THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0422 OF 2016

UGANDA ::APPELLANT

VERSUS

1. MAJOR JOEL BABUMBA
2. BAGUMA ALEX ::RESPONDENTS

(An appeal from the decision of the High Court of Uganda at Masaka before Keitirima, J. dated the 16th day of December, 2012 in Criminal Session Case No. 0042 of 2015.)

CORAM: HON. MR. JUSTICE ALFONSE OWINY-DOLLO, DCJ.
HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE CHEBORION BARISHAKI. JA

JUDGMENT OF ELIZABETH MUSOKE, JA.

I have had the opportunity of reading in draft the leading Judgment of my learned brother Hon. Justice Cheborion Barishaki, JA in this matter. He sets out the factual and procedural background to this appeal, the representations for both sides, the arguments made in support of the cases for both sides. I would respectfully adopt the same in my judgment.

I would also allow grounds 1, 2 and 4 of the appeal for the reasons given by Hon. Justice Cheborion, JA in his Judgment, with which I agree.

However, I would reach a different conclusion from Hon. Justice Cheborion Barishaki, JA on grounds 3 and 5. Those grounds were formulated as follows:

1. ...
2. ...
3. **The learned Trial Judge erred in law and fact when he found that the appellants were not properly identified at the scene of crime.**
4. ...
5. **The learned Trial Judge erred in law and fact when he failed to properly evaluate all the circumstantial evidence on record and thereby reaching a wrong conclusion and acquitted the respondents.**

Those grounds relate to the identification of the respondents by PW4, a single identifying witness and other evidence which corroborates that identification evidence. In **Abdalla Nabulere & 2 others vs. Uganda, Supreme Court Criminal Appeal No. 09 of 1978,** it was observed that:

> **"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 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.**
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> **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.**
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> **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 **Lt. Jonas Ainomugisha vs. Uganda, Supreme Court Criminal Appeal No. 0019 of 2015.,** the Court observed that:

> **"Where a Court is faced with a case entirely dependent on the correctness of an identification or identifications of an accused, the evidence ought to be considered as whole. The factors favouring correct identification have to be weighed against those factors which made correct identification difficult."**

With the above principles in mind, I would observe that:

In the instant case, the evidence of PW4 Kabigumira Joseph, the single identifying witness, was made in conditions that reasonably rendered correct identification difficult. PW4 testified that he made the alleged identification of the respondents at around 3 a.m on 31st July, 2012 when he went to check on his traps. PW4 further said in evidence that he had 3 dogs in his company as he went to check on the traps. He had laid the traps at a place near a swamp in Kamwanga. PW4 testified that on his way, to checking on the traps, he had to pass near the deceased's farm in Bwanyi.

PW4 stated that somewhere along the way, the dogs he was with started barking at a spot of interest. From that spot, he could hear indistinct voices. When he went closer to the spot, he had heard a voice say, "why are you killing me." PW4 said in evidence at page 30 of the record that at that moment he was frightened, but stopped and stood still and kept hearing those voices. In cross examination, PW4 said at page 32 that the dogs had first barked fiercely at the assailants, but that shortly thereafter, he had been able to control them and make them silent.

After a while, PW4 had seen a light from a motorcycle headlamp. He had then heard a person say in Luganda (or Lunyankole), "twist and we hurry and we go." A while later, the motorcycle had moved towards his direction with the head light on. Because of fear of being identified by the cyclist on the passing motorcycle, three people had run from the spot from where PW4 had earlier heard voices. The three people then moved towards the direction where he was hiding and they hid near him.

PW4 testified that he had been able to identify 2 of the assailants, both; 1) with the aid of light from the headlight of the motorcycle; and 2) when they had come to hide near him. PW4 testified that two of the three people were

the 1st respondent and the 2nd respondent. The 1st respondent was wearing a black checkered shirt and a cap. The 2nd respondent was wearing a checked green shirt and a cap. PW4 insisted that he was familiar with the two respondents whom he had seen in his village before.

After the motorcycle had passed, PW4 testified that he saw the people return to the spot where the noises were heard. He then heard a voice say, "hold his mouth and we go." He didn't hear anything else. Thereafter, PW4 testified that he saw flash torch lights moving toward the direction of the 2nd respondent's home. He then left his hiding place and returned home.

During cross examination, PW4 testified that he observed the incident from behind some shrubs where he was hiding. PW4 stated that he was frightened. It was about 8.3 metres from his hiding place to the scene of crime. He was not sure how long he had been at the scene of crime. The next day when he returned to the scene of crime, he saw the deceased's dead body and a motorcycle at the scene of the crime.

It also emerged that PW4 did not immediately report what he had witnessed at the scene of crime to any person in authority. Instead he confided in a close friend. After some time, the close friend encouraged him to report to the police.

In his police statement (Exhibit D.6), PW4 stated that he never made any immediate reports of the incident because: 1) He feared that he would be arrested as a suspected killer; 2) he feared that R1 who is an army man would harm him. Therefore, it wasn't until 31st January, 2013, almost 6 months after he witnessed the incident that PW4 made a statement with police.

As correctly pointed out at page 14 of the draft Judgment, PW4 was the single identifying witness in this case. The evidence of the single identifying witness has to be weighed against all the other evidence on record. Including the evidence that, there were, at the time the alleged identification was made, prevailing conditions which rendered correct identification difficult. In the instant case: it must have been very dark at 3 a.m when the identification was made; the identifying witness was hiding from the assailants behind a shrub which obscured his view, making it difficult for him to see the

assailants from behind the shrub where he was hiding; PW4 was frightened and panicky when he observed the incident; the 1st and 2nd respondents' alibis that they were away from the village on the night in question.

Regard must also be had to the conditions which made correct identification possible, namely, that the respondents were well-known to the identifying witness.

Hon. Justice Cheborion Barishaki, JA writes at page 16 of his judgment that:

> **"We find that PW4 was able to identify the respondents because they were well known to him as village mates and also the light from the motorcycle provided him with enough light for proper identification. Even when the motorcycle was moving past, the accused (sic) ran and hid near where PW4 was taking cover."**

But the conclusions at page 16, seem to have considered the factors favouring correct identification, in isolation from those which made correct identification difficult. Yet the evidence of PW4 has to be properly weighed, before reaching the conclusion that PW4 identified the respondents.

In **Roria vs. Republic [1967] 1 EA 583**, it was observed that:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner, L.C. ...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**
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> ...
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> **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."**

In the **Roria case**, the Court further referred to **Abdala bin Wendo & Another v. R (20 E.A.C.A. at p. 168)** where it was said that:

> **"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such**

circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

The "other evidence" identified in the judgment of Hon. Justice Cheborion Barishaki, JA as supporting the identification evidence of PW4 is discussed below:

- The alleged rift between the 1st respondent and the deceased arising out of a land dispute which had not ceased at the time the deceased was murdered. However, I noted that there is no evidence on record showing that the rift was ongoing at the time of the deceased's murder. On the contrary, the 1st respondent's unchallenged evidence was to the effect that the two had reconciled and had even established some business relations together. PW6 Tumuramye Obed, Detective Assistant Inspector of Police stated at page 44 of the record that he did not exhaust the investigations on the grudge, the 1st respondent supposedly had with the deceased. This left a probability that the differences between the 1st respondent and the deceased had been worked on by the time of the deceased's death.
- The incessant phone calls from the 1st respondent to the deceased, which were calculated at luring the deceased to his death by the 1st respondent. My view is that there was no evidence about the subject of conversation during those phone calls which would have formed the basis for that finding. The phone call print-outs only showed the time when the phone calls were made.
- The disappearance of Nabaasa Justus, the deceased's worker, who had just been hired shortly before the deceased's murder but had disappeared from the village shortly after the deceased's murder. There was also a finding that the disappearance of Nshija, the 1st respondent's worker after the murder was suspicious. In my view, it would be unfair to draw an inference of guilt on the 1st respondent based on the actions of his worker.
- The 1st respondent's alibi was destroyed by the evidence of PW5 Okuyo Emmanuel who testified that the 1st respondent was not in Arua on the

fateful day. However, the 1st respondent's alibi was that on the day of the deceased's murder, he was in Kampala with PW5. This was confirmed by evidence of phone network location which showed that on the 31st July, 2012, when the deceased was murdered, he was anywhere between Arua and Kampala, and not in Kalungu where the murder took place.

- The 1st respondent also testified that he was with PW5 on the fateful night. Although, PW5 denied this in his testimony in Court, PW5 had said earlier in a statement to police that he was with the respondent on the fateful day. By all indications, PW5 may have been telling lies on oath.

As the above discussion has shown, the circumstantial evidence relied on by the prosecution at the trial to support the evidence of PW4, the single identifying witness in the instant case did not satisfy the standard of such evidence, which is that the inculpatory facts must be incapable of any other hypothesis but guilt of the accused person. The learned trial Judge held as much in his judgment. The leading judgment in this matter however seems to disagree on that point.

I have also considered the testimony of PW2 Kakajeya Grace, the widow of the deceased who said in evidence that on 30th July, 2012, the day before he was murdered, the deceased had been asked, by the 1st respondent to go to Lukaya with one Paul Kajabura, a labourer working on the 1st respondent's farm.

PW2 had further said in evidence that on the same day, 30th July, 2012, the deceased, along with one Paul Kajabura and one Tabagisha David, had all sat on a motorcycle belonging to the deceased which they would use to ride to Lukaya.

According to the evidence of PW6 Detective Assistant Inspector of Police Tumuramye Obed, who participated in investigations in this matter, PW6 had ascertained as he carried out the said investigations that Paul Kajabura was also known by the alias Nuwahereza.

PW2 had further said in evidence at page 26 of the record, that in the morning of 31st July, 2012, she had gone to the alleged scene of crime. PW2 testified that she had found the same motorcycle which the deceased had

used to travel to Lukaya at the alleged scene of the crime. PW2 further said in evidence that the motorcycle was damaged when she saw it.

It must also be observed that Paul Kajabura alias Nuwahereza was not charged with the deceased's murder. Neither was the said Nuwahereza nor Tabagisha David, both who had ridden on the deceased's motorcycle, along with the deceased on the day prior to the murder of the deceased called to give evidence about the circumstances mentioned by PW2 and their connection to the murder of the deceased. If they left together on the same motorcycle, where and when had Paul Kajabura alias Nuwahereza and Tabagisha David parted with the deceased.

For me it is still mere suspicion that PW2 thought that the respondents participated in the murder of the deceased, merely because the respondents did not attend the deceased's burial. Moreover, PW2 said in evidence at page 26 of the record that she saw the 1st respondent on 2nd August, 2012, the day after the deceased's burial. This in my view, could support the 1st respondent's assertion when he testified in Court that he was away from the area, on the day when the deceased was murdered. It could also explain why the 1st respondent did not attend the burial of the deceased as he returned to the area on 2nd August, a day after the deceased's burial.

As for the 2nd respondent, the circumstantial evidence against him as stated in the testimony of PW9, Detective Assistant Inspector of Police Mpamizo Kanyomozi at page 53 of the record which he discovered during investigations was as follows:

> **"I proceeded to inquire about the whereabouts of Baguma on the fateful day and found out that on 30th July 2012 there was a funeral and most people were at that vigil. My inquiries revealed that Baguma was not at that vigil and he never slept at his home. I proceeded to find out where Baguma had spent the night and I discovered that Baguma slept at the home of one Rwamushana where her (sic) purportedly spent a night having changed his plan to go to the vigil bit (sic) never went home. I asked Baguma why (A2) whey (sic) he could not sleep at his home. His explanation was that he feared to more (sic) at night. I discovered that he had gone unescorted and found no reason why he feared to go home."**

In cross examination at page 57, it was put to PW9 that the 2nd respondent had said in his statement to the police dated 23rd August, 2012, that the 2nd

respondent had attended the vigil on 30th July, 2012 where he had spent the night. It was also put to PW9 that in his own statement recorded on 7th November, 2012, he had not said that the 2nd respondent went to the home of Rwomushana as he had alleged in examination in chief. At page 58 of the record, PW9 disowned his own testimony and ended up saying only that the involvement of the 2nd respondent in the deceased's murder is only brought out in the testimony of PW4, the single identifying witness.

It is fair to say in the circumstances that the only evidence linking the 2nd respondent to the murder of the deceased was the identification evidence of PW4, the single identifying witness.

I must say that the evidence relied on in the leading judgment as being capable of leading to the inference that the respondents participated in the murder of the deceased, so as to hold that such evidence supports the identification evidence of the single identifying witness, which was made in difficult conditions, only seems to have raised suspicion, specifically against the 1st respondent only. However, it is trite that suspicion, however strong cannot lead to a conviction, only cogent and compelling evidence can. In criminal law, it is the burden of the prosecution to lead compelling evidence to establish the guilt of the accused persons beyond reasonable doubt, before such accused persons can be convicted of the offence with which they were charged.

Back to the identification evidence of the single identifying witness, the approach to be taken by a court considering such evidence, as discernable from the decision of the Supreme Court in **Lt. Jonas Ainomugisha vs. Uganda, Supreme Court Criminal Appeal No. 0019 of 2015.,** is that the existence of a single factor or condition rendering the identification by the single identifying witness difficult, makes it unsafe to rely on his or her identification evidence, because the possibility of erroneous identification on the part of the single identifying witness cannot be ruled out.

On the authority of the **Lt. Jonas Ainomugisha case**, alone, I am bound to say that the existence of several factors in the instant case which rendered the identification of the deceased's assailants by PW4 difficult, makes the conviction proposed in the leading judgment in this appeal unsafe.

If the rules articulated in the **Nabulere (supra)** and **Roria (supra)** cases, making it necessary to look for additional evidence to support the evidence of the single identifying witness, are applied, in the instant case, I am of the view that the evidence relied on in the leading judgment in this appeal cannot not serve the purpose of supporting the identification evidence of PW4.

For the above reasons, I would conclude that the possibility that the respondents had been erroneously identified by PW4, as two of the three assailants who murdered the deceased cannot be ruled out. It is, therefore, unsafe to rely on the evidence of PW4.

In the result, I would dismiss grounds 3 and 5, the vital grounds of appeal relating to the participation of the respondents in the murder of the deceased.

I would have upheld the acquittal of the respondents of the charge of murder of the deceased contrary to **Sections 188 & 189** of the **Penal Code Act, Cap. 120**.

It is for the reasons mentioned hereinabove that I write this dissent from the part of the leading judgment relating to grounds 3 and 5 of the instant appeal.

Dated at Kampala this ....7th....day of ....July..... 2020.

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Elizabeth Musoke

Justice of Appeal