THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S.G. ENGWAU, JA.
HON. JUSTICE A. TWINOMUJUNI, JA.

CRIMINAL APPEAL NO.72 OF 1999

1. ATYAM PATRICK
2. BABU SAM :: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

(Appeal from the High Court of Uganda at Gulu (RUBBY AWERI OPIO, Judge) dated the 2nd of June 1991)

JUDGEMENT OF THE COURT

This appeal is against both conviction and sentence. Patrick Atyam, the first appellant and Sam Babu, the second appellant were indicted together with Abibi Peter (who later escaped from remand prison) for the offence of murder contrary to sections 183 and 184 of the Penal Code Act.

The facts as presented and accepted by the trial court were as follows:
On 24th April 1998 at around 8.00 p.m., Moses Obong, PW1, went to join his brother George Omara, the deceased, who was having a drink at Friends Pub in Lira Town, in the company of Atyam Patrick, Babu Sam and Abibi Peter. At around midnight Moses Obong and the deceased decided to go home. On their way, they decided to wait for a boda-boda bicycle transport at a place called Mukwano Corner. As they waited, both appellants and Abibi arrived and started physically assaulting them. The first appellant started the fight. As he tried to twist Ebong's neck, the latter kicked his private parts and escaped to go and call the police guards at Mukwano

Warehouse, leaving his brother at the mercy of the appellants. On coming back, Ebong found both appellants still assaulting the deceased. Atyam was twisting his neck while Babu was kicking him. When they saw the local askaris approaching, they ran away. The deceased had already passed away. Ebong ran to report to the police at Lira CPS and to his father, Frederick Omara, PW2. He named the appellants as the assailants. Mr. Omara found his son's body lying by the roadside.

The appellants were arrested the following day. At their trial they set up defences of alibi, which were rejected by the trial judge. He convicted them as charged and sentenced them to death.

The original memorandum of appeal was abandoned. The supplementary one comprises four grounds. However, at the hearing grounds 3 and 4 were abandoned, leaving only grounds 1 and 2, which state as follows:

1. The judge erred in fact and law when he failed to properly evaluate the evidence on record and hence came to a wrong decision that the appellants had murdered the deceased.

2. The learned judge erred in fact and law when he rejected the appellant's defence of alibi which was not disproved by the prosecution.

Mr. Max Mutabingwa appearing for both appellants on a state brief argued the two grounds together.

He submitted that the judge did not evaluate the evidence of identification by a single identifying witness, Moses Obong, PWI. He however conceded that the learned judge considered all the relevant factors in identification except the intensity of the light and its source. He argued that the court was not told how far the security lights on the walls were from the scene of crime which was on the street, let alone the intensity of the lights.

Mr. Vincent Okwanga, Senior State Attorney for the respondent supported both the conviction and sentence. He submitted that many factors existed favoring a correct identification of the appellants as the assailants. He pointed out that the source of the light was the electric light on the main Street in Lira town. It was midnight and the town was deserted.

The learned judge held:

> **“Apart from having prior knowledge of the accused persons, there was enough light for proper identification as the incident took place along one of the lit streets in Town. Also the time the incident took was a bit long as to enable the witness identify those who had assaulted the deceased. He appeared to be a credible witness. He was well composed and was not shaken, even during cross-examination”**

We find that the learned judge considered all the relevant factors, including the lighting at the time, along the guidelines set down in **Nabulere and Others vs. Uganda (1979) HCB 77** and applied the cautionary test in **Roria v R (1967) EA 583.** The value of identification evidence depends on all the relevant factors taken together and not only on one factor considered separately. The light might be dazzling bright but if the assailant is a stranger whom the victim only manages to give a flecking look, then the source of lighting alone would not be a very useful factor. However, if the lighting is bright, and the encounter lasts some considerable time, whether the attacker is known to the victim or not this would lend some weight to the evidence of identification. This aspect of the matter was dealt with in **Wassajja v Uganda (1975) E.A 181** where it was held that when the quality of identification is poor, as for example, when it depends solely on a fleeting glance or a long observation made in difficult condition, 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 the case before us, even if the lighting was bad as Mr. Mutabingwa contends, the appellants and the witness and his dead brother were relatives. They had been drinking together from around 8.00 p.m. till midnight, when the witness and his brother decided to leave for home. Most importantly the encounter lasted some considerable time. They were trading accusations. “You, you were boasting”. They were not fighting in silence. There was nobody else around, (to cause confusion) apart from the victims and their assailants, the appellants. The town was deserted. It was in the middle of the town. The witness went to collect a guard, came back, and found them still assaulting his brother. Obviously whatever lighting there might have been, the witness had more than ample opportunity to identify their attackers, even if they had not been known to them.

The learned judge considered all the above. The source of the lighting alone would not vitiate the otherwise correct identification. That evidence alone was overwhelming.

Mr. Mutabingwa further submitted that the learned judge failed to consider the discrepancy between Ebong's evidence in court and his police statement regarding identification. In court he named the three appellants but he did not mention them to the police. Mr. Okwanga contended that the statement which was tendered in court as Ex Dl named the two appellants as the attackers though it was very detailed and was not dated.

This same issue was raised in the lower court and the judge dealt with it as follows:

> **"There are many factors which make statement not to be sacrilege. In the first place, it is not rare to find some investigating officers who lack knowledge and cannot even record their own statements. Others may not be user-friendly to their witnesses. Such witnesses would not have the opportunities to tell their stories confidently and exhaustively. The list is long. That is why what is told in court prevails over the police statements. Also when a witness testifies in court, court can have the opportunity of assessing his credibility. This is not possible with police statements.**
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> **Applying the above test, I found the said witness credible and also consistent. His evidence was not assailed to during cross-examination. He was firm and clear that it was Atyam who twisted the neck of the deceased while Babu was kicking the sides of the deceased. He reported this to the police and also to the father of the deceased. There is therefore no danger of any mistaken identity of the accused."**

The judge saw the witness and observed his demeanor very closely. Unless the witness is a skilled actor his demeanor frequently furnishes a clue to the weight of his evidence. It has been held that while a police statement made by a witness may be used to impeach the credibility of a witness the courts will ordinarily go by the witness's oral evidence (given) on oath.

We are satisfied that the learned judge had the advantage of observing the witness and we are convinced that he exhaustively scrutinised his evidence. There was no possibility of any error in the identification of the appellants.

The appeal is devoid of any merit and is dismissed.

Dated this 2nd day of February 2001

A.E.N. MPAGI-BAHIGEINE
JUSTICE OF APPEAL

S.G. ENGWAU
JUSTICE OF APPEAL

A. TWINOMUJUNI
JUSTICE OF APPEAL