THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA

CRIMINAL APPEAL NO.314 OF 2003

KURONG STANLEY…….……APPEALANT

V E R S U S

UGANDA ……..RESPONDENT

[Appeal from conviction and sentence of the High Court of Uganda at Gulu (Mary Maitum, J) dated 13/06/2003 in Criminal Session Case No.138 of 2001]

JUDGMENT OF THE COURT:

This is an appeal against judgment and sentence of the High Court of Uganda in Gulu where the appellant was charged with the offence of Murder c/s 183 and 184 of the Penal Code Act and was sentenced to death.

The facts of the case as found by the trial court are as follows:-

> **"The facts are that on 1st May 2001, the deceased left Kapchorwa with the accused who had offered to assist him in buying a tractor from Gulu. The accused and the deceased booked into the DC Africana Bar and Lodge in Gulu on 2nd May 2001. The accused registered under the names of WAMAYI from Mbale on business in Gulu. The accused paid for a room with two beds. The employee of the lodge conducted both the accused and the deceased to a room named SOROTI room. Both lodgers were seen**

drinking soft drinks at the bar, that evening. They retired to the room afterwards.

The next morning the body of the deceased was discovered by a cleaner of the lodge in one of the beds in SOROTI room. The accused was no where to be found. He was last seen in the lodge at 2.00 am. The deceased had cut wounds and a black shoe was recovered outside the bathroom attached to SOROTI room.

The accused was arrested several months later and was identified by the employees of DC Africana Bar and Lodge as the WAMAYI who had booked and paid for SOROTI room on 2nd May 2001, in an identification parade held some months later.

The accused in his defence denied any knowledge of the charge and gave an alibi to the effect that he had been in his home in Kapchorwa on the night of the 2nd May 2001."

At the trial the learned trial judge believed the prosecution case and rejected the defence, hence, this appeal.

The appellants' Memorandum of Appeal contains four grounds of appeal, namely:-

"1) THAT the learned trial judge erred in law and fact when she convicted the appellant on the basis of unsatisfactory circumstantial evidence.

2) THAT the learned trial judge erred in law and fact when she found that the identification parade had been conducted in accordance with laid down procedures.

3) THAT the learned trial judge erred in law and fact when she disregarded the appellants defence of alibi.

4) THAT the learned trial judge erred in law and fact when she failed to adequately evaluate the evidence adduced at trial and hence reached an erroneous decision."

Mr. Henry Kunya represented the appellant on state brief and Mr. Waninde Fred, the learned principal State Attorney at Directorate of Public Prosecutions, represented the respondent. Mr. Henry Kunya argued the four grounds of appeal separately. However, after a careful perusal of all the evidence before the learned trial judge, the submissions of counsel and the detailed judgment of the trial judge, we find that there is really one main issue for determination, namely, whether the appellant was correctly identified as the person who killed the deceased. Mr. Kunya attacked the evidence which was adduced to prove that the appellant was the last person to be seen with the deceased in their home town of Kapchorwa and at DC Africana Inn Bar and Lodge in Gulu on 2nd May 2001. He submitted that there was no evidence to prove that he was seen with the deceased in Kapchorwa. There was only circumstantial evidence of PW2, the wife of the deceased and PW3 who claimed that the deceased had told them that he was going to Gulu with the appellant but no one saw them leave together.

Secondly, he attacked the evidence of the Gulu lodge witnesses whom he argued that they had never seen the appellant before the date of the murder and had no capacity to identify him.

Thirdly, he attacked the evidence of the identification parade which was carried out at Gulu Police Station on 16th July 2001 in which four witnesses allegedly identified the appellant as the person who appeared at the Gulu lodge with the deceased. He argued that the parade was faulty in four respects:-

(a) The appellant was not informed of his right to have a lawyer present.

(b) That the identifying witnesses were shown the appellant before the exercise began.

(c) That appellant was not placed in line with people of similar appearance.

(d) That it was suggested to the witnesses that the person suspected of the crime would be among the nine people who were lined up during the identification parade.

Finally, he criticised the trial judge for refusing to believe the alibi of the appellant despite the fact that the prosecution had failed to place him at the scene of crime. He urged us to re-evaluate all the evidence and to hold that the charge against the appellant was not proved beyond reasonable doubt.

Mr. Waninde could not agree. He submitted that the evidence adduced by the prosecution, though circumstantial, was very cogent and strong enough to justify conviction of the appellant. He supported the manner in which the identification parade was conducted. His only regret was that most witnesses who had identified the appellant were unable to appear to testify in court. He contended, however, that two of them (PW6 and PW4) had given evidence which was corroborated by that of other witnesses and by the conduct of the appellant both before and after the murder of the deceased. He invited us to hold that though most of the evidence was circumstantial, it was cogent enough to prove the charge. He asked us to uphold the conclusions of the trial court and to dismiss the appeal.

We now turn to the merits of the appeal. We find it convenient to begin with the evidence of the identification parade. The learned trial judge considered the evidence at length and came to the conclusion that the parade was conducted in accordance with the rules laid down in **Republic vs Mwanga s/o Manaa (1936)**

EACA 29. It is this conclusion that was challenged by the appellants counsel at the trial of the appeal. We begin with his submission that the appellant was never informed of his right to request that a lawyer be present at the parade and that this omission was fatal to the whole parade. Counsel relied on the case of **Ssesanga Stephen vs Uganda Civil Appeal No.85 of 2000 (CA)** in which this Court held that the right of the accused to be informed that he could have his lawyer present was mandatory and failure to inform him would be fatal to the parade. In the instant case, the appellant was asked, and he admitted that much in his evidence, whether he had an advocate whom he wished to attend and he answered in the negative. In our view, the fact that the appellant was asked whether he had lawyer should have alerted him to the possibility that he could have a lawyer present if he wished to have one present. He could have asked there and then whether, if he had one, he would be allowed to attend. Instead, he simply answered that he had no lawyer and never complained thereafter about the absence of one at the identification parade. We think that this case is distinguishable from the **Ssesanga case** where the appellant was never alerted to the possibility that he could require that an advocate or a friend attends the parade.

The second objection to the parade is that witnesses at the parade were shown the appellant before the exercise was conducted. We have read the evidence of PW7, the officer who carried out the parade, and the appellant's own evidence on the matter. We do not find any evidence to support that claim. The learned trial judge can be forgiven for rejecteing the appellant's evidence on the matter because, on the whole, she found that he was an **"inveterate liar".** As the trial judge who had the opportunity to see all the witnesses, including the appellant, in the witness box, she was entitled to make that finding.

The third objection was that at the parade, the appellant was lined up with people of dissimilar appearance in size and height which made it easy to be identified.

The rules in **Mwanga case (supra)** require that the accused should be placed as far as possible with persons of similar age, general appearance and class of life of himself or herself. According to PW7 Ojok Bona who conducted the parade, most of the volunteers who participated in the parade were **"almost of same size"** with the suspect. We also note that most of the volunteers were aged between 18 and 31 years except one who was aged 37 which was also the age of the appellant. It is not always an easy matter to assemble eight volunteers of similar age, height and size, but all effort should be made towards that direction so that the suspect does not stand out as manifestly distinct from all other participants. We accept the evidence of the police officer (PW7) that he lined up eight people of similar appearances of the appellant save that only one of them was of his age. However, since the witnesses did not know the age of the appellant, this could not have occasioned a miscarriage of justice or prejudice the judgment of the witnesses. Moreover, this was not one of the reasons that the appellant advanced against the fairness of the whole exercise when he was asked whether he was satisfied with the conduct of the parade. We hold that the irregularity on age differential is minor and did not prejudice the fairness of the whole exercise.

Finally, counsel challenged the fairness of the conduct of the parade on the ground that it was suggested to the witnesses that the man whom they saw in Gulu at the scene of crime was definitely one of the nine men paraded. According to DW7, he was instructing the identifying witness to walk along the parade and to touch the person he/she saw in Gulu if he/she recognised one. Four witnesses were told the same thing and they picked out the appellant. The

appellant himself agrees that this was the procedure used. Counsel for the appellant did not tell us the words PW7 used that suggested that the suspect would be in the parade. We do not agree that the instructions PW 7 gave the witnesses suggested what counsel for the appellant is complaining of. All he said was that if you recognise among these people the man you saw in Gulu, then touch him. The use of the word IF clearly left the possibility that the suspect may be there and you don't recognise him or he may not be there at all. This objection to the fairness of the parade is unfounded and we reject it.

On the whole, we find that there were a few minor irregularities in the exercise but on the whole they did not prejudice the fairness of the identification parade. Both PW7 (the police witness) and the appellant himself agree that four witnesses picked out the appellant from the line. We agree with the trial court that there was no credible evidence that three Gulu lodge witnesses who picked the appellant from the line were shown the appellant before the exercise began. It is unfortunate that two of them did not testify in court but the appellant himself testified that they picked him out of the parade of eight volunteers. We hold that the identification parade was conducted properly and fairly.

Now, there is evidence on record of the conduct of the appellant before and after the murder of the deceased which corroborates the results of the identification parade. First there is the evidence of PW2, the elder widow of the deceased. Her husband told her before he left for Gulu that he was going with the appellant who had offered to assist him identify a tractor that the deceased intended to buy. She was the one keeping the shs.4,000,000/= the deceased had kept for that purpose. She surrendered the money to him on the morning of 2nd May 2001 when they left for Gulu. Though she did not see the two leave together, she learnt from her husband that they were going together and from that moment, she has never seen her husband alive. She identified the dead

body of their husband in Gulu four weeks later. In the meantime, the appellant also vanished from the village for about two weeks.

Furthermore, PW3 was told by the deceased on 1st May 2001 that he would be going for a long journey to Gulu with the appellant. On the morning of 2nd May 2001, the appellant found the deceased at the home of PW3 where the deceased had spent a night. PW3 saw the two together discussing something. When the appellant left, the deceased borrowed a motor-cycle from PW3 to take some properties to his home before going for the journey. During his absence, the appellant returned to the home of PW3 looking for the deceased. When he found that the deceased had gone to his home, the appellant left a message for the deceased (who would be returning there to deliver the motor-cycle) that the deceased would find him at Rock Gardens Hotel Kapchorwa Town. PW3 duly delivered the message to the deceased who left and he never saw him alive again.

Second, the appellant and the deceased appeared at the lodge in Gulu that very evening. The appellant appeared to be in charge of the mission. He was last seen at 2 am on 3/5/08 bare chaste going to the bathroom. He had shared SOROTI room at the lodge with the deceased. The next morning, the appellant had vanished and the body of the deceased was discovered in the room. This evidence strongly points to the man, who had come with the deceased as the person who killed him. The results of the identification parade only confirmed this.

Third, the appellant was the last person to be seen with the deceased when still alive both in Kapchorwa and in Gulu. He vanished from his home area for about two weeks but on his return, he did not volunteer any information about the deceased he had left with. When he was approached by PW2, the widow of

the deceased and PW3, the last person to see the two together in Kapchorwa, he told them that he had gone with the deceased to Kampala where they had bought guns and ammunitions which the deceased took to Kenya to sell. As it turned out, this was a blatant lie which clearly confirms that he was not an innocent man and corroborates the results of the identification parade.

Fourth, when the body of the deceased was reported to police, it could not be identified. Police put up notices at all police stations throughout Uganda. As a result PW2 and PW3 learned that a body had been buried in Gulu about one month earlier. The two left for Gulu to try and identify the body. When the appellant learnt that the two had gone to Gulu, he knew his secret was now out. He took himself and surrendered at Kapchorwa Police Station. Despite this, he made several attempts to escape from custody after he was committed for trial. By that time, he had discovered that the game was up. The learned trial judge wondered whether this could be conduct of an innocent man. Considering all the evidence we have evaluated above, we would say **"definitely not."**

Finally, the appellant appears to have performed very poorly under cross-examination. He evaded many questions and refused to answer others. He gave incredible evidence to the effect that he never knew the deceased, that he did not know PW2 and PW3 and that all the witnesses from Gulu told lies against him. He could not give a single reason why such strangers should give evidence against him which pinned him down with forceful precision of mathematics. The trial judge was right to hold that he was an **"inveterate liar."**

In the result, we find no merits in this appeal which we accordingly dismiss.

Dated at Kampala this 20th day of June 2008.

Hon. Justice A.E.N. Mpagi Bahigeine
JUSTICE OF APPEAL

Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL

Hon. Justice C.N.B. Kitumba
JUSTICE OF APPEAL