

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., MANYINDO, D.C.J., & PLATT, JS.C.)

CRIMINAL APPEAL NO. 4 OF 1986

BETWEEN

A1. PATRICK KASOLO

A2. PATRICK NAIKA

A3. HERBERT KASOLO APPELLANTS

A4. SALIMU IKULUBA

A5. BADIRU BABALANDA

A6. PAUL NUSISI

VERSUS

UGANDA RESPONDENT

(Appeal from the conviction and sentence
of the High Court of Uganda at Jinja
(Mr. Justice Z. Ekirapa) dated 5th
September, 1986).

IN

H.C. CR. SS. CASE NO. 58 OF 1985

JUDGEMENT OF THE COUR

During the night of the 22nd March, 1984 at Nakyaka village in Kamuli District, the house of Nasana Mubi (Pw8) was attacked by a number of people. One of the invaders shot Mubi in the abdomen with a gun and the gang carried away a quantity of Mubi's property, including cash. An alarm was raised and it would appear that as the attackers retreated, they shot a number of people who, either attempted to answer the alarm or in some way or another crossed the path of escape of the gang. In the exercise, four people died and two were seriously injured. These facts gave rise to charges of robbery, murder and attempted murder.

In the High Court nine people were, in the same indictment, charged with robbery contrary to sections 272 and 273 (2) of the Penal Code in count 1, murder contrary to section 183 of the Penal Code in counts 2, 3, 4 and 5 and attempted murder contrary to section 197 (a) of the Penal Code in counts 6 and 7. All the accused persons were acquitted on counts 2 to 7, three of the accused persons, Charles Kalangala (AI), Yusuf Kamala (A8) and Difasi Lukanda (A9) were also acquitted on the remaining count 1. It was in respect of that count that the six appellants were convicted and sentenced to death. The six appellants have now appealed to this court against their convictions.

In his memorandum of appeal, the first appellant, Patrick Kanyolo, represented by Mr. Tuyiringire, put forward three grounds of appeal. They are:-

“1. That his Lordship the learned Judge erred in law and in fact in admitting the evidence regarding the identification of the appellant in view of the grave contradictions in the evidence of PW8 and PW9.

2. That his Lordship the Judge erred in law and in fact to completely reject the defence offered by the appellant thereby occasioning a miscarriage of justice.

3. Alternatively and without prejudice to the foregoing it is contended on behalf of the appellant that the conviction Of the appellant was erroneous according to the evidence as a whole, more so putting into account that the trial Judge found that Pw8 and pw9 could have been mistaken regarding the identification of accused No. one - Charles Kalangala who was acquitted”.

In our view, grounds one and three are really the same in effect, the point raised being that the learned trial Judge should not have relied upon the evidence of PW8 and PW9 in convicting the first appellant.

For the other five appellants, who were represented by Mr. Zaabwe also three grounds of appeal were put forward in their joint memorandum 01’ appeal. These are:

“1. That the learned trial Judge erred in law in that he convicted the appellants of robbery when the evidence was conflicting, insufficient and unsafe to convict on.

2. That the learned trial Judge erred in law in that he convicted the appellants without considering common intention on their part.

3. That the learned trial Judge erred in law in that he rejected the appellants’ alibi when there was no sufficient evidence to negative it.”

The second ground was abandoned and the remaining two grounds are in view the same in effect as those raised by the first appellant.

On the evidence as a whole there can be no doubt that a robbery took place on the night in question. Mubi's property and cash were taken. Mubi was shot in the abdomen a fact testified to by Mubi himself and his wife Mukyala (PW9). There was medical evidence admitted by both sides that Dr. Katende examined Mubi on the 26th April, 1964, about four days after the incident, and found bullet entry and exit wounds on the anterior abdominal walls, lie classified the injury as grievous harm. There is evidence that a deadly weapon was used in the robbery. The fact of the robbery was not even contested in the lower court. The only issue before the lower court therefore, was whether the appellants or any of them took part in the robbery.

After the learned trial Judge had considered the evidence of both sides he concluded that a robbery with aggravation had been committed. He went on to examine whether or not the accused persons or any of them committed the robbery. He addressed his mind, to the question whether or not the conditions favoured correct identification.

He considered the lighting conditions, fear by the witnesses, the duration of the robbery and came to the conclusion that the conditions favoured correct identification.

The learned trial Judge found that all the appellants were identified by Mubi (pw8), his wife, Mukyala (PW9) and Mugumba (PW10) as members of the gang which attacked and robbed Mubi of his property.

In the case of Paulo Musisi (A2 in the lower court), the learned trial Judge found that he had made a statement, the contents of which he repeated in his evidence on oath in which he claimed that on the day in question he travelled to Nakyaka village in the company of some of the other accused persons, Babalanda (A3) and Kanyolo (A7), his brother Byekwaso and a man in army uniform who was armed with a gun which he collected from the bush. He left the group and proceeded to his relative, Lukanda, who was one of the accused persons and who was in company of yet another accused person, Ikuluba. Byekwaso's body was found at the scene of the robbery soon after the gang had left.

In the case of Badiru Babalanda, Herbert Kasolo and Patrick Kanyolo (A3, A4 and A7 in the lower court), the learned trial Judge accepted the evidence of a co-accused, Musisi, to the

effect that they were together in the vicinity of the robbery shortly before it took place. The learned trial Judge observed that Badiru Babalanda (A3) had gone into hiding shortly after the robbery. The learned trial Judge further observed that Patrick Naika (A5) and Herbert Kasolo (A4) were arrested together on the night of the incident. We must point out however, that Herbert Kasolo (A4) was not mentioned by Musisi in his evidence.

For all the appellants it was argued in effect that it was not safe to rely on the evidence of identification Mubi and his wife (Pw8 and Pw9). First because of contradictions and inconsistencies in their evidence and secondly because of possible mistaken identity.

Mr. Tuyiringire for the first appellant submitted that the conditions did not favour correct identification on account of the possibility that light was provided by a candle and not by pressure lamp as both Mubi and his wife had claimed, a matter not resolved by the court. Counsel made this submission on the basis of a police statement allegedly made by Mukyala (PW9).

On this issue the learned trial Judge said,

“The defence argues that there was no pressure lamp but a candle and that only a mattress and a blanket were burnt outside. So there was no sufficient light for proper identification. The defence gets the idea of a candle from the witness’s statement to the police. Be that as it may be the fact remains that there was light. A light from a candle is sufficient for recognition of persons. It may not be sufficient for reading but is definitely sufficient for identification of assailants”.

Apparently it did not matter to the learned trial Judge whether there was a candle or a pressure lamp. He was satisfied that there was sufficient light for purposes of identification. This may well be so but both Mubi and his wife said there was a pressure lamp. Questioned on her police statement, Mukyala said it was a pressure lamp and not a candle as stated in her police statement. All the other witnesses including Magumba (Pw10) and Isabirye (Pw17) said there was a pressure lamp burning in the house although the last witness came after the attackers had gone. None of the witnesses was discredited as having told lies. There was, therefore, evidence on which the learned trial Judge could have safely held that there was light from a pressure lamp and not from a candle, However, the point is not of much significance as will appear later in this judgment.

The most valid point raised in this appeal which is common to all appellants is that of possible mistaken identity. It was the Case for all the appellants that the three eye witnesses Mubi and his wife and Magumba who claimed to have identified the appellants were mistaken as they were in their identification of Kalangala (A1 in the lower court) who was acquitted by the learned trial Judge on that ground. Two of these witnesses, Mubi and his wife claimed that they knew Kalangala before the incident, Mubi knew him as a village mate and Mukyala knew him as the brother of her brother's wife.

We note that Mubi (pw8) was inside the house and he claimed to have recognised Kalangala (A1), Babalanda (A3), Kasolo (A4), Ikuluba (A6) and Kanyolo (A7). All these he knew before and named as they were village mates. He claimed to have recognised Musisi (A2), Kamala (A8) and Lukanda (A9) by appearance. He did not know their names.

Mukyala (PW9) who also was inside the house claimed to have recognised Kalangala (A1), Kasolo (A4), Ikuluba (A6), Kanyolo (A7) and Kamala (A8). She claimed to have known these before. She also claimed to have identified Musisi (A2), Babalanda (A3) and Naika (A5) whom she did not know before.

Magumba (PW10) the third eye witness was outside the house and he claimed the attackers brought property from the house and set it on fire outside the house and by means of the fire from the burning property he was able to recognise Babalanda (A3), Kasolo (A4) and Ikuluba (A6) who were village mates. He also Recognised Musisi (A2) whom he had seen before. He claimed Kalangala (A1) was there although he did not know him before. Magumba claimed to have given the names of Musisi (A2), Babalanda (A3), Kasolo (A4) and Ikuluba (A6) to the police on the night of the robbery.

Detective Corporal Yazid Bazalaki (PW23) visited the scene on the night of the incident to investigate. According to his evidence, Mukyala and Magumba told him that they knew some of their attackers whom they named and directed him to their homes. Those named to him were, Paulo Musisi (A2), Badiru Babalanda (A3), Patrick Naika (A5), Ikuluba (A6) and Yusuf Kamala (A8). We note that Mukyala did not give Kalangala's name to the police. We agree that in the circumstances of this case it would be unsafe to base a conviction on the evidence of Mubi and his wife. Although these two witnesses claimed they knew Kalangala (A1) as a village mate, they were mistaken about him as the learned trial Judge held.

On the other hand, Magumba (PW10) also identified Kalangala (A1) as a man in army uniform but he did not claim to have known this man before nor did he refer to him by name. We note also that Magumba did not claim to have made his identifications in the house but rather outside the house so whether or not at the time Mubi and his wife claimed to have identified the attackers, there was a candle and not a pressure lamp, the matter did not affect Magumba.

Both Mubi and his wife also claimed to have identified Musisi (A2), Babalanda (A3), Kasolo (A4), Ikuluba (A6) and Kanyolo (A7). Mukyala, however, claimed to have identified in addition Naika (A5). Magumba from a different setting that is to say outside the house and perhaps in a more calm atmosphere as the shooting had stopped and he was instructed to collect various items from the house, the head of a sewing machine and two bicycles, he claimed to have recognised the same people, that is to say, Musisi (A2), Babalanda (A3), Kasolo (A4), Naika (A5) and Ikuluba (A6). Magumba did not claim to have recognised Kanyolo (A7). Mukyala and Magumba named Musisi (A2), Babalanda (A3), Naika (5) and Ikuluba (A6) to Detective Corporal Bazalaki. Again we note that the names of Kanyolo (A7) and indeed Kalangala (A1) who as acquitted in the lower court were not included in the list of names given to the police.

The evidence of both Mubi and his wife as to the identification of Musisi (A2), Babalanda (A3), Naika (A5) and Ikuluba (A6) is supported by Magumba. These names were given to the police. At least Mukyala and Magumba were consistent as far as those four accused persons were concerned. We note that even Isabirye (Pw17), Mubi's neighbour confirmed at least two of the names which had been given to the police. These two were the names of Babalanda (3) and Ikuluba (A6).

As regards Musisi (A2) his defence was a denial of having taken part in the attack. In his evidence on oath, however, he claimed that by arrangement he travelled in the company of some of the other accused persons Babalanda (A3), Patrick Kanyolo (A7), soldier in uniform who was armed with a gun he collected from the bush and his brother Byekwaso. He admitted the group arrived at the village around 8.00 or 9.00 a.m and he left the rest of the group to go to his relative Lukanda. Half an hour later he heard an alarm being raised. Apparently he did not answer the alarm. The learned trial Judge accepted the evidence of this accused except where the accused denied taking part in the attack. As far as this accused in

concerned, we are satisfied that on the evidence as a whole was properly identified as having taken part in the robbery. On his own evidence he was near the scene at the time of the robbery in company with some of the gang. We note that he admitted having been in the company of his brother Byekwaso and the latter's body was found at the scene of the robbery shortly after it had taken place. We are satisfied that there is sufficient evidence to support the conviction of Musisi.

Relying on the case of Patrisi Ozia vs. R. 1957 E.A 36 the learned trial Judge accepted the evidence of Musisi against some of his co-accused. Quite rightly, in our view, he approached that evidence with caution and sought corroboration. The learned trial Judge found that the evidence of the eye—witnesses Mubi and his wife and Magumba (PW8), (Pw9) and(Pw11) that they saw Musisi (A2), Babalanda (A3), Kasolo (A4) and Kanyolo (A7) corroborates Musisi's story. The learned trial Judge also found that the finding of Steven Byekwaso's body at the scene of the robbery also corroborates Musisi's evidence. There can be little doubt, therefore, that on the evidence of Musisi as accepted by the learned trial Judge, Musisi (A2), Babalanda (A3) and Kanyolo (A7) were together armed with a gun in the vicinity of the scene of the robbery a matter of minutes before the robbery took place. In his defence Babalanda (A3) claimed he was at home. He had a grudge with Musisi that possibly being the reason why Musisi mentioned his name. The learned trial Judge considered Babalanda's defence and rejected it. The learned trial Judge found that Babalanda (A3) was well—known to Mubi and his wife and Magumba (Pw8, PW9 and PW10). According to Magumba, it was Babalanda (A3) who ordered production of a sewing machine head, and it was Babalanda (A3) to whom Magumba handed one of the bicycles he was made to produce. The names of Babalanda (P3) were given to the police as having been one of the gang.

Kasolo (A4) claimed he was at home with Naika (A5). His story was also rejected, the learned trial Judge having accepted the evidence of Mubi and his wife and Magumba who claimed they saw Kasolo (A4): during the robbery. Magumba knew Kasolo (A4) well as a teacher. Kasolo (A4) was arrested the same night with another accused person, Naika (A5) who had been identified as one of the gang.

Ikuluba (A6) claimed he was at the home of Lukanda (A9). His story was also rejected and the learned trial Judge accepted the evidence of the three eye witnesses that this accused was one of the gang. Magumba knew this accused before the incident and he had even discussed

the possibility of building a house for him. It was to this accused that Magumba handed the head of the sewing machine on the night of the robbery.

In respect of all these accused persons, Babalanda (A3), Kasalo (A4) and Kanyolo (A7) the learned trial Judge took into account the evidence of their co—accused Musisi (A2). We must point out however, that Kasolo (A4) was not mentioned by Musisi as having been in this group before the robbery. Be that as it may the trial Judge quite rightly in our view approached Musisi's evidence with caution as warned in Ozia's case. However, the learned trial Judge does not appear to have directly addressed his mind to the fact that the evidence of Musisi (A2) was accomplice evidence. The learned trial Judge does not say to what extent he regarded Musisi as witness of truth although he relied on his evidence against some of his co—accused.

In the case of Morjaria vs. Republic 1972 E.A.10 the Court of Appeal for East Africa said this at page 16;

“We think it is perhaps convenient at this stage if we touch very briefly on the nature of accomplice evidence and corroboration. An accomplice has to a larger or lesser degree participated in the crime, and his evidence is suspect. If his evidence is disbelieved, that is the end of the matter. Indeed if the evidence of an independent witness is disbelieved, that would be the end of the matter too. However, if the evidence of an accomplice is believed then farther stages set in. a court would then normally look for corroboration of the accomplice evidence. Such corroboration would have to be found in other independent evidence on a material particular linking the accused with the offence. The court would then decide whether the accomplice evidence supported by corroboration is sufficient to sustain a conviction. That of course will depend on the background and circumstance in each Case. Or there may be no corroborative evidence available. In such an event the court will have to decide whether to reject the accomplice evidence or whether it is one of those exceptional cases where the accomplice evidence is so cogent and reliable that the court would after warning itself, be prepared to base a conviction on it. However, a court has to direct its mind specifically on each of the above case”.

The learned trial Judge did not say so but he did not treat Musisi as an entirely truthful witness. Although Musisi denied taking part in the robbery, the learned trial Judge accepted the evidence of eye—witnesses that Musisi took part in the robbery. He must, therefore, have disbelieved the evidence of Musisi that he was not involved in the robbery. It appears that the

learned trial Judge believed and, therefore, accepted as true only part of Musisi's evidence, the part in which Musisi claimed to have beers in the company of some members of the gang in the vicinity and shortly before the robbery took place. The learned trial Judge looked for corroboration which he found in the evidence of the three eye-witnesses who named some members of the gang and the finding of Byekwaso's body at the scene. There is further corroboration of Musisi's story in the fact that the gang was armed with a gun and that one of the gang was in army uniform.

It was, therefore, open to the learned trial Judge to hold that Musisi's evidence that Babalanda, and himself were near the home of Musisi shortly before the robbery and were armed with a gun. These facts would accordingly re-enforce the evidence of identification of the eyewitnesses particularly Magumba (Pw10) who claimed to have known the accused persons before the incident. On that evidence the learned trial Judge was justified in coming to the conclusion that Babalanda (A3) took part in the robbery.

In the case of Kasolo (A4) and Ikuluba (A6) we are satisfied that the evidence of identification of Mubi and his wife supported by the evidence of Magumba as indicated earlier in this judgement, is sufficient to sustain their convictions.

On the evidence as a whole we see no inconsistencies or contradictions in the evidence which are fatal to the learned trial Judge's finding of guilt in respect of Musisi (A2), Babalanda (A5), Kasolo (A4) and Ikuluba (A6). Having accepted the evidence of identification of the accused persons he was bound to reject their defences of alibi which defences raised no reasonable doubt. The learned trial Judge directed himself properly as regards the defence of alibi and in the circumstances we are unable to say that he came to the wrong decision to convict those accused persons on the charge of robbery.

On the other hand we feel somewhat uneasy about the convictions of Naika (A5) and Kanyolo (A7). Mubi (PW8) did not claim to have recognised Naika as One of the assailants although he apparently picked him out of an identification parade. Mubi was, in exactly the same conditions, mistaken about the identity of Kalangala (A1) whom he knew before. Apparently, the only reliable witness regarding the identity of Naika during the robbery is Magumba (PW10). But Magumba also did not know Naika before the incident. Detective Corporal Bazalaki (Pw23) claimed Naika was one of the suspects named by Mukyala and Magumba (Pw9) and (pw10) or perhaps one of them. We find this rather strange because

neither Mukyala nor Magumba know Naika by name before the incident. The list of names Magumba said he gave to the police did not include Naika's name. Another witness Isabirye (Pw17), a neighbour in his evidence referred to three names of suspects given to the police by the two witnesses namely; Badiru, Kasolo and Ikuluba (A3, A4 and A6). Naika's name was not one of them.

In the case of Kanyolo (A7) he was identified by Mubi (PW8) and his wife Mukyala (Pw9) as a person they knew well but as pointed out before, both these witnesses were mistaken in the identity of Kalangala (A1) whom they also claimed to have known well. The only other eye witness, Magumba (PW10), did not claim to have identified Kanyolo and his name was not given to the police on the night of the incident not even by Mukyala who claimed she knew him before the incident.

In his evidence Kanyolo (A7) claimed he came to the scene in answer to the alarm and remained there guarding Byekwaso's body till next day. He claimed to have been present when the police came and heard names of suspects given to the police by Mukyala. This was a daring defence if it was not true. Paradoxically although the accused gave his evidence on oath the prosecutor did not cross examine him at all.

Although Musisi's evidence indicates that Kanyolo (A7) was in the vicinity of the robbery shortly before it took place we are not satisfied that there is reliable and credible evidence that Naika (A5) and Kanyolo (A7) or either of them took part in the robbery. Strong suspicion is thrown on them but we cannot say that there is evidence to prove beyond reasonable doubt that these two or either of them had participated in the robbery.

For the foregoing reasons we dismiss the appeals of Kasolo (appellant 3), Ikuluba (appellant 4), Babalanda (appellant 5) and Musisi (appellant 6). We allow the appeals of Kanyolo (appellant 1) and Naika (appellant 2), quash their convictions and set aside their sentences of death. We direct that these two appellants shall be set free forthwith unless they are otherwise legally held.

Before we take leave of this case, however, we would like to comment on a few unsatisfactory features in it.

Firstly we think that it is undesirable to face an accused person with a whole host of charges. We particularly draw attention to the practice referred to in the case of Yowana Sebusukira vs. Uganda 1965 E.A 684 at page 685 the Court of Appeal said;

“we can see no objection to a departure from the established rule of practice that no other count should be joined to a count of murder or manslaughter, in a case such as the one now under consideration, although it is not ordinary desirable that the trial of such grave offences be complicated by the introduction into the proceedings of additional matter to which consideration must necessarily be given by the Judge and assessors, and which might distract attention from the main issue.”

As we have observed in this judgement the indictment consists of one count of aggravated robbery four counts of murder and two counts of attempted murder. It would have been more desirable to concentrate on the capital offences or perhaps include the lesser offences as alternative charges.

Secondly on the evidence some prosecution witnesses testified that they knew some of the members of the gang as members of the village before the incident. We assume that even in their police statements they must have alluded to this fact. We find it odd that these witnesses should have been asked to pick out from the identification parade people they said they knew before.

Lastly as we have remarked before in this judgement the prosecution should in the interests of justice be conducted by fairly experienced prosecutors. It is too elementary for us to point out that if a witness is not cross examined at all this means his evidence is not challenged. The normal procedure is to indicate to the witness his evidence which it is alleged is not true and to put the correct version to him for his comments.

DATED at Mengo this 11th day of September 1990.

Sgd:

S.W.W. WAMBUZI

CHIEF JUSTICE

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

H.G. PLATT

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE
COPY OF TH ORIGINAL.

B.F.B. BABIGUMIRA
REGISTRA SUPREME COURT