THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

CRIMINAL APPEAL NO.224/2003

KIZITO ENOCK……..APPELLANT

V E R S U S

UGANDA…….RESPONDENT

(Appeal from the decision of
the High Court, (C.A. Okello, J) dated 21/11/2003
in High Court Criminal Session Case No.464/2001 at Mpigi)

JUDGMENT OF THE COURT:

This is an appeal from the decision of the High Court which convicted the appellant on a charge of murder and sentenced him to death.

The case for the prosecution as accepted by the trial court is as follows:-

On the night of 5th July 2001 at 11.00 p.m in Lugazi village in Wakiso District, the deceased Paul Musisi, was severely assaulted by the appellant. The deceased raised an alarm which was answered by Lovinsa Nabakooza [PW2] and some other residents of the village. Those who answered the alarm assisted to take Paul Musisi who was in critical condition to Namayumba Police Post where the assault was reported. Paul Musisi the deceased was then taken for treatment to Namayumba Health Centre where he passed away not long afterwards.

Subsequently, the appellant was arrested days after and was ultimately charged in court with the said offence.

At the trial, six prosecution witnesses gave evidence. A post mortem examination carried out by PW6 on 7th July 2001 established that the cause of death was brain damage. During the defence case, only the appellant gave evidence in an unsworn statement. In his statement, the appellant set up an alibi in which he stated that he left the village for Kampala two days before the deceased was assaulted.

The learned trial judge rejected the appellants alibi and convicted and sentenced him as aforesaid, hence this appeal. The appellant relies on three grounds of appeal as follows:-

1. **The trial judge erred in law and fact when she held that the appellant had been correctly identified by a single witness PW2.**
2. **The trial judge erred in law and fact when she believed the deceased's dying declaration, implicating the appellant.**
3. **The trial judge erred in law and fact when he rejected the appellant's alibi.**

At the hearing of the appeal, Mr. Sseguya Samuel appeared for the appellant on state brief, while Ms Faridah Nakayiza a State Attorney, appeared for the respondent.

On ground No.1, Mr. Sseguya Samuel, counsel for the appellant argued that the evidence of identification by a single witness was not credible. According to him, his, client's evidence that he was not at the scene when the deceased was assaulted was unshaken. Counsel submitted that the evidence given by PW2 at the trial was lacking and was not reflected in the post mortem report. PW2 had testified that by the time she arrived at the scene, the appellant had put the deceased's penis on a block and he was hitting it with wood and had broken both legs of the deceased. If such injuries existed, the doctor would have reflected them in the post mortem report. But he only observed bruises and the cause of death was brain damage. This casts doubt on the evidence of the witness. It shows she did not see what she claimed she saw.

Counsel further submitted that the witness observed the incident for about 3 minutes which was too short to identify a person at night, therefore the witness must have exaggerated her evidence. In response, Nakayiza Faridah, for the respondent

submitted that though there was only one identifying witness, the trial judge did not error because she knew the appellant very well since they had grown up together on the village. There was moonlight that night and she was able to identify the appellant during the incident. Secondly, PW2 and PW5 saw coffee branches used in assaulting the deceased. PW2 was only three metres away when the deceased was being assaulted and the appellant also kept on threatening her (PW2) that he would beat her if she intervened. Therefore, the identification was both visual and audio.

It is our duty to consider and re-evaluate all the evidence which was adduced before the trial court and bearing in mind that we did not have the opportunity like the trial court, to see the witnesses as they gave their evidence in court, we must make a finding of our own whether the decision of the trail court can be supported.

Secondly, the trial court appears to have believed PW2 and based its conviction on her evidence because she seemed to be telling the truth and even when cross examined, her testimony was still credible. In dealing with this issue, we wish to state that, as a first appellant court, the Court of Appeal has power to take into consideration, evidence lawfully adduced at the trial but over looked in the judgment of the trial court, and to base its won decision on it. In doing so, however, the appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses, and should, when available on record, be guided by impressions of the trial judge on the matter and demeanour of witnesses.

What is more, care must be taken not only to scrutinise and re-evaluate that evidence as a whole, but also to be satisfied that the trial court had erred in failing to take that evidence into consideration.

Having laid down the duty of the first appellate court as reiterated in **Kifamunte Henry vs Uganda Cr. Appeal No.10/1997 (unreported),** we wish to scrutinize the evidence of PW2 to see if its worth of basing a conviction thereon.

PW2, Lavinsa Nabakooza, testified and stated that when an alarm was raised, she was the first person to answer it. At about 11.00 p.m. when she rushed to the scene to see what was happening, she found the appellant Kizito assaulting the deceased. By that

time, the deceased was lying down on the ground and the appellant had two pieces of wood which he used to assault the deceased. For emphasis, we reproduce what PW2 said in this connection:

> **"I was at my home when I heard an alarm from the neighbourhood. I answered the alarm then found Kizito assaulting Musisi. Musisi was then lying on the ground groaning. Kizito had two pieces of wood which he used to assault the deceased. He also wanted to assault me. I observed the accused beating the deceased from a distance of about three meters. I kept the accused and deceased under observation for about three minutes. Because, he would assault the deceased then run towards me and threaten to beat me as well. He would say, "I will beat you also Nalongo". There was moonlight, since I did not stop the beating; I made an alarm that was answered by people. Kizito then run away."**

In cross-examination, PW2 further stated that;

> **"It took me about 15 minutes to arrive at the scene from my home. When I arrived, the deceased was lying on his back facing upwards. Accused kept on turning the deceased from side to side as he beat him. I watched, but did not rescue Musisi, as Kizito wanted to beat me as well. The deceased said, "Sister have you left Kizito to kill me? When the deceased said so, I ran away while calling Sematimba."**

By any standards, the conditions described in the evidence in this case were quite conducive for easy identification of the attacker. In evaluating such evidence, there are factors that must be taken into consideration in order to determine if conditions were easy or difficult for identification.

The Supreme Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction unless it, is satisfied that mistaken identity is ruled out.

In doing so, the court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult. It is trite law that no piece of evidence should be weighted except in relation to all the rest of the evidence.

The problem of cases dependent on evidence of identification only is highlighted in the following passage from the judgment of the Court of Appeal for East Africa in **Roria vs Republic (1967) EA 583 at pg.584**.

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in the course of a debate……. *'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if they are as many as ten – it is a question of identity'*. The danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."**

The need for care stressed in the above passage is not required in respect of a single eye witness only but is necessary even where there are more than one witness where the basic issue is that of identification. This point was stressed in **Abdala Nabulere & Another vs Uganda Cr. App. No. 9/1978** in the following passage in the judgment:

> **"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witness can be all mistaken. The judge should then examine closely the circumstances in**

which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger….. When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution." (Emphasis added)

In **Moses Kasana vs Uganda vs (1992-93) HCB 47** court which cited the two foregoing decisions with approval, underlined the need for supportive evidence where the conditions favouring correct identification are difficult. It said at p.48:

"Where the conditions favouring correct identification are difficult there is need to look for other evidence whether direct or circumstantial, which goes to support the correctness of identification. Other evidence may consist of a prior threat to deceased, naming of the assailant to those who answered the alarm, and of a fabricated alibi."

We have pointed out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences. Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself will suffice as supportive evidence for that purpose. We think that in the instant case, having regard to the conducive conditions for identification by PW2, such as, the moonlight, she observed the incident for a longer time, knew the appellant before the incident, the dying declaration by the deceased where he mentioned the appellant as his assailant, all those factors point to the appellant as the deceased's assailant and attacker. In those circumstances, we are in agreement with the finding of the learned trial judge that the appellant was correctly identified by PW2.

GROUND NO.2:

We now turn to the second ground that the learned trial judge erred in law and fact when she believed the deceased's dying declaration, implicating the appellant.

Counsel for the appellant argued that the evidence of PW2 and PW3 who claimed to have heard the deceased make this dying declaration, when put to cross-examination, there arose the possibility of another Kizito on the village. That PW4 and PW5 found the deceased unconscious and could not talk. This creates doubt whether the deceased could have made a dying declaration when he was actually not conscious. Counsel's arguments were based on **Roria vs Republic (1967) E.A 528** and **Nyanzi vs Uganda (1999) E.A 228** where it was observed that a witness could be honest but mistaken.

In reply, counsel fro the respondent Ms Faridah Nakayiza argued that the deceased kept on saying that it was the appellant who had killed him. He said it to PW2 and PW3 while they were taking him to hospital. PW5 the LC1 Chairman in his testimony stated that there was no other Kizito on the village. Hence, all this evidence was enough to justify the conviction.

In dealing with this issue, we start by citing section 30(a) of the Evidence Act Cap 6 which makes such statements made by persons who are dead to be relevant and admissible in evidence. Dying declarations made by deceased persons are receivable in evidence if it appears to the satisfaction of the judge that the deceased was conscious of being in a dying state at the time he made them and was sensible if of his lawful situation, even though he did not actually express any apprehension of danger and his death did not ensure until a considerable time after the declaration was made.

According to Eyre C.B. in **Woodcook cited in R vs Perry (1909) 2K.B. 697,** the general principle on which these species of evidence is admitted is that they are declarations made when the party is at the point of death, and whom every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth. For emphasis, we reproduce what PW2 and PW3 said in this connection:

To Pw2;

"Sister have you left Kizito to kill me?"

PW3: found the deceased saying **"I am dead. Kizito has killed me".**

The above statements said to PW2 and PW3 by the deceased qualify as dying declarations and are admissible in evidence.

In the authority of **Uganda vs Benedict Kibwami (1972) ULR 28;** it was held that it was not a rule of law that in order to support a conviction, there had to be corroboration of a dying declaration and there might be circumstances which show that the deceased could not have been mistaken in his identification of the accused. But it was generally speaking very unsafe to base a conviction solely on a dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there was satisfactory corroboration.

In the present case, the deceased mention the appellant as his killer to PW2 in the presence of the appellant and to PW3, he mentioned him in his absence. However, before accepting a dying declaration, it must be established that the maker had the opportunity to identify his attacker. Besides such evidence is of the weakest kind since it cannot be tested by cross examination but once it is corroborated by some other evidence, then it can warrant to conviction. In relation to this issue, the dying declaration was corroborated by the identification made by PW2 Lovinsa that the appellant was the deceased's assailant. In the circumstances, there was other evidence which taken together with the identification and dying declaration, excluded the possibility of error on the part of the trial judge. On this ground, we are in agreement with the findings of the trial judge that she was correct when she believed that the deceased's dying declaration implicating the appellant.

GROUND NO.3

Lastly, we wish to consider ground No. three which is that the learned trial judge erred in law and fact when she rejected the appellant's alibi. Counsel argued that when the arresting police officer went to the home of the appellant, he was told by his father that the appellant had left the village that night. Counsel contends that this was

hearsay evidence on which the judge should not have relied upon to base a conviction. There was no evidence to put the appellant on the scene of crime and his alibi should have been believed. Finally, counsel prayed that the appeal be allowed.

In response, counsel for the respondent argued that the trial judge analysed the evidence as a whole and rightly rejected the alibi of the appellant. She further contended that the prosecution evidence had put the appellant on/at the scene of crime. She prayed that the appeal be dismissed.

In all criminal cases, the principle is that apart from certain limited exceptions, the burden of proof is throughout on the prosecution.

In **Uganda vs George Kasye (1988-90) HCB 40.** It was stated that, "It is trite law that an accused person who puts forward the defence of alibi does not assume any burden of proof. The burden rests upon the prosecution to disprove or destroy the alibi.

Similarly in **Kibale vs Uganda (1990) EA 148.** It was held that where an accused set up an alibi as a defence, he/she did not assume any responsibility for proving the alibi and it was upon the prosecution to negative the alibi by evidence. Where the prosecution adduced evidence showing the defence not only denied it but adduced evidence that the accused was else where at the material time, it was incumbent on the court to evaluate both versions judicially and give reasons why one and not the other was accepted.

Prosecution gave evidence especially by PW1, PW2 and PW3 which showed that the appellant was at the scene of crime when the incident occurred. However, counsel for the appellants seems to be saying that there was not any evidence that put his client at the scene and that therefore, his defence of alibi should be upheld. What then amounts to putting an accused person at the scene of crime?

This question was considered in the Supreme Court case of **Bogere and Anor. Vs Uganda S.C.C.A. No.1/97** where their Lordships held that the expression must mean proof to the required standard that the accused was at the scene of crime at the

material time. To hold that such proof has been achieved, the court must base itself on evaluating the evidence of the prosecution and the defence. It must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was else where at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one and then hold that because of that acceptance per se, the other version is unsustainable. In the instant case, we find that the prosecution evidence especially PW2, rightly put the appellant at the scene of crime. PW2's evidence was corroborated by that of PW1, PW3 and PW4; though the appellant claimed that he left the village on 4th/06 and went to Kalerwe two days before the incident, we find that his alibi was merely fabricated to convince this court and the court below. We find the appellant's alibi unsustainable and agree with the trial judge. We have not been persuaded that the learned trial judge erred in law and fact to justify any intervention. Therefore this ground must fail and the entire appeal must fail too. The conviction and sentence of the appellant are upheld and the appeal is dismissed.

Dated at Kampala this 12th day of February 2009.

Hon. Justice L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE.

Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.

Hon. Justice C.K.Byamugisha
JUSTICE OF APPEAL.