THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL NO. 0401 OF 2014
(Arising from High Court of Uganda at Nakawa Circuit holden at Entebbe Criminal Session Case No. 0547/2009.)

MBOGO RAJAB :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda before Mwonda, J. (as she then was), delivered on 21st December, 2009 in Criminal Session Case 0547 of 2009.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF THE COURT

Brief Background

This is a first appeal against the decision of the High Court of Uganda (Mwonda, J. (as she then was)) wherein the appellant was convicted of the offence of Murder Contrary to Sections 188 and 189 of the Penal Code Act, Cap. 120 and sentenced to suffer death.

The background to that decision was as follows:

The appellant was charged and committed for trial on an indictment containing the above indicated offence. He pleaded not guilty and the prosecution adduced evidence to prove his guilt. When called upon to give his defence, the appellant denied having participated in the offence and set up an alibi that at the material time, he was fishing on Lake Victoria. The learned trial Judge, however, believed the prosecution evidence.

The facts as accepted by the learned trial Judge were that the appellant, had, on the 2nd day of December, 2007 at Lugonjo Village, Entebbe Municipality in the Wakiso District murdered Nante Eva. Thereafter, the learned trial Judge convicted the appellant and imposed the sentence

indicated earlier. The appellant was dissatisfied with the decision of the trial Court and appealed to this Court on the following grounds:

"1. **That the learned trial Judge erred in law and fact when she failed to adequately evaluate the evidence on record as regards identification thereby coming to an erroneous decision.**

2. **That the learned trial Judge erred in law and fact when she discredited the appellant's alibi.**

3. **That the learned trial Judge erred in law and fact when she imposed a manifestly harsh and excessive sentence against the appellant."**

Representation

At the hearing of the appeal, Mr. Henry Kunya, learned Counsel represented the appellant who was in Court on state brief; while Ms. Tumwikirize Joanita represented the respondent. Counsel for both parties proceeded by way of oral submissions, which we considered in the determination of this appeal.

Appellant's case

Ground 1

Counsel faulted the learned trial Judge for convicting the appellant in reliance on identification evidence which was not free from error. This was the evidence of PW1, NV (a minor) and daughter of the deceased, the single identifying witness, who alleged to have identified the appellant as her mother's assailant. Counsel contended that several factors rendered her evidence unsafe to be relied upon to found a conviction. Firstly, that PW1 had been asleep when she was awoken by alarms from her mother when the latter was being attacked by her assailant. Counsel contended that she could not have shaken up the drowsy effects of sleep in order to be able to correctly identify the assailant. Secondly, that PW1 had testified during the trial that the assailant's face was covered with a cloth making it difficult for her to identify the said assailant. She had further testified that the assailant was unknown to her, rendering a correct identification of the assailant difficult. Counsel contended that it could be objectively stated that conditions

existing at the material time rendered it difficult for PW1 to correctly identify the assailant and that it was erroneous for the learned trial Judge to consider the factors favouring correct identification, like the sufficiency of the lighting at the scene of the crime in isolation of those that made it difficult.

Counsel further complained about the manner in which the identification parade at which the appellant was identified by PW1 was conducted. He pointed out that PW4, Inspector of Police Kalema Deogratius who was present during that parade had given a misleading testimony to Court when he stated that the wound on the appellant's right palm was, "not fresh but not an old wound which was not bleeding." In counsel's view, PW4's testimony was a misrepresentation of the nature of the body mark in issue, which was authoritatively described in the appellant's medical examination report as a scar and not a wound.

Counsel asked this Court to allow ground 1 because in all the obtaining circumstances of the case, it could not be ruled out that the appellant was mistakenly identified as the deceased's assailant.

Ground 2

The complaint in this ground was that the appellant's defence of alibi was injudiciously rejected by the learned trial Judge in an outright manner merely because she was convinced by the evidence adduced by the prosecution. Counsel relied on **Bogere Moses & Another vs Uganda, Supreme Court Criminal Appeal No. 001 0f 1997**, where the Court held that an alibi may be rejected only after both the prosecution evidence and the defence evidence has been judiciously considered by the court. Counsel contended that this was not done by the trial Court and he invited this Court to allow this ground as well.

Ground 3

Counsel raised two complaints relating to the sentence imposed on the appellant by the trial Court. Firstly, that the learned trial Judge did not consider the legal position that it was only in rare circumstances that a first offender, like the first appellant was, could be sentenced to the maximum sentence. Secondly, that the learned trial Judge considered the lack of remorsefulness from the appellant in imposing the sentence, which was

irrelevant in sentencing. He asked this Court to deem it fit to set aside the sentence imposed by the trial Court, and substitute thereof a more lenient sentence of between 18 years and 20 years if the appellant's conviction was maintained.

Respondent's case

The respondent opposed the appeal and made submissions on the various grounds as follows.

Ground 1

Counsel submitted that there was ample evidence by which it came to be established that the appellant was the deceased's assailant. She contended that PW1, the single identifying witness, testified that she had seen the assailant being cut by a knife/panga on the right palm during a scuffle with the deceased at the material time. Further, PW1 had picked out the appellant from the identification parade because, he too, like the assailant, had a wound on his right palm. As to whether PW1 had identified the appellant by his face or by the mark on his right palm, counsel submitted that PW1 had identified the appellant using the face during the attack and by the mark on his right palm in the identification parade. Counsel further maintained that there was sufficient lighting at the scene of the crime which favoured correct identification of the appellant. For the above reasons, counsel asked this Court to dismiss ground 1.

Ground 2

On this ground counsel supported the decision of the trial Court of holding that the appellant was correctly placed at the scene of the crime. As a result, his alibi was rightly rejected because he could not be in two places at the same time. She asked Court to dismiss ground 2, as well.

Ground 3

It was conceded for the respondent that the death sentence imposed by the trial Court was harsh and excessive given the fact that the appellant was a first offender, and this case did not fall within the category of the rarest of the rare. Counsel conceded that the death sentence be set aside, and a sentence of 20 years imprisonment be substituted in its place.

Resolution of the appeal

We have carefully considered the submissions of counsel for both sides, the court record as well as the law and authorities cited, and those not cited, which we found relevant in the determination of this appeal. The first appellate court has a duty to reappraise the evidence adduced in the trial Court and come up with its own inferences. **See: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10**.

The duty of the first appellate Court was stated in **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997,** being that:

> **"...on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses."**

We shall proceed to review the evidence and materials, presented before the learned trial Judge.

The evidence adduced by the prosecution established that in the wee hours of the 2nd day of December, 2007, an intruder went into the deceased's house. The house had two rooms, a sitting room and a bedroom and the deceased lived there with her daughter, a minor. The Child was ten years old at the time. The deceased raised an alarm and shouted at the intruder. Soon after, a scuffle broke out between the pair. The noise produced by the scuffle awoke the deceased's minor daughter who went to the sitting room from the bedroom and saw her mother struggling with the intruder. This minor daughter testified at the trial as PW1.

According to PW1, when she got to the sitting room, the intruder caught her by the neck, and ordered her to return to the bedroom. He also asked her to switch on the light and thereafter demanded for money from her. PW1 gave him some coins of an unascertained value. In her own words, PW1 described the intruder as follows at page 4 of the record:

> **"He had put on a black cap and his clothes were black. He had a see through cloth on his face but I identified him as him. There was some little time as I was interacting with him asking me for money and cautioning me not to shout that he would kill me. I had not known that my mother had died by the time I gave him the money. I was looking at his face all the time. I looked at his face when he was asking for money."**

In cross examination at the same page PW1 stated that:

> **"He (intruder) was wearing a see-through cloth on the face. Had not seen him before. The accused had a panga and he waited to cut my mother with it and my mother pushed him and the panga cut him on the right palm."**

It was, therefore, established that the intruder's face was concealed with a cloth rendering correct identification of his facial features extremely difficult or impossible. It was also established that PW1 had never met the intruder before, and for most of the time she observed the scuffle in question under her bed in circumstances that would terrify most people. PW1 was able to make an observation that the intruder sustained a cut on the right palm during the scuffle. Hence in an identification parade conducted at the Police Station in Entebbe after the death of her mother, she was able to identify the appellant as that intruder because he had a mark on his right palm. Court will be making a detailed analysis of this piece of evidence later on in this judgment.

When the intruder left the deceased's house, the lifeless body of the deceased, was left lying there in a pool of blood. On seeing her mother's life less body, PW1 reported to her neighbours who later called the police. The deceased, a young mother of only 32 years, was confirmed dead. A post

mortem examination report (P.Ex II) showed that she had died of, "acute haemorrhagic shock following sharp injuries." She had suffered external injuries like multiple cut wounds on neck, anterior chest and left lower arm and neck wounds which measured 14 x 4 cm, 8 x 3 cm inflicted on great vessels. The deceased's life was taken cruelly indeed.

The appellant contended during the hearing of this appeal that it was erroneous for the trial Court to reach a finding that he was the assailant who cruelly took the deceased's life. We note that grounds 1 and 2 relate to the issue of identification of the appellant and present one question for determination by this Court, namely whether the appellant was correctly identified as the deceased's assailant.

In answering that question we shall begin by reiterating the principles laid down in **Abdula Nabulere & 2 others vs Uganda, Supreme Court Criminal Appeal No. 009 of 1978**:

> **"A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken.**
>
> **...**
>
> **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 witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, 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.**

In our judgment, when the quality of identification 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 well before, a court can safely convict even though there is no 'other evidence to support to identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered.

When, however, in the judgment of the trial court, the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation made in difficult conditions; if for instance the witness did not know the second accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification."

In **Abdulla Nabulere (supra),** the principles on identification evidence set out in earlier cases were endorsed and the Court observed that:

"...the courts have over the years evolved rules of practice to minimise the danger that innocent people may be wrongly convicted. The leading case in East Africa is the decision of the former Court of Appeal in Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166 cited with approval in Roria v. R. (1967) EA 583. The paragraph which has often been quoted from Wendo (supra) is at page 168. The ratio decidendi discernible from that case is that:—

(a) The testimony of a single witness regarding identification must be tested with the greatest care.

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

The safe-guards laid down above are in our view adequate, if properly applied, to reduce the possibility of a miscarriage of justice occurring."

Further in **Roria (supra)** the following observation was made:

"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 on s. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

> **"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 there are as many as ten – it is in a question of identity."**

That 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 **Roria authority (supra)**, establishes the legal position that an appellate Court should, before upholding a conviction based on identification by one witness satisfy itself that in all circumstances it was safe to act on such identification. The relevant circumstances in the present case are; firstly, the deceased's assailant's face was concealed with a cloth rendering his identification difficult; secondly, the circumstances must have been terrifying for PW1, the single-identifying witness because the assailant had manhandled her. She also stated that she had observed the assailant from under her bed most of the time.

We further note that PW1 testified that the assailant was cut on the right palm by a weapon (either a panga or a knife) during the scuffle with her

mother. Hence she was able to pick the appellant out in an identification parade by a mark on his right palm which she believed to have been inflicted on him during the attack on her deceased mother. According to the identification report from the relevant parade, prior to identifying the appellant as the assailant, PW1 asked to see his right palm. PW4, who was present during that parade testified that PW1 had picked out the appellant because he had a cut on his right palm.

The identification parade was conducted on the 6th day of December, 2007 which was four days after the deceased had been murdered. The appellant's medical examination report showed that he had a visible scar on his right palm. According to the Merriam Webster Dictionary (2019), a scar is a mark remaining after injured tissue has healed. The mark on the appellant's right palm was therefore not a cut as stated by PW1 but an old mark which was sustained earlier than the day of the murder of the deceased.

PW4, who saw the alleged cut on the appellant's right palm had this to say at page 12 of the record:

> **"I saw the cut wound on his right hand palm. It was a deep cut wound in the palm. That wound was not very fresh but showed that it was not an old wound. It was not bleeding."**

The medical examination of the appellant was carried out on 4th December, 2007 two days earlier than the Identification parade which was conducted on 6th December, 2007. The former revealed that the appellant had a scar on his hand while PW4 who participated in the latter testified that the appellant had a deep cut which in our view was a major contradiction in the prosecution evidence. In **Kato John Kyambade & Another vs. Uganda, Supreme Court Criminal Appeal No. 0030 of 2014**, the Court referred to **Alfred Tajar Vs Uganda, Supreme Court Criminal Appeal No. 167 of 1969 (unreported)** where it was held that:

> **"The law of contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained**

away. Minor ones on the other hand will only lead to rejection of the evidence if they point to deliberate untruthfulness."

The evidence of PW4 contradicted the findings in the relevant medical examination report that the appellant had a scar on his right palm and not a wound. For that reason, PW4's testimony on that point had to be disregarded as it was untruthful. The findings made in the medical examination report supported the appellant's own testimony that the scar on his right palm came about due to an injury he sustained in 1998 which had long cured.

We also observe that PW1 is quoted as having stated in the relevant Identification Parade Report during the relevant Parade at page j of the record that:

"He is the one who killed my mother on Saturday night 0800 hrs in our village in Lugonjo Village. I knew him, he was my mother's lover (friend).

She subsequently stated during the trial that she had never seen the appellant prior to the day of the attack in question. Overall, our conclusion about the evidence adduced by the prosecution is that the identification made by PW1 was of an assailant who sustained a cut on the right palm during his scuffle with the deceased, in the process sustaining a wound thereon. The assailant cannot have been the appellant who did not have a wound on the right palm but a scar which he probably sustained earlier in 1998. The attacker could also not have been the appellant, who was unknown to PW1, yet the attacker whom PW1 saw attacking the deceased was known to her (PW1), for he was the lover of her mother, the deceased.

We hold the opinion that the quality of the identification evidence adduced by the prosecution was poor and left a huge possibility that the appellant was mistakenly identified as the deceased's assailant. For the above reasons, the appellant's alibi remained intact meaning that he was out fishing on Lake Victoria on the material day. Having examined all the relevant circumstances, we have to respectfully disagree with the learned trial Judge's finding that the appellant was sufficiently identified as the deceased's assailant.

We are therefore unable to maintain his conviction for the murder of the deceased person. Grounds 1 and 2, must therefore succeed. The findings on grounds 1 and 2 render it unnecessary to consider ground 3 concerning the sentence imposed on the appellant, his conviction having been quashed.

Accordingly, the appellant's conviction for murder is hereby quashed, and the relevant sentence set aside. He is to be henceforth set free unless he is being held on some other lawful charges.

This appeal is therefore allowed.

We so order.

Dated at Masaka this ..... 18th ..... day of ..... Dec ..... 2019.

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Elizabeth Musoke

Justice of Appeal

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Ezekiel Muhanguzi

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal