THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.148 OF 2009

(Appeal from a decision of the High Court of Uganda holden at Luweero before His Lordship Hon. Mr. Justice Benjamin Kabiito dated the 12th day of June 2009 in Criminal Session Case No. 429 of 2007)

NKONGE ROBERT.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM: **HON. MR. JUSTICE REMMY KASULE, JA**
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

THE JUDGMENT OF COURT:

The appellant was convicted for murder and was sentenced to suffer death. He was aggrieved and appealed against both the conviction and sentence.

Background facts:

The deceased was a wife of the appellant. They lived together in Namasujju village in Kasangombe sub-county in Nakaseke District. They lived together with their son Bbosa Mbusera who testified as PW5 at the trial. He was 13 years old then. The deceased was killed on 8th November 2006 in a garden where she was

digging, her dead body was discovered in the garden with deep cut wounds after an extensive search by villagers.

PW5 testified that on that day he was deployed by the appellant to their rice garden to protect their rice from the menace of birds. Whilst there he saw the appellant and their herdsman, one, Byakatonda slaughter the deceased, his mother. He testified that he saw the herdsman cutting the deceased's neck while the appellant held her legs. According to the witness the incident was about 100 meters from him and then he moved closer to about 50 meters. He saw the appellant and the herdsman lift the body of the deceased to a bush about 15 meters away. That is where the body was recovered eventually after a search. PW5 after 2 days reported what he had seen to Nalwanga Florence his teacher at Hope Infant and Primary School. The teacher testified as PW6. It was the teacher who reported to the LC1 Vice Chairman, Senyonjo who then took PW5 to police and the case was then reported to Kasangombe Police Post.

The appellant was arrested. The herdsman, Byakatonda, had disappeared from the village when the search for the deceased's body commenced. He had not been traced by the end of the trial in the High Court. The appellant was tried and convicted for murder. He was sentenced to death by the High Court sitting at Luweero. He was dissatisfied with both the conviction and the sentence. Hence this appeal against both the conviction and the sentence.

According to the Memorandum of Appeal the grounds of appeal are the following:

1. **That the learned trial judge erred in law and fact when he found that the appellant had participated in the murder of the deceased.**

2. **That the learned trial judge erred in law and fact when he relied on the uncorroborated evidence of PW5 to convict the appellant.**

3. **That the learned trial judge erred in law and fact when he disregarded the appellant's defence of alibi.**

4. **That the learned trial judge erred in law and fact when he sentenced the appellant being a first offender, to suffer death.**

The appellant prayed to this Court to allow the appeal, quash the conviction and set aside the sentence. In the alternative, he prayed Court to reduce the sentence in case the court upheld the conviction.

Legal representation:

At the hearing of this appeal the appellant was represented by learned counsel, Mr. Henry Kuunya, while the respondent was represented by Mr. Simon Semalemba, acting chief prosecutor.

Submissions of Counsel for the appellant:

The applicant filed Criminal Application No.319/2014 for orders that additional evidence be adduced. This Court heard the application and dismissed it and undertook to give the reasons in the full judgment. We shall first give the reasons

for dismissal of the said application before going into the merits of the main appeal.

The principles under which additional evidence can be admitted in Court were stated by the Supreme Court in **Miscellaneous Application Nol.8 of 2013, Hon. Anifa Bangirana Kawooya vs. National Council for Higher Education** where it held:-

> **"In Attorney General vs. Paulo Ssemogerere & Ors., Supreme Court Constitutional Application No.2 of 2004, this court, cited several persuasive authorities which have dealt with this issue of when additional evidence may be admissible on appeal. These include,** ***Ladd vs. Mashall (1954) 3 All ER 745 at 148 Skone vs. Skone (1971), 2 All ER 582 at 586; Langdale vs. Danby (1982) a3 All ER. 129 at 137; Sadrudin Shariff vs. Tarlochan Singh (1961) EA.72, Elgood vs Regina (1968) EA 274; American Express International vs Aulkimar S. Patel, Application No.8B, of 1986 (SCU)(unreported); Karmali vs Lakhani (1958), EA.567 and Corbett (1953), 2 All ER, 69.*** **The Court then held as follows (at page 11 of the ruling).**
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> > **'A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:**
> >
> > **(i) Discovery of new an important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time**

of the suit or petition by, the party seeking to adduce the additional evidence;

(ii) It must be evidence relevant to the issues;

(iii) It must be evidence which is credible in the sense that it is capable of belief;

(iv) The evidence must be that, if given, it would probably have influence on the result of the case, although it need not be decisive;

(v) The affidavit in support of an application to admit additional evidence should have attached to it, proof of the evidence sought to be given;

(vi) The application to admit additional evidence must be brought without undue delay.'

The Court went on to give the rationale for these principles as follows:

'These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put up its full case before the court."

We needed to examine whether the applicant/appellant had satisfied these principles to warrant our grant of leave to adduce additional evidence.

The first principle the applicant needs to meet is to prove that the evidence he seeks to adduce is **"Discovery of new and important matter of evidence** which, after exercise of due diligence, **was not within the knowledge of, ..."**

The evidence sought to be adduced must be discovered. It must be **new** and **important** and was not within the knowledge of the applicant.

In the instant case, the evidence sought to be adduced was by a witness who was originally PW5 at the trial in the lower court. He was a witness for the prosecution.

He testified and was cross examined by the defence. His evidence was for the prosecution.

The defence now seeks to recall the witness to essentially change his testimony and this time round testify for the defence.

We do not find that this witness is new. He has not been discovered and was unavailable to the appellant at the trial. He was available and he testified for the prosecution. The defence had opportunity to cross examine him. The third principle stated in **Paul Ssemwogerere case** (supra) on which additional evidence is admitted is that the evidence **"must be evidence which is credible in the sense that it is capable of belief."**

In the instant case, the appellant is seeking to call a prosecution witness for the sake of altering his earlier statement in Court. If that was allowed to happen such evidence would certainly not be credible and not be capable of belief.

We reminded ourselves of the principle that **"an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances."**

We are of the view and hold that this application fell short of principles upon which additional evidence could be admitted. We therefore dismissed the application for the reasons above stated

We shall now proceed to consider the main appeal on its merits.

Submission of counsel for the appellant on the main appeal:

Counsel by his written submissions argued grounds one and two together then grounds three and four separately.

Ground one and two.

Counsel submitted that the prosecution evidence on record was not sufficient to prove beyond rcasonable doubt that the appellant participated in the murder of the deceased. Counsel faulted the learned trial judge for having relied on the uncorroborated evidence of PW5 who was a child of tender years. According to counsel, PW5 was a child of tender years and his evidence was not free from error. When at the rice gardens he was gripped with fear, was hiding at a distance in a bushy environment when he witnessed the killing. The witness could in those

circumstances according to counsel, have been honest but mistaken in his identification and there was no corroboration to support his testimony. Counsel contended that the learned trial judge should not have relied on the uncorroborated sole witness evidence of PW5 to convict the appellant.

Ground three.

Counsel contended that the defence of alibi raised by the appellant was not properly handled by the learned trial judge in that the trial judge erroneously shifted the burden of proof to the appellant for purposes of proving his alibi contrary to established norms, practice and principles.

According to counsel there was no credible evidence that the appellant was at the scene of crime at the material time the offence was committed.

Ground four.

Counsel submitted that the appellant being a first offender did not serve a death sentence. He contended that the learned trial judge alluded to extraneous considerations to arrive at the sentence.

Submissions of counsel for the respondent:

Counsel for the respondent opposed the appeal and supported both the conviction and sentence. He argued grounds 1, 2 and 3 together and then ground 4 separately.

Counsel submitted that S.40(3) of the Trial on Indictments Act was not applicable to the evidence of PW5 since he testified on oath and the court was at liberty to convict the appellant once it believed his evidence even without corroboration. Counsel contended, however, that the learned trial judge properly warned himself of the danger of relying on the evidence of a sole identifying witness before convicting the appellant.

Counsel further contended the conditions under which the witness (PW5) identified the appellant were conducive for him to have properly identified the appellant as one of the assailants of the deceased. There was evidence that PW5 was about 50 meters away from the scene of crime and the grass smothered down which enabled him to see well. The offence was committed at 2.00 pm and it was a clear day. The appellant was the father of the witness so the witness knew him well. These conditions, according to counsel, favoured correct identification and no question of mistaken identity would arise.

Counsel further submitted that the appellant himself admitted to have been at the scene of the crime when he took porridge to PW5 at about 1.00 pm. This was shortly before the time the offence was committed at about 2.00 p.m. According to counsel all that evidence squarely put the appellant at the scene of crime and therefore the learned trial judge was right to reject the defence of alibi put up by the appellant.

Court's decision.

This being a first appeal, it is the duty of this Court to re-evaluate all the evidence which is on court record and come to its own conclusion as to whether or not the

appellant's conviction is supported by the available evidence. See rule 30(1)(a) of the Rules of this Court, and see also **Kifamunte Henry vs. Uganda Criminal Appeal No. 10/1997.**

We shall proceed to re-evaluate the evidence and consider the submissions of both counsel and also consider the legal authorities on the issues raised.

We shall handle ground 1, 2 and 3 together. The three grounds concern the identification of the appellant in the commission of the offence, the evidence of PW5 and the defence of alibi given by the appellant. We find the issues closely linked and we shall for that reason handle them together.

The death of the deceased was not contested. What is contested is whether on the evidence available the prosecution had proved that the appellant was a participant in the murder of the ceased who was his wife.

It is true the prosecution case greatly relied on the evidence of PW5 for proof of the participation of the appellant in the commission of the murder.

PW5 is a son of the appellant. He knew both his father, the appellant and the herdsman who was with the appellant in the commission of the offence. They both lived together with the witness in the same home. The herdsman later escaped when the search for the deceased was on going.

The offence was committed in broad daylight at about 2.00p.m. in an open rice garden. The witness was only 50 meters from the place where the deceased was killed.

The above are all factors that favoured correct identification.

On the fact that the witness was of tender years we note that the trial judge conducted a voire dire. He found that **"PW5 understood the nature of an oath, the seriousness of taking such oath and its consequences and as a result allowed PW5 to give evidence on oath."**

The trial judge was impressed by the witness's testimony and he made the following observation:-

> **"However, I was convinced, from careful observation of the witness, while he testified before me, that his demeanor, presence of mind, composure and courage were those, of a child, beyond 14 years of age. This was particularly so as the witness testified in respect to what his own father had done. The witness testified without consternation and his ability to observe, remember and to verbally describe events, deeply impressed me."**

On corroboration the trial judge considered the available evidence that corroborated the evidence of PW5. He enlisted that evidence on pages 8 and 9 of his judgment and on analyse concluded as follows:-

> **"It is my consideration that medical evidence, the natural condition of a scene of crime, the accused's own conduct and movements near the scene of crime and the emotional and distressed reaction of PW5, provide supportive evidence, to the direct evidence of PW5."**

We agree with the learned trial judge that the evidence of PW5 was corroborated.

Counsel for the appellant faultered the learned trial judge for not having properly considered the defence of alibi that the appellant had raised.

We shall first state the law on how courts should handle the defence of alibi once its raised in a trial.

The law on the defence of Alibi was stated by the Supreme Court in **Criminal Appeal No.10 of 2000 Mushikoma Watete & 3 Others vs. Uganda**, when it held:-

> **"The defence of alibi is set up when an accused person, wishing to show that he could not have committed the offence charged, asserts that at the time the offence was committed he was in a different place from the scene of the crime. The law is well settled, that an accused person who puts forward an alibi as an answer to the charge against him, does not assume any burden of proving that answer. The burden remains on the prosecution to prove that the accused was at the scene of crime and not at the different place where he claims to have been. This emanates from the general principle propounded in the well-known decision of the House of Lords in Woolmington vs. Director of Public Prosecutions (1935) A.C. 462 to the effect that, with the exception of the defence of insanity, and some other statutory defences which are not relevant here, no burden ever rests on an accused person to establish his defence. That is true of the defence of alibi also. An accused person does not**

have any burden to prove his alibi. Needless to say, however, that for the prosecution to negative it, and more so, for the court to consider it as the defence, the alibi has to be put forward as the answer to the charge."

In the instant case, we find that the trial judge considered the defence of alibi raised by the appellant. He was also alive to the law on the defence. He handled it as follows:-

"This court must now carefully weigh the defence of alibi with the rest of the evidence on record and consider the effect of failure to raise the alibi to test to challenge the evidence of PW5.

In my opinion, the alibi is put forward alright, but, in the circumstances of this case, the alibi is of least value, if any, as it was belatedly disclosed. I have considered the evidence of PW5 and accept his evidence that the accused was at the scene of crime at the time of the murder of the deceased. The alibi is false and is rejected."

We do not find a fault in the way the learned trial judge handled the defence of alibi. We also find that he was justified to conclude as he did in rejecting the defence of alibi raised by the appellant.

We do find that grounds one, two and three are without merit and dismiss them.

Ground four.

Counsel for the appellant contended that the trial judge erred to have sentenced the appellant to death when he was a first offender. He submitted that the appellant did not deserve the maximum sentence authorized by the law.

He prayed this Court to quash the sentence and substitute it with an appropriate custodial sentence.

This Court, as an appellate court, has the power to interfere with the sentence imposed by a lower court on principles that were considered and stated by the Supreme Court in the case of **Kiwalabye Bernard vs Uganda Criminal Appeal No.143 of 2001 (unreported)** as follows:

> **"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the sentence of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle".**

We are cautious to the fact that as an appellate court, we should not be tempted to interfere on the mere ground that we may differ with the trial Court on the sentence imposed as was cautioned by the Court of Appeal for East Africa in the case of **Ogalo s/o Owoura vs R [1954] 24 EACA 270** where the Court stated:-

"The court does not alter a sentence on a mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence."

Applying the above principles to the facts of this case as they were before the trial judge, we find that the judge considered the mitigating factors that were properly laid before the court by his counsel before the appellant was sentenced. Counsel stated the mitigating factors and prayed for leniency.

The trial judge also considered the aggravating factors that were raised by the prosecution. The trial judge stated and analysed all those factors in the sentencing process. The trial court was handling a case of murder for which the law prescribes a maximum sentence of death. The trial judge considered the Supreme Court decision of **Susan Kigula Serembe and Others vs Uganda, Constitutional Appeal No.3 of 2006.**

The trial judge found that in the circumstances of the case before him the appropriate sentence was death.

We do not find a convincing reason for us, as an appellate court, to interfere with the sentence that the trial judge imposed in this case.

For the reasons stated above we dismiss this appeal. We uphold the conviction and sentence.

Dated at Kampala this ....24th.....of ....June..... 2015.

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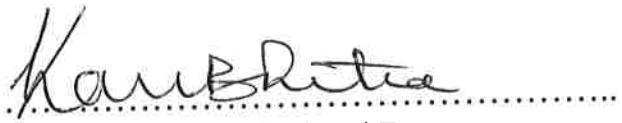
Hon Mr. Justice Remmy Kasule

JUSTICE OF APPEAL



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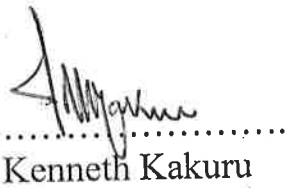
Hon Mr. Justice Richard Buteera

JUSTICE OF APPEAL



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Hon Mr. Justice Kenneth Kakuru

JUSTICE OF APPEAL