

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT ARUA
CRIMINAL APPEAL No. 215 of 2009**

{ *Arising from Criminal Session Case No. 0007/2009 Before his
Lordship Hon. Justice J. WKwesiga at Adjumani*

IMAKURU ISAAC;:..... :: APPELLANT

VS

UGANDA:..... RESPONDENT

**Coram ; Hon. Justice Remmy Kasule, JA
Hon. Lady Justice Hellen Obura, JA Hon. Justice Simon
Byabakama Mugenyi, JA**

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence arising from the decision of Hon. J.W. Kwesiga, delivered on 6-11-2009, whereby he convicted the appellant of the offence of murder contrary to **Sections 188 and 189 of the Penal Code Act** and sentenced him to life imprisonment.

Briefly, the facts as accepted by the trial Judge were that, the deceased ica Lawrence was husband to Maurina Edea who was a former wife to the appellant.

On the 8th of April 2007, at about 9:00pm, the deceased and his wife (PW2) were at home when the appellant kicked open the door of the house. He entered the house armed with an axe and started assaulting the deceased. PW2 identified him with the help of light from a paraffin candle (tadoba). She ran outside raising an alarm and rushed to her brother’s home for help. PW2 returned to the scene later and found the deceased lying dead in a pool of blood. The matter was reported to police and the appellant was arrested.

At the trial, the appellant denied the charge and put up an alibi to the effect that he was asleep at his home in the night of 8.4.2007.

The trial Judge believed the prosecution evidence, convicted the appellant as indicted and sentenced him to life imprisonment, hence this appeal.

The appeal was premised on two grounds, namely:

- 1, That the learned trial Judge erred in fact and in law when he failed to properly evaluate the evidence on record and came to a wrong conclusion.**
- 2. That the learned trial Judge erred in law and facts in meting out a harsh sentence of life imprisonment upon the appellant**

At the hearing of the appeal, the appellant was represented by Mr. Ben. Ikilai on state brief while Mr. Kalinaki Brian, Principal State Attorney, appeared for the respondent.

At the commencement of the hearing, counsel for the appellant sought and obtained leave of Court to amend ground 1 to read as follows:

- 1. The learned trial Judge erred in fact and law when he relied solely on the evidence of a single identifying witness and thereby came to a wrong conclusion.**

On ground 1, counsel submitted that the learned trial Judge erred by not warning himself of the need for caution regarding the identification evidence of PW2 who was a single identifying witness. Counsel's arguments were centred on four factors which can be summarised as follows:

1. The attack was sudden and at night when conditions favouring correct identification was difficult.
2. There was no evidence to the effect that the eyewitness (PW2) informed anyone that she identified the assailant when she ran from the scene for assistance.
3. The evidence of PW2 was suspect considering that she had a so volatile relationship with the appellant during their marriage resulting into a bitter separation. She could have framed him therefore.
4. PW2 contradicted herself. At first she stated the appellant straight away embarked on assaulting the deceased when he entered the house. Later she stated he first kicked her and she fell down thereafter he turned to the deceased and assaulted him. The trial Judge believed the latter version without giving reasons for doing so.

Learned Counsel for the appellant concluded his submissions on this ground by praying this Court to re-evaluate the evidence itself, find that PW2's identification evidence was weak and quash the conviction therefore.

On ground 2, Counsel argued that, in the alternative, the sentence of life imprisonment imposed by the trial Judge was harsh and excessive in view of the mitigating factors that the appellant, at 29 years of age, was still young and that he had three wives together with several orphans to cater for.

Counsel implored Court to reduce the sentence to a period of 10 years imprisonment, so as to give the appellant an opportunity to reform and become a useful citizen to this country.

Counsel for the respondent opposed the appeal. He contended that the learned trial Judge carefully considered the conditions at the scene of

crime and rightly concluded they were favourable for correct identification. These included the fact that PW2 knew the appellant very well, there was light in the house and the attack occurred inside the house.

Counsel also submitted that the trial Court can safely convict the accused basing on the uncorroborated evidence of a single identifying witness, provided it is mindful of the dangers of doing so and was satisfied that in the circumstances of the given case, there was no possibility of mistaken identity. In counsel's view, this was one such case where the evidence of the single identifying witness sufficed.

On ground 2, counsel submitted that the sentence of life imprisonment was neither harsh nor excessive considering the gravity of the offence, us the manner of its commission and the fact that the offence carries the maximum penalty of death. Counsel further argued that the learned trial Judge addressed himself to the mitigating and aggravating factors before he determined the appropriate sentence. Counsel was of the view, that there were no sufficient reasons advanced by the appellant to warrant this Court to interfere with the sentence.

Counsel prayed that the Court dismisses the appeal and upholds the conviction and sentence.

We have carefully considered the submissions of both counsel and perused the record of the trial Court.

As a first appellate Court, it is our duty to review and re-evaluate the evidence before the trial Court, draw inferences from the evidence and reach our own conclusions bearing in mind that this Court did not have the opportunity to hear and observe the witnesses testify as the learned trial Judge did. See **Rule 30(1) (a) of The Judicature (Court of Appeal Rules) Directions; Begumisa and others vs Tibebaga, SCCA NO.17/2002** and *Mbazira Siraji and another vs Uganda*, Cr, Appeal No. 7 of 2004 (SC)

In the matter before us, there is no doubt the appellant was well-known to Maurina Edea (PW2), they having lived as a couple for 12 years before they broke up. PW2 was awake when the assailant kicked the door open and entered the house. She identified him with the help of light from a paraffin candle (tadoba). P.W.2 described the scene as a small hut where a bed could not fit. She testified :

“ I identified it was Isaac Imakuru (accused). He first kicked me once, I fell down. When I fell down, he started beating I ca. He said “today you people will see me”. He had an axe which he was carrying on his shoulder. There was todoba light when I saw the accused. He had a long sleeve black cloth looking like a rain coat”.

From the evidence, it is apparent the appellant and PW2 were proximate to one another during the

attack. Secondly, PW2 knew the appellant very well. Thirdly, it was not suggested to her during cross-examination that the tadoba light was inadequate for her to properly identify the assailant. The implication is that the sufficiency of the said light was not doubted by the defence. Further, the fact that PW2 described the attire of the assailant emphasised she had had ample opportunity to properly observe him and identify him. Finally, PW2 heard the appellant speak as well.

In a series of decisions by the Supreme Court and its predecessors, it has been reiterated that where prosecution is based on the evidence of a single identifying witness, the Court must exercise great care so as to satisfy itself that there is no danger of basing conviction on mistaken identity - see **Abdalla Bin Wendo and another vs R {1953} E.A.C.A 166; Roria Vs Republic [1967] E.A 583; G.W Kalyesubula vs Uganda Cr. Appeal NO. 16 of 1977 (SC); Abdala Nabulere and another vs Uganda Criminal Appeal NO. 9 of 1978 (SC); Moses Kasana vs Uganda Cr. App. 12 of 1981 (SC); Bogere Moses and another vs Uganda, Cr. Appeal No.1 of 1997 (SC).**

In the **Nabulere case** (supra), it was stressed, that apart from light during the incident, and the familiarity of the assailant to the victim, other factors, such as the distance between them, the length of time the witness had to observe, and even opportunity to hear the assailant are factors to look out for.

The learned trial Judge in the instant case applied the test in the **Nabulere (case)** when, in the judgment he stated:

“She saw the accused enter the one roomed house which was lit by the candle. There was hardly a distance between the accused and the witness. The accused first kicked her before he descended upon the deceased with the blows and kicks. The witness knew the accused person very well They had lived together for 12 years as husband and wife find that the circumstances were favourable for correct and unmistakable identification of the culprit Although she is a single identifying witness, she gave water light evidence of identification”.

We too, upon re-evaluation of the evidence, are satisfied that the conditions at the scene were such that PW2 had opportunity to positively identify the appellant whom she knew quite well.

We are therefore not persuaded by the submissions of counsel for the appellant that PW2's evidence was suspect merely because she had separated from the appellant. In our analysis, we have not come across any instance that suggests P.W2's evidence was actuated by her bitter past with the appellant, other than what she observed at the scene.

In our considered view, this was one case where the Court could safely convict even though there was no other evidence to support the identification evidence. See **Nabulere's case (supra)**.

We accordingly find no merit in ground 1 of the appeal and it fails.

On sentence, it is trite that this Court can only interfere with the sentence of a lower Court where, in the exercise of its discretion, the Court imposes a sentence which is excessive or so low so as to amount to a miscarriage of justice or where the 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, see: **Kiwalabye Bernard vs Uganda, Cr. Appeal No.143 of 2001 (SC); Semakika Josam vs Uganda, Cr. Appeal No.332 of 2009 (COA)** and **Semanda Christopher and another vs Uganda Cr. Appeal N0.77 of 2010 (COA)**.

While sentencing the appellant in the instant case, the trial Judge stated;

"I have considered the submissions of the defence and submissions for the State. The offence was committed with brutality; Considering that the accused has been on remand for 3 years, I will discount the maximum death sentence and I do sentence the accused to life imprisonment

To our understanding, by stating that he had considered the submissions of the defence and the submissions of the state, the trial Judge was indicating his having considered the mitigating and aggravating factors. These included the gravity of the offence and the brutality with which it was committed. Also, that the appellant was a first offender, he had a family of three wives and orphans to cater for, and that at 29 years he was still youthful. The trial Judge also took into account the remand period.

We note that one of the objectives of sentencing is rehabilitation of the offender. The other factor to be considered is the need for parity in sentences, in particular where the facts of the case under consideration have a resemblance to previous cases.

This Court, in **Tumwesigye Anthony vs Uganda, Cr. Appeal NO. 46/2012**, substituted the sentence of 32 years imprisonment with that of 20 years. The appellant in that case was convicted of murder. The deceased had reported him for stealing his (deceased) employer's chicken. The appellant killed him by crushing his head after which he buried the body in a sandpit.

While reviewing the sentence, this Court observed that;

"We note that the fact that the appellant was a first offender, and a young man, aged only 19 years with a chance to reform, was a father of two children and supported two orphans called for a lesser sentence than what the trial Judge

imposed.” The Court thus set aside the sentence of 32 years and substituted the same with 20 years imprisonment.

In another case before this court, **Atiku Lino vs Uganda Criminal Appeal No. 0041/2009**, the appellant was convicted of murder and sentenced to life imprisonment. The appellant had attacked and cut to death the deceased in the latter’s house accusing him of bewitching his son. He was aged 31 years at the time of sentence and a was a first offender.

This Court, citing the case of **Tumwesigye (supra)**, observed that the appellant ought to be given an opportunity to reform. The sentence of life imprisonment was reduced and substituted with 20 years imprisonment.

Considering the circumstances of this case, in line with the above cited cases whose facts have a resemblance to those of the case before us, it is

our considered opinion that the circumstances called for a lesser sentence than that imposed by the trial Judge.

Consequently, we consider a sentence of 20 years imprisonment to be commensurate with the gravity of the offence. We accordingly set aside the sentence of life imprisonment and substitute it with a term of 20 years imprisonment. The sentence is to be served from the date of conviction of the appellant, which is 6-11-2009.

We therefore allow this appeal in part. The appeal against conviction is hereby dismissed and the appeal against sentence allowed in the above stated terms.

Dated at Arua this 6th day of June 2016.

Hon.Justice Remmy Kasule

JUSTICE OF APPEAL

Hon.Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL