taken a bit of time right from the deceased was driven away, killed and up to the time the attackers came back to the deceased’s house only to find all other members of family already fled into hiding.

.... As already stated all accused persons said they were in their homes, the whole night of 14-

3-2001. Thus a defence of alibi was raised. It is still the duty of the prosecution to disprove it and place the accused persons at the scene of the crime. Ssekitoleko vs Uganda (1967) EA 531.

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Herein above I have already considered the evidence as a whole regarding the participation of the accused persons. They were honest and their evidence was not based on mere suspicion. Their evidence placed the accused person at the scene of the crime. I am in agreement with the gentleman assessor that there was no mistaken identity.

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I find all the accused persons guilty of murder C/SS 183 and 184”

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The learned trial Judge properly followed the guidelines in the relevant authorities on identification under difficult circumstances: **Roria vs Republic (1967) EA 583, Abdalla Nabulere & Another vs Uganda (1979) HCB 77, George William Kalyesubula vs Uganda Criminal Application No. 16/77.** In view of such detailed appraisal of the evidence we can not fault the Judge’s finding which we hereby confirm and dismiss the appeal.

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Dated at Kampala this ... 28th day of ... April2006

L.E.M. MUKASA KIKONYOGO
DEPUTY CHIEF JUSTICE.

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A.E.N. MPAGI BAHIGEINE
JUSTICE OF APPEAL.

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C.N.B. KITUMBA
JUSTICE OF APPEAL.

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