THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCT-03-CR-CN-45-2014

ARISING FROM JIN-00-CR-CO-0220/2013)

UGANDA	::::::::::::::::	**APPELLANT**
	vs	
1. BAKAKI JAMES **2. KYAKONE LULENTI** **3. NAMBULAWUWE JAMADA** **4. TIBENKANA YOWANA**	::::::::::::::::	**RESPONDENTS**

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant, who is the State, filed this appeal against the acquittal of the four respondents namely, **BAKAKI JAMES, KYAKONE LULENTI, NAMBULAWUWE JAMADA** and **TIBENKANA YOWANA.** The respondents had been charged with the offence of the Attempted Murder of one Idembe John and were acquitted by HW Susan Kanyange, Chief Magistrate in Jinja.

As a background to these charges, the evidence for the prosecution was that the complainant in this matter, Idembe John (PW 1), had an ongoing Court matter against the respondents. On the 22nd of May 2012 he went for the hearing of the case at Busedde Court. Bakaki James the first respondent told the complainant as he walked by in the Court premises that 'today we have you'. The complainant perceived this as a threat.

At 9:00 pm later that night, PW 1 came out of his house in Bulama village Bulongo Sub County to have a short call. It is his evidence that Bakaki emerged from the side of his house and grabbed him by the neck and mouth so that he could not make an alarm. He also saw Jamada Nambulawuwe standing by the house. Then Tibenkana who was behind the victim said 'let's put him aside' before they cut the complainant several times with a panga. The victim was able to recognize all his assailants because it was a moonlit night. Bakaki had also been seen by PW 2 Moses Bumali, the son of the victim a little earlier standing near his father's house although PW 2 did not see him attack.

PW 1 lost consciousness and was rushed to the hospital for medical attention. The case was reported to the police and the appellants were arrested and charged with these offences.

In their defence all the appellants denied the charges and blamed these allegations on the land dispute which had created a longstanding grudge with the PW 1.

A1 set up an alibi saying that when he returned home from court he did not leave his premises again that night.

A2 also raised an alibi stating that he was away in Budome about 6 km from the scene where he went to attend the burial of an uncle.

A3 also stated he was at home that night. He attributed the charge to a grudge that the complainant bore against him resulting from A3's refusal to trump up evidence regarding the sale of land that the complainant was interested in selling.

A4 denied the charges. He also stated that the matter arose out of a land dispute where A3 and he were witnesses against the complainant which had all along annoyed the complainant.

The trial magistrate disbelieved the prosecution case and acquitted the respondents. The state being dissatisfied with that Judgment filed this appeal against the acquittal with one ground of appeal namely,

1. That the learned trial magistrate erred in law and in fact when she failed to evaluate the evidence as a whole thus arriving at a wrong decision.

The state prayed that the acquittal be set aside and this court make orders that it deemed fit.

This matter was heard on the 27th of October 2015 but that was after adjournments on the 31st of March 2015 when the case had been fixed for the 25th of June 2015. There is no record of proceedings on the 25th of June 2015 but parties were present on the 27th of Oct 2015. On that day the respondents again sought to have the appeal adjourned because their lawyer was absent but the court ordered that it proceed. The state made its submission. This Court then ordered that the respondents make their replies on the 29th of October 2015. It is only the 2nd respondent who complied and filed a written submission. The other respondents did not file and did not offer any explanation why.

This appeal was overlooked following the transfer of the previous presiding Judge and mistakenly called in this session handling criminal appeals and fixed for hearing for the 21st of August 2017. When the anomaly was realized the submissions of the other three respondents were ruled out of time and the matter fixed for Judgment.

The submissions referred to are on record and shall not be reproduced here.

As a first appellate court, it is the duty of this court to subject the evidence to a fresh scrutiny and come to its own conclusions, bearing in mind that it has not seen the witnesses testify (**Kifamunte Henry V Uganda SCCA NO. 10 of 1997** unreported).

The court is also mindful that the burden is on the prosecution to prove the offence to a standard beyond reasonable doubt. It is also the duty of this court when it gives judgment to evaluate the evidence as a whole carefully balancing each item of evidence in relation to the rest (see **Okethi Okale and others v Republic [1965] 1 EA 555**).

The appellants rightly in my view, submitted on the question of identity, stating that the respondents had been properly identified by the complainant and there could be no possibility of mistake in his identification. Therefore the learned trial magistrate arrived at the wrong conclusion in stating that the identification left her with doubt.

The state contends that the identification made was corroborated by PW 2 whose evidence was unchallenged.

It was the evidence of the Idembe John that he was attacked at 9:00 pm by the repondents. He was held down and cut by Bakaki who had a panga. He saw Kyakone and Nambulawuwe clearly but recognised Tibenkana by his voice. There was moonlight and the assailants were first seen at a distance of 6 metres before they grabbed him.

At that time PW 2, Musa Bumali the 18 year old son of PW 1, had come out of his house for a short call. He saw Bakaki who ran away. Shortly thereafter he discovered his father badly injured and unable to talk.

PW 2 immediately informed neighbours who included a brother and father of the complainant and it was the two who rushed Idembe to hospital.

Earlier that day, the 22nd of May 2012 the parties had spent the day at Busedde court where they had an on-going land related dispute. At the end of the Court matter the respondents are said to have threatened the complainant in the hearing PW 2.

The appellants all stated there was a long standing grudge with the PW1. In the case of the 1st respondent that there was a case of Forgery before the Court in Jinja, there was another of Threatening violence and then the land dispute they had gone to hear at the Busedde Court on the 22nd of May 2012. He admitted a frosty relationship between the complainant and himself. This witness also stated that when he returned from Court he had spent rest of the day at home resting.

A2 set up an alibi and called 2 witnesses in support. His testimony was that he was not in Busedde Court on 22nd because he had gone for burial. Secondly that he had a long standing grudge against the complainant over the land where the complainant was accused of forging documents. It was Kyakone who bought the land from the complainant's sister but was bitterly opposed by the complainant.

A3 Jamada Nambulawuwe is the LC chairman of the area and also set up an alibi. He stated that the complainant was bitter with him, because A3 had refused to go along with him in the scheme to forge documents over the land that A2 bought.

A 4 is an Uncle of the complainant and also raised an alibi. In addition it is his evidence that the complainant was angry over the fact that A4 testified against him in the Forgery case.

This then is a matter where proof of participation depends exclusively on the identification evidence. Where identification is made in difficult conditions, such as at night, the court must caution itself and examine such evidence closely to avoid a case of mistaken identity (see **Roria V R 1967 E.A. 583**). I warn myself now of that danger here because identification was made at night and the witness appears to have been taken by surprise.

To avert the stated danger the court will look at the circumstances under which the identification is made to test the quality of the identification evidence by scrutinising the light conditions; the familiarity of the witness with the accused; the length of time observing the incident; and the distance (see **Abdalla Nabulere and Ors V Ug Cr App 1/1978**).

Looking at the circumstances here it would appear that the conditions favoured a correct identification to be made. The assailants were well known to the victim, he was aided the moonlight and there was close proximity between them. But the court is alive to the danger that a mistaken witness could be a truthful in his belief of identification.

The court in **Roria [supra]** went on to add that in such circumstances (where identification by a single witness is made in difficult conditions) 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.

In the instant case there was the evidence of the long standing grudge and the prior threat made against the victim which would appear to furnish corroboration.

This court is however enjoined to look at the evidence as a whole. In the Supreme Court case of ***Suleiman Katusabe vs Uganda S.C. Cr. Appeal No. 7 of 1991*** *(unreported) it was held that:*

> *"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that final decision is not taken until all the evidence has been considered...*
> *The proper approach is to consider the strength and weakness of each side with the evidence as a whole, apply the burden of proof as always*

resting upon the prosecution and decide whether the defence has raised a reasonable doubt in the prosecution case."

I note the victim told PW 4 Sargent Luguma Sinad, who was the first officer to interview him that he was attacked by Kyakone and others. He did not name the other assailants until the 9th (see pg 30 of Proceedings) more than 18 days later when he spoke to another Police Officer PW 5, Detective Constable Otai James. It is pertinent however that the trial court took note that PW5 was drunk when he testified, a matter of demeanour duly recorded by the court.

In a matter wholly dependent on identification such as this, it is crucial for the witness to name assailants at the earliest opportunity before he has had an opportunity to review and be influenced by extraneous factors.

I have also examined the alleged grudge in this matter. In my view the grudge falls both ways. It could a motive on either side, one to tell lies and the other to commit murder. It is clear that the parties are all extremely bitter with each other and this is noted.

In this present case the respondents all set up alibis. I am aware that they did not assume the duty thereby to prove their alibis. The duty and burden of proof remained on the prosecution to adduce evidence to the required standard placing them at the scene of crime in a bid to rebut the alibis.

I will start with A2. His alibi was supported by two witnesses. Neither the evidence of Kyankone nor his witnesses was shaken in cross examination and it appears that indeed he was at a burial. He is also the person first named by PW 1 as his assailant when he made the first statement to PW 4.

DW 7 was a wife of A1 Bakaki. She stated he was at home with the A1 the whole evening. No attempt was made to challenge her on this.

These two alibis therefore appear not to have been challenged by the state.

I have looked at these aspects in light of the difficult conditions the complainant had to identify the attackers and the fact that he did not name his assailants until after several days. I have weighed that evidence against the alibis raised. The onus remained on the prosecution to adduce evidence beyond a reasonable doubt plàcing the respondents at the scene of crime. I find that there is indeed doubt raised as to whether the complainant properly identified the attackers to be the respondents here or he was motivated by the grudge between them after taking several days to review the events and then name them one by one to PW 5. In the result, I resolve this doubt in favour of the appellants.

I therefore find there is no merit in the appeal and in agreement with the trial magistrate I acquit the respondents.

Appeal dismissed.

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Michael Elubu

Judge

27.9.17