THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 158/2016 AND 116 OF 2018

(Coram: Obura, Bamugemereire & Madrama, JJA)

OONYU SIMON} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Soroti in Criminal Session Case No 020 of 2013 before Wolayo, J delivered on 4th May, 2016)

JUDGMENT OF COURT

The Appellant and another were charged with murder contrary to sections 188 and 189 of the Penal Code Act. It was alleged that the appellant and Okurut Sam with others at large on the 18th of March 2012 at Jebel village in Serere District murdered Areu Richard. The appellant was tried and convicted as charged while Okurut Sam was acquitted.

The appellant being aggrieved by the conviction and sentence appealed to this court on the following grounds:

1. That the learned trial judge erred in law and fact when she failed to evaluate the entire evidence on record and convicted the appellant on wrongful identification hence occasioning a miscarriage of justice.
2. That the learned trial judge erred in law and fact when she totally ignored the appellant's defence of alibi which was plausible.
3. Without prejudice to the former, the sentence of 32 years was deemed harsh and excessive in the circumstances given the remorsefulness of the appellant.

The appellant prays that the appeal is allowed and the conviction be quashed or alternatively the sentence be varied or set aside.

At the hearing of the appeal, the appellant was represented by learned counsel Ms Agnes Wazemwa while the respondent was represented by the learned Chief State Attorney Hajat Fatinah Nakafeero holding brief

for the learned Chief State Attorney Mr. Joseph Kyomuhendo. The appellant was present in court.

The court was addressed in written submissions and both counsel prayed that the court considers the written submissions which had been filed on court record and deliver Judgment after considering them.

The appellant's written submissions:

The appellant's counsel submitted that on 22nd March 2016, the appellant was produced in court for trial and he denied the charges and a full trial was conducted. To prove the allegations against the appellant, the prosecution adduced evidence of five witnesses. The appellant on the other hand denied the offence and led evidence of one witness. Upon conducting the hearing, the learned trial judge convicted the appellant and sentenced him to 22 years' imprisonment. The appellant appeals against conviction and sentence on the grounds set out before.

Ground 1.

The appellant's counsel submitted that ground 1 hinges on the evaluation of evidence on record. PW1 testified that she did not see the appellant assaulting her husband (the deceased) similarly PW2 stated that she did not see the appellant assaulting the deceased (her father). In cross examination, PW1 stated that she made two separate statements concerning the murder of her husband. On one occasion, she claimed to have seen four people and in another she claimed to have seen seven eight months after the murder. This inconsistency appears in the statement of PW2 in her initial statement, where she stated that four people were involved in the assault but later on indicated that there were seven in another statement recorded at a later date. The appellant's counsel relied on **Baluku Samuel and Another Vs Uganda (2018) UGSC 26** where the Supreme Court found that in assessing the evidence of a witness and where it is to be relied on, his or her consistency is a relevant consideration. The appellant's counsel contended that PW1 accepted she did change her statement in as far as the number of people involved in the murder of the deceased were concerned. When she was asked about her reasons for changing the statement she made to the police, she alleged that she feared for her life. Counsel submitted that

this speaks to the question as to the truthfulness of PW1 and the learned trial judge by not putting much consideration on this issue erred both in law and fact.

The appellant's counsel also relied on the decision of this court in **Sseremba Dennis Vs Uganda; Criminal Appeal No 480 of 2017** where the court held that inconsistency in identification of an accused is not minor as it is at the centre of the prosecution case. By ignoring such inconsistency, the learned trial judge occasioned a miscarriage of justice.

The appellant's counsel submitted that the appellant woke up upon hearing people and a person scream from nearby. This fact is corroborated by the evidence of DW 2 who testified that she was awake when she heard a person scream. She states that her husband woke up a little after she did and went to help the person who was screaming. The appellant testified that he was apprehended by two men who slapped and ordered him to sit down. Further that the statement is corroborated by DW2 who heard a person being slapped.

The appellant's counsel contended that court is faced with an issue dealing with conviction of a man who reported a crime in his community to the police and set an example to every person that if he or she sees danger, it is better to try and help.

The appellant's counsel pointed out that the learned trial judge while establishing that the appellant participated in killing the deceased relied on the fact that the accused reported his ox plough stolen and that PW2 was told by her cousin that her father was the suspect. Counsel submitted that this amounted to hearsay evidence which was not corroborated. No other account shows that indeed the appellant accused the deceased of theft. Further the matter was before the LC1 court and not police as PW2 stated. It was therefore fatal to rely on the statement of PW2.

The appellant's counsel prayed that given the reluctance of the learned trial judge to correctly evaluate the evidence, this court should take it upon itself in exercise of its jurisdiction under section 11 of the Judicature Act to evaluate the evidence and come with an appropriate verdict and quash the conviction and set aside the sentence.

Secondly, the appellant's counsel submitted that there was wrongful identification. That it is trite law that when dealing with evidence of identification by eyewitnesses in criminal cases, the court ought to satisfy itself from the evidence that the conditions under which the identification is claimed to be made were not difficult and would not lend itself to the possibility of mistaken identity. The court shall then proceed to evaluate the evidence cautiously so that it does not convict or uphold the conviction unless it is satisfied that the mistaken identity is ruled out. The court must consider the evidence as a whole, the evidential factors favouring correct identification together with those rendering it difficult. Counsel relied on **Abdallah Nabulere & Another Vs Uganda (1979) HCB 77** for the applicable principles to identification evidence. The appellant's counsel submitted that the learned trial judge correctly found that the circumstances were not favourable for the prosecution witnesses' No's PW1 and PW2 to recognise the assailants of the deceased. She contended that this would have raised doubts in favour of the appellant on the ground that the witnesses had attempted to lie on oath but the learned trial judge wrongly concluded that PW1 and PW2 rightly recognised the appellant's voice and this occasioned a miscarriage of justice.

Counsel relied on **Sharma Kooky & Anor Vs Uganda [2002]** 2 EA 589 on the question of identification by voice. Counsel submitted that the Supreme Court held that identification becomes a crucial issue if the identifying witness is unable to physically see the speaker whose voice she claims to identify and therefore it is necessary for the trial court to consider such identification with the greatest caution.

The appellant's counsel submitted that the testimony of PW2 was the smoking gun in convicting the appellant yet she gave contradictory statements to the police regarding identification of the killers. In the first statement, she alleged that she had seen four people whereas in the second statement she alleged to have seen seven people. She contended that this speaks volumes about the character of PW2. Moreover, in her evidence in chief she listed the people she identified as Okurut, Omalia, Agwedo, Egau, and Okello. She did not testify that she identified the appellant. Further PW1 in cross examination gave contradictory statements as to the identity of the assailants to the police yet this is the

time when her memory was fresh. In the first statement PW1 stated that she did not know the killers of her husband. Thirdly in the entire cross-examination, the learned trial judge was biased and interfered with the cross examination of the prosecution witnesses and gave them unnecessary protection in the course of cross examination and were asked questions about their contradictory statements. She submitted that it is not in dispute that the witnesses wrote initial statements at the police in April 2012 and later on gave additional and contradictory information in December 2012. In the premises there was no evidence to incriminate the appellant. It was counsel's contention that the prosecution witnesses made additional statements as an afterthought simply to pin the appellant down.

The appellant's counsel pointed out that whereas PW1 testified that she heard an alarm made by her husband in which he mentioned the appellant's name. She then went and woke up PW2 and told her that her father is making an alarm from that direction. "haven't you heard him mentioning Okurut and Oonyu's name? She submitted that contrary to this PW2 testified that PW1 told her that it appears the appellant was beating his wife and she did not mention the name of her father. Counsel contended that this contradiction was major in that the learned trial judge ignored it and wrongly convicted the appellant thereby occasioning a miscarriage of justice. PW2 further contradicted herself and contradicted the evidence of PW1 when she testified that whilst in the house, she heard the appellant ask her father outside that: *"Richard, where have you been the whole night? My father did not reply him but was crying"*. Counsel further relied on **RO. 0875 Pte Wepukhulu Vs Uganda [2018] UGSC 14** where the Supreme Court held that minor inconsistencies, unless they point to deliberate untruthfulness on the part of the prosecution witnesses, should be ignored and major inconsistencies which go to the root of the case, should be resolved in favour of the accused. In conclusion the appellant's counsel submitted that the evidence of PW2 corroborates the appellant's evidence because he testified that he heard a person crying and came out and asked as he was going towards the crying person, when he was apprehended by two men who slapped him. She contended that this is exactly what the witness heard while at their

home and thought that the appellant was beating his wife. Thereafter PW2 changed her statements to claim that she heard the appellant beating the deceased. In the premises, the appellant's counsel submitted that the appellant was a victim of circumstances when he moved out to rescue his neighbour only to be set upon by the assailants. The appellant was consistent and his strong evidence was not broken down by the prosecution. Counsel contended that in the premises the learned trial judge erroneously relied on the testimony of PW1 and PW2 to convict the appellant.

Ground 2.

The appellant's counsel submitted that the learned trial judge erred in law and fact when she totally ignored the appellant's defence of alibi which was plausible. He submitted that once an accused raises the defence of alibi, it is the duty of the state to water it down and place the accused at the scene of the crime (see **Kamya Johnson Wavamunno Vs Uganda; SCCA 16 of 2002**). The appellant in this cross examination testimony stated that he was with his wife DW2 with whom he shared a bed on the fateful night of the murder of the deceased. He stated that he heard the persons screaming a short distance away from his home and after a brief interaction with his wife, he decided to follow the direction from where the noise came. He could not however properly ascertain the events that were going on because he was caught by two men who slapped him and ordered him to sit down. The appellant testified that when he got a chance to do so, he escaped and ran to the police to report what had happened in his community and requested for help. He led the police to the scene of the incident and they called the LC 1 chairperson. The LC 1 did not deny being called by the police and gave sworn testimony of the fact that he was called by a police officer. The prosecution did not undertake any step to water down the alibi and this occasioned a miscarriage of justice.

The submissions of the Respondent's counsel.

In reply the respondent's counsel merged grounds 1 and 2 and submitted that the ground on evaluation of evidence had the potential to resolve the ground on the alibi of the appellant.

The respondent's counsel submitted that there was proper identification of the appellant by PW1 and PW2 and as correctly pointed out by the appellant's counsel, but the appellant's counsel did not correctly apply the facts. The respondents counsel submitted that PW2 did identify the appellant positively through his voice although the conditions were difficult, the appellant was positively identified and placed at the scene of the crime. He relied on **Abdulla Bin Wendo and another Vs R (1953) 20 EACA 166** where the East African Court of Appeal considered well-known exceptions to facts proved by the testimony of a single identifying witness. They held that in such circumstances, "what is needed is other evidence whether circumstantial or direct pointing to the 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." Counsel also relied on **Abdullah Nabulere and Another Vs Uganda [1970 HCB 77** for the same proposition of law. The Court should take special caution where there is evidence of a single identifying witnesses and that before convicting in reliance of it, special caution should be taken to ensure that there was no possibility of mistaken identity. A judge should examine closely the circumstances in which the identification came to be made and particularly the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused which all go to the issue of quality of identification evidence.

The respondent's counsel submitted that the learned trial judge evaluated the evidence on record and correctly applied the law to the facts and evidence with regard to identification and contradictions, as well as the alibi and arrived at the correct decision convicting the appellant.

As far as identification evidence is concerned, PW1 and PW2 testified that they knew the appellant and that he was their neighbour. The witnesses

told court that they had known the appellant for a very long time. PW1 testified that she heard an alarm from a voice that was mentioning the name of the appellant and one Okurut. She later established that the voice was that of her husband the deceased, one Richard Areu.

The deceased was asking "why he and some other persons were killing him. PW1 woke up PW2 her daughter. PW1 told the court how she crawled and saw the appellant, Mr Okurut and five other people assaulting her husband. PW1 was in a position to identify the assailants with the help of the moonlight and light from phones. Further PW2 confirmed that PW1 had indeed on the fateful night called her and woke her up and told her that someone was making an alarm. She also informed the court that she heard the voice of the appellant because for him he had a very bold and loud voice. She further testified that when she moved closer, the appellant said "Richard can you keep quiet"? That is when she recognised that the person being assaulted was her father. The witness also told court that she crawled together with her mother towards the scene of the crime and there were about 50 feet from the assailants although the place was bushy.

In the premises, counsel submitted that the learned trial judge properly evaluated the evidence with regard to identification though she disallowed the evidence of PW1 because the conditions were unfavourable for identification. The learned trial judge found that of the two witnesses, PW1 and PW2 could not have identified the assailants with their eyes because they were at a distance and were watching from a bushy place that impaired their vision. On the other hand, the learned trial judge accepted the evidence of PW2 whom she considered a credible witness with regard to identification of the appellant though she rejected the evidence of identification of Mr Okurut.

Further, the respondents counsel submitted that PW2 relied on the familiarity with the appellant to identify him. She had known the appellant for a long time since they were neighbours. She knew his deep voice and used the same to identify him. Counsel submitted that a person can rely on a voice to identify another if the two people are acquaintances. In the premises, PW2 properly identified the appellant and there was no mistaken identity.

The deceased was heard asking the appellant and his accomplices why they were killing him. The respondent's counsel submitted that this amounted to a dying declaration that corroborated the prosecution case that the appellant was involved in the assault of the deceased. Further that the deceased also knew that the appellant took some time with him and the two exchanged some words. Counsel submitted that with this kind of corroboration, the trial judge did not have to warn herself for relying on the evidence of a single identifying witness to convict the appellant.

Further, the respondent's counsel addressed the court on the contradictory evidence of PW1 and PW2 and submitted that the learned trial judge applied the law correctly and arrived at the right decision. Counsel pointed out that it is trite law that major inconsistencies pointed to a deliberate falsehood and this should lead to the rejection of the evidence. However, the law allows for the severance of evidence of a witness that may have some truth and lies at the same time. The respondents relied on **Kato Kajubi Godfrey Vs Uganda; Criminal Appeal No 20 of 2014** which cited with approval **Alfred Tajar Vs Uganda** where the Supreme Court held that in assessing the evidence of a witness, it is open to a trial judge to find that a witness has been substantially truthful even though he lied in some particular respect.

The respondent's counsel submitted that the learned trial judge evaluated the evidence of both PW1 and PW2 and found that the two witnesses had told some lies. The evidence that contained lies was rejected but the truthful part was admitted. In the premises, the respondent's counsel submitted that the learned trial judge did not reject the entire evidence of PW1 and PW2. Instead she severed the truthful parts of the testimonies from the falsehood. He contended that the credible evidence that the learned trial judge believed was sufficient to prove the ingredient of participation of the appellant in the murder of the deceased.

Resolution of the appeal

We have carefully considered counsel for the appellant's submissions against the appellant's conviction in grounds 1 and 2 of the appeal. Ground

1 relates to participation evidence while ground 2 relates to the defence of alibi. We have stayed resolution of ground 3 which is on severity of sentence because its resolution depends on the outcome of grounds 1 and 2. We have also considered the submissions of Counsel and the law referred to generally.

This is a first appeal against the decision of the High Court issued in the exercise of its original jurisdiction and this court has discretionary powers to reappraise the typed record of evidence in the record of appeal by subjecting it to fresh scrutiny and coming to its own conclusions on matters of fact. In reappraisal of evidence the court is required to caution itself on its disadvantage of not having seen or heard the witnesses testify and to treat with deference the observations of the trial judge on matters of credibility of witnesses (See the holding of the East African Court of Appeal on the duty of a first appellate court in **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123,** and the decision of the Supreme Court of Uganda in **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**). Apart from the case law, the duty of this court is stipulated under rule 30 (1) (a) of the **Judicature (Court of Appeal Rules) Directions, S.I No. 13-10**, which provides that on appeal from the decision of the High Court in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact.

The grounds appealing against conviction are:

1. That the learned trial judge erred in law and fact when she failed to evaluate the entire evidence on record and convicted the appellant on wrongful identification hence occasioning a miscarriage of justice.

2. That the learned trial judge erred in law and fact when she totally ignored the appellant's defence of alibi which was plausible.

We agree with the respondent's counsel that this ground relates to the issue of participation of the appellant in the commission of the offence. In the premises, we have subjected the evidence to exhaustive scrutiny. We have carefully considered the decision of the learned trial judge which was supported by the respondent's counsel as he made no attempt to support the decision on other grounds other than that relied on by the

learned trial judge. The learned trial judge found that the prosecution relied on the testimonies of PW1 and PW2 after the other ingredients that the death was unlawfully caused and that the deceased had been killed with malice aforethought had been established. The learned trial judge also considered the contradiction between the first statement of PW1 and PW2 which they made to the police immediately after the murder of the deceased and a statement that they made about 9 months later. We shall in due course, refer to these contradictions. The learned trial judge indeed found contradictions between the two statements made to the police about 9 months apart and she observed as follows:

> "I have examined the two statements by Angida and see no material contradiction with respect to what she heard that night. In the statement recorded on 1.4.2012, she mentioned that she heard Oonyu order her father who was called Richard, to keep quiet. She mentions the same information in her statement dated 19.12.2012. There is no contradiction with respect to identification of A1 Oonyu by voice.
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> With respect to the other people whom she states she saw, in the first statement she said she saw four people beating the deceased including the two accused persons while in the second statement she mentions seven names including the two accused persons.... The legal position on police statements is that these are not under oath and therefore cannot be the basis for determining credibility of a witness. Nevertheless, they are relevant in establishing consistency of relevant facts as attested in court under oath.
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> Although PW2 Angida cited fear as the reason for not naming A2 Okurut in the initial police statement, she categorically stated that she heard the voice of A1 Oonyu ordering her father to keep quiet.
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> Both Ibiara and Angida confirmed that Oonyu was their close neighbour who lived 100 feet away from their home. Angida specifically described Oonyu as having a loud unmistakable voice and hence she quickly recognised it that night when their mother woke (her) up."

The learned trial judge found that PW1 corroborated this story but found that with respect to Okurut, both women's testimony is suspect because the name of Okurut emerged months after the incidents. She found considerable doubt about the participation of Okurut in the crime.

The learned trial judge also considered a sworn statement of the appellant and other witnesses and found that the appellant was

positively placed at the scene of crime both by the prosecution witnesses and by his own account. She found that the identification of other suspects by the two witnesses in the night of 18th of March 2012 is suspect because of the circumstances. That the two witnesses were not close enough to visually identify the assailants whether by sight or by their voices. Most importantly the learned trial judge found as follows:

> "with respect to following the group until 5 am in the morning, this was by tracking bloodspots until they found the body. Therefore, the two did not follow them close enough to identify the culprits. This explains why the identity of the other assailants apart from Oonyu were not disclosed initially to the police. In the initial police statements, both witnesses said they saw four people assaulting the deceased while in the second statements, both said they saw seven people. These are grave inconsistencies that cannot be ignored. This leaves the only credible evidence being whether Angida was awoken by Ibiara and when she listened, she heard Oonyu ordering her father to keep quiet. The other credible evidence is when Ibiara was awoken by the crying of her husband. That in fact her husband was found dead the next morning is strong circumstantial evidence that A1 Oonyu participated in his death.
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> With respect to malice aforethought, the fact that Oonyu admits that he reported his stolen ox plough to the authorities and during the day, Angida had received information that her father the deceased had been suspected of theft of Oonyu's ox are relevant facts. These facts coupled with the death of the deceased at night at the hands of A1 and unidentified others is evidence that A1 intended the death and had the mens rea or intention to kill on account of his stolen ox plough."

The learned trial judge held that malice aforethought can be proved through circumstantial evidence.

We find that the issue of identification of the appellant is crucial in this case. The question of whether the appellant was properly identified forms the foundation of his conviction and will be considered first. Further this is tied up with whether he participated in the assault.

PW1 Ibiara Rose widow of the deceased testified about the incident in that she heard an alarm at around 3 AM in the morning where she stated that the person making the alarm mentioned the names of Oonyu and Okurut. She further stated that she heard the deceased making an alarm again saying "*Okurut why are you people killing me for nothing?*". She testified

that the deceased was close to their garden or in the direction of or behind the kitchen. She went and woke up PW2, Angida Lucy, her daughter. PW2 then stated that she wanted to go to the toilets and they went together. PW1 thereafter went and hid as the accused persons were assaulting the deceased until the time "*Okurut told the deceased that he gets up and we go*" and the deceased replied that he could not get up. She did not know where her daughter was hiding. She testified that seven people were assaulting the deceased and she was able to recognise them and named them as Oonyu, Okurut, Omalia, Ongodia, Egowu, Agwetu and Okello. She heard the appellant and Okurut saying "that if he survives today then we shall know that he is a man and they said let us carry him away." She stated that after killing the deceased, they carried him up to the main road. All along she was hiding under a shrub and she did not know where her daughter was hiding. Significantly she testified that the assailants carried the deceased for about half a mile and dumped him thereafter on the main road where they placed him on the ground.

In her cross examination testimony, she said that the hands of the deceased were tied with a rubber band when they found him eventually. There was also an ox plough which had been put a bit ahead of him some distance from where he lay. That the appellant had a dispute with the deceased about a year before about land boundaries but otherwise they had no problems. That morning the deceased had left home riding a bicycle and never came back. PW1 was cross examined about her statement recorded at the police where she indicated that she had identified four men who killed her husband and not seven as appeared in her testimony. Her explanation for the disparity was the fear of reprisals in revealing their names. In the police statement which she made initially she did not identify the four men. In the first statement, she did not mention the appellant at the time she heard her husband making an alarm. She testified that she did not mention this because of fear. She also did not know that the appellant had reported to the police about the incident. The testimony of PW1 was discredited and the learned trial judge disregarded it in arriving at her verdict and we have no grounds to rely on it.

Nonetheless, we have considered the police statements and particularly the first statement of PW1 which was made on 19th of March 2012. She wrote that late in the evening on the fateful day, her daughter PW2 told her that she got information that her father (the deceased) was taking alcohol at a certain trading centre. When they went to bed, he had not yet come back. Deep in the night on 18th March 2012 at around 3.00 am while in bed and asleep, she heard the voice of a man crying in the garden near their home and came outside and woke her children. People were beating him. He was literally crying: "my mother" "my mother". At that time, she did not know the person being beaten until one of them said *"Richard you get up*" that is the time she knew that they were beating her husband. She moved nearer and saw 4 men beating a man. She did not identify the men since it was dark. Later she testified in court that the person who said *Richard you get up* was Okurut. Further she testified that then they carried the victim into the main road. In the morning they followed the blood trail from where they had started beating the deceased and discovered where they had put him on the side of the road. She then stated inter alia "but we had a land dispute with Oonyu and stay was bad with him being our closest neighbour." She also stated that near the body was an ox plough and a bicycle (the bicycle of the deceased). Further she stated that on 17th March 2012, the appellant had reported the theft of his ox plough and at night the deceased was killed meaning that he planned to kill the deceased.

In her additional statement made on 19th December 2012 she added that she woke her children and told them that she had heard someone making an alarm and it sounded like her husband. Then further she stated that she overheard the voice of one Oonyu Simon who is their neighbour shouting that "Richard why did you steal my ox plough" the deceased answered that he did not steal. They were making false allegations against him and wanted to kill him for nothing. Further she identified seven people who she named. She remembered that the deceased fought the appellant in relation to a land boundary sometime back.

We compared the testimony of PW1 with that of PW2, a daughter of PW1. The testimony of PW2 about the involvement of the appellant was much more detailed. She testified in English and stated that at around the 10

AM in the morning her dad left home and said he was going to Serere. At around 4 PM she went to the trading centre (Amakiyo Trading centre) and that while there her cousin one Ogunya Martin informed her that the appellant had reported to the police that her dad had stolen his ox plough. Further she saw that the appellant was moving together with the LC1 chairperson around midday that day. That night as they were sleeping, her mum came and knocked at her door and called her out whereupon she was informed that someone is making an alarm that is when she heard the voice of the appellant. She further stated that the appellant had a bold voice and can talk very loudly. She thought that the appellant was beating his wife with whom he usually had quarrels. Further, when she moved a little distance ahead, she heard the appellant saying *"Richard can you keep quiet"* and that is when she recognised that it was her dad who was being beaten. She crawled towards the scene of the crime in the grass which was a bit bushy. She stated that there were many people talking confidently and were bragging that today was the day of the deceased when he would be killed. All of them were just uttering words. The time was about 5 AM in the morning and she crawled slowly and nearer while trying to avoid detection and so as to be able to see what was going on. There was moonlight and there were even flash lights from their phones. She identified Okurut, Omalia, Ongodia and Agwedo Egau the last one was Okello. Further and on being prompted she stated that she has identified all of the assailants including the appellant and Okurut.

The detailed observation of PW2 was that the assailants were using sticks and some were carrying pangas and the deceased was saying that **"you are beating me for nothing but there is nothing"** and "they" replied "*keep quiet don't make noise for us*". This is contrasted with what PW1 stated in her testimony that Okurut said "*Richard get up*". Further PW1 testified that the deceased said "*Okurut why are you people killing me for nothing?* In her cross examination testimony PW1 said: *so I hid there while listening as the accused persons were assaulting the deceased until one Okurut told the deceased that "get up and we go" and the deceased replied that he could not get up.*

With regard to PW2 there is no reference specifically to the appellant because the plural reference to the people assaulting is used. We further

note that PW2 testified that she recognised all their voices (the seven assailants). This is what she said: "*Yeah, they were taking confidently, they were many so I was able to identify all their voices because they are our neighbours and just within one area so they were like you used to brag but today is your day whether you want it or not, we are going to kill you.*" PW2 further repeated: *yeah, I even identified all of them because I know them very well.* The learned trial judge did not accept this testimony of identification but only accepted that in relation to the appellant's voice.

Further, PW2 testified that after the assailants beat the deceased, they were saying he has died, because they were telling him to stand up but he couldn't and when they tried to make him stand up he would just fall down. She then heard Omalia saying "he has died; this king has died". We note that the plough which was found near where the body of the deceased lay the plough of the mother of Egawu, one of the suspects.

PW1 testified that it is after this incident that the assailants "carried the victim up to the road side and dumped him there, after dumping him, they started pulling him". "again after sometime they started again carrying, they carried up to where the ox plough was. The ox plough was something like one kilometre like that so they carried him up there and dumped him there" (sic).

This testimony discloses three possible scenes of crime. The first assault occurred near their home, a second assault a little further away where they crawled to see and lastly where they carried the body still further away to near the plough. Whether it was a kilometre away or half a kilometre away is a minor contradiction.

The assailants then disappeared and thereafter and subsequently PW1 and PW2 with other people traced where the body was by following drops of blood. The learned trial judge found this contradictory and discarded the testimony of PW2 on her identification of seven assailants whom she mentioned (and identified by voice too). This left only the voice identification of the appellant and other circumstantial evidence as corroboration. It is inter alia on the basis of this that she acquitted Okurut who had been implicated by PW1 as the person who talked to the deceased. Okurut was acquitted after further considering his defence of

alibi. The real issue is whether after this major contradiction, and falsehood relating to whether PW2 saw seven assailants, it was safe to rely on her voice identification of the appellant. Particularly in light of the fact of the learned trial judge discarding the testimony of PW1. PW1 heard Okurut and in her police statement she did not hear that it was the deceased when she heard screams. It is PW2 who heard the appellant and the deceased afterwards. PW1 mentioned the deceased later in her testimony in court. Moreover, she implicates Okurut rather than Oonyu (the appellant). Then the appellant and Okurut are mentioned as if they spoke together in unison.

The issue of the ox plough came up as corroboration and particular PW2 heard that the appellant had reported the theft to police. The person who gave her (PW2) this information never testified and therefore the testimony is hearsay. PW2 said that she saw an LC1 chairperson in company of the appellant when they were walking together but she never heard what they discussed and she used this as possible reporting of the theft of an ox plough.

PW2 in her cross examination testimony, she contradicted her mother PW1 by stating that her mother told her that it was as if the appellant was beating his wife and not that it was her dad who was making an alarm. She was also cross examined about her statement to the police inclusive of the fact that the first statement was different from the second statement in some material respects. We have examined these two statements and the following can be extracted from them. In a statement dated 14th of April 2012 PW2 informed the police that on 17th of March 2012 she went to the trading centre and met a cousin who told her that he had heard rumours that her father had stolen a plough from the appellant. That time her father was drinking some alcohol with one Eboga. That very evening the father did not come back and they went to sleep. Deep in the night at around 3 AM (in the morning) her mother woke up telling her to come out because there was someone being beaten in the garden. She was hearing the voice of the appellant as if he was beating his wife. She then heard the voice of the appellant when he said "Richard you get up" then she saw four people beating the deceased. She properly heard the voice of the appellant when he said that "this man is not yet dead" then

they continued beating and then carried him to a further distance. She recognised the voice of the appellant because they were close neighbours. The assailants went and dumped the body roughly 1 km away. The appellant was arrested and released and came back and went to church and then told the Christians to pray for him for God's help for the bad things he had done and that it was Satan.

In the second statement which was recorded by the police on the 19th of December 2012 about eight months later she repeats that she heard voices of people including the one of the appellant on the fateful morning. She was together with her mum when she moved closer and was able to identify seven people whom she named. The deceased was found near an ox plough and his bicycle in the morning. She later learned that the appellant had reported to the police on his own accord. However, the police detained him as one of the suspects. When she recorded her first statement to the police she was not in her full senses so she could not narrate everything properly. She learned that the ox plough which was put near the deceased belonged to one Akayo a mother of one Egawu, one of the suspects. Particularly she stated as follows:

> "therefore this matter was a planned move because the deceased also had a land dispute which was not solved till now. It is the same land wrangle that caused the death of Okwalinga Justine the father of Areu Richard in 2003. The assailants were not arrested."

In short she told the police the motive implicating the appellant was a land dispute rather than theft of a plough. She also stated that she heard that the appellant had reported to police afterwards and was detained there.

In **RO. 0875 Pte Wepukhulu Nyuguli v Uganda (Criminal Appeal 21 of 2001) [2002] UGSC 14 (04 March 2002)** the Supreme Court of Uganda stated that:

> We shall discuss the issue of inconsistencies first. This same issue was raised before the Court of Appeal which held that the inconsistencies were minor. It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses, should be ignored and that major ones which go to the root of the case, should be resolved in favour

of the accused (**See Alfred Tajar -Vs- Uganda Cr. Appeal No. 167 of 1969 EACA)** (unreported).

There were inconsistencies relating to the correct identification of the appellant and moreover PW2 was disbelieved on her positive identification by voice of seven suspects she named. Further PW1 identified the voice of one Okurut while PW2 identified the voice of appellant who she noted had a loud and unmistakable voice. Why did PW1 refer to the voice of Okurut while she initially was not clear about the voice of the appellant? This inconsistency related to identification. Again the Supreme Court in **Lt. Mike Ociti Vs Uganda ((Cr. Appeal No.7 Of 1988)) [1990] UGSC 5 (30 April 1990);**

> The considerations which we would have thought of greater consequence were that this sole witness to the identity of the appellant was not proved to be consistent, nor corroborated, on the issue of identity. however, if a sole witness to the identify of an accused found to be deliberately lying on part of the case, great care must be taken in considering whether the false part, of the testimony can be excluded legitimately from the rest of his evidence, or whether, it affects his whole evidence. Generally speaking, where a sole witness as to identify is found to be deliberately lying on an important aspect of his evidence, it is not logically possible to believe the witness in part and reject his evidence in part.

In this appeal the learned trial judge disbelieved the elaborate testimony of PW2 on how she was able to identify seven assailants by voice but believed her testimony on how she identified the appellant by voice yet PW1 heard the voice of yet another person Okurut and she was also disbelieved. It was unsafe in the circumstances to accept this testimony and the corroboration of reporting the theft on an ox plough was inadmissible.

The issue of alibi of the appellant.

On the issue of the alibi of the appellant, the learned trial judge found that in his defence the appellant gave sworn testimony in which he acknowledged that his ox plough had been stolen and that he made a report to the LC chairperson but denied participation in the crime. In the evaluation of his testimony, the appellant had testified that he woke up between 3 AM to 4 AM and heard an alarm so he got out of the house to

ascertain what was happening and bumped into people speaking in low tones. According to the appellant, he was detained by two people after which he took off and reported to the police station about what he had encountered. He was supported by his wife and the other defence witness namely the LC 1 chairperson and on the issue of reporting his ox plough stolen on 17th March 2012. The learned trial judge held as follows:

> "I find that A1's defence places him away from his home between 3 AM to 5 AM, the time prosecution witnesses heard his voice as he ordered the deceased to keep quiet and as he had been beaten and crying out for help.
> He was positively placed at the scene of crime by prosecution witnesses and by his own account. ...
> The identification of other suspects by the two witnesses in the night of 18th of March 2012 is also suspect because for the two witnesses to hide only 100 feet away from the scene of murder of a loved one is too close for their safety. While it is true they crawled towards the scene it was not close enough to identify the assailants. Indeed, Angida testified that the group spoke as they assaulted the deceased but she could only recount that Oonyu A1 said '*keep quiet*'. This is the same statement she heard him say when she was initially awoken by her mother.

This meant that PW2 heard the appellant tell the deceased "keep quiet" when her mother PW1 woke her up and later when she saw the many people assaulting her father when she crawled nearer the place where the assault was taking place. Further the learned trial judge found that:

> "With respect of malice aforethought, the fact that Oonyu admits that he reported his stolen ox plough to the authorities and during the day, Angida received information that her father the deceased had been suspected of theft of Oonyu's ox plough are relevant facts. These facts coupled with the death of the deceased at night at the hands of A1 and unidentified others is evidence that A1 intended and had mens rea or intention to kill on account of the stolen ox plough."

Clearly there is a problem with the conclusion of the learned trial judge because the issue of the words "keep quiet" attributed to the appellant was also attributed to Okurut. Secondly, the mens rea to murder the deceased was not conclusive as the witnesses attributed it not to the stealing of the ox plough but rather to the fact that there was a land dispute involving the boundaries between the two families. Further there was another ox plough involved. There was mob justice and even the LC1

chairperson confirmed that thefts were rampant. Specifically, the appellant dissociated himself from the mob by reporting to police.

We have further considered the timelines relating to the reporting of the appellant to the police. The appellant stated that he reported to the police after he heard a person making an alarm and that person was following a certain road. He went out and in the course of this, he was assaulted by two young men and detained. When the young people went to join the mob, he got a chance he ran to the police and reported the incident. He reported that somebody was yelling and that there were many people involved. He stated that he also went to the police because he had reported the loss of his plough and these people are talking about the theft of a plough. He stated that as a teacher, he teaches people that when something wrong is happening, it is better to report to the police and that is what he did. In other words, at the critical time when the murder happened, the appellant run to and was at the police. When he reported, the LC 1 chairperson was called by the police officer to establish what was happening. Thereafter, the police officer detained him for his own protection. The following day he was picked from the police cells between 8:30 AM and 9 AM. When he entered the police pickup, he realised that there was a plough in the pickup and he noted that it was not his.

On the other hand, DW1 Omugetum Richard, the LC1 chairperson testified that on 17 March coming to 18 March 2012, the appellant had reported the theft of his ox plough and that theft was rampant in the village. He also reported the matter to the police as there was rampant theft in the area. On the night of the 17th going to the 18th, he received a phone call from Elotun OC Police post asking him whether he knew what had happened in his village. The call came about 6 AM in the morning. He also testified that during his tenure as the LC 1 chairperson, he never heard about a land wrangle between the appellant and the deceased.

The issue of what time the appellant reported to the police was material and the prosecution was required to rebut this evidence. In any case, the police records were available to the prosecution or an attempt should have been made to obtain them if they thought it was a relevant factor. The only witnesses who testified were PW1 and PW2 on behalf of the

prosecution. We think that there is doubt about the participation of the appellant regarding the words used "keep quiet". The positive identification by PW2 of the voice of the appellant was contradicted by the testimony of PW1.

In addition, there are several other contradictory statements. It is possible that the appellant was involved in some way but not necessarily with the assault. What is striking is that he reported the theft to the police and also reported to the police in the early hours of the morning about an incident in his village. He did not attempt to run away or conceal his participation. Because there was a doubt about his participation in the beating of the deceased, the burden was on the prosecution to rebut the strong alibi of the appellant. The same allegation of participation and statement "keep quiet" was made against Okurut and his alibi was upheld by the learned trial judge. This pointed to falsehood of the prosecution witnesses.

In the circumstances we are inclined to give the appellant the benefit of doubt as the evidence against him was shaky and full of contradictions and uncertainty. The fact that he reported the loss of an ox plough and that an ox plough was discovered near the deceased is not sufficient to link him to the assault. Further, PW2 did not identify the appellant among the assailants when they were beating the deceased. In any case, her testimony about the beating and the people who were participating in it was discarded.

In the circumstances, there is a reasonable doubt which has been established from the record and the appellant is entitled to the benefit of the doubt. He was convicted on the basis of circumstantial evidence which was not certain where there were alternative theories as to who could have participated or who had the motive to murder the deceased.

We quash the conviction of the appellant and set aside his sentence. The appellant shall be set free unless held on other grounds.

Dated at Mbale the 30th day of January 2023

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal