THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. LADY JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ
HON. MR. JUSTICE G. M. OKELLO, JA
HON. LADY JUSTICE A. E. N. MPAGI-BAHIGEINE, JA

CRIMINAL APPEAL NO.94 OF 1999

BETWEEN

ALOIKIM CHARLES :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of the High Court
(Kania, J) dated 13/08/1999 at Soroti in
Criminal Session Case No.48 of 1998)

JUDGMENT OF THE COURT

The appellant was convicted by the High Court sitting at Soroti on 13-8-99 of murder contrary to sections 183 and 184 of the Penal Code Act and was sentenced to death. He has appealed to this court against the conviction.

Julius Opedun, the deceased lived at Ayep village in Soroti District. In his so homestead were two huts, one of which had no door. He also had a kraal for his cattle in the court yard. At about the time of his death, the deceased was suspected by his community to have caused the death of the child of the appellant

On the night of 31-7-96 at about 11:00p.m., the deceased was asleep with his wife (PW2) and their six children in their hut which had a door. Suddenly the door of their hut was forced open.

PW2, who was apparently still awake, got up, raised an alarm and went to the door where she was cut by the attacker on the forehead. She fell down but soon got up as she bled. Her fall woke up the deceased. He also ran to the door where the assailants were. He was also cut on the head and on the neck. He fell down. The attackers went out and entered the hut without a door. Soon they returned and cut the deceased to death. After that they proceeded to the Kraal where they cut some of the cattle of the deceased. When the attackers were in the Kraal, PW2 again raised an alarm. On hearing the alarm, the attackers ran away.

Many people including the local council official (PW3) answered the alarm. PW2 told them that she identified the appellant as one of the attackers. The matter was accordingly reported to the authorities and the appellant was arrested. Meanwhile, Dr. Ochom Akabwai who carried out post mortem examination on the body of the deceased found the cause of death to be Haemathoresis, that the chest cavity was filled with blood. Appellant was indicted for the murder of the deceased. He denied the offence.

At his trial, the appellant set up a defence of alibi which the trial judge rejected, convicted him and sentenced him to death. It is against that conviction that this appeal was brought.

The memorandum of appeal comprises three grounds couched as follows:

(1) That the learned trial judge erred in believing and relying on the evidence of PW2 a single witness to base his conviction of the appellant for murder of the deceased.

(2) That the learned trial judge erred in rejecting the appellant's defence.

(3) That the above errors committed by the learned trial judge occasioned a miscarriage of justice to the appellant.

The major complaint in this appeal is that the learned trial judge erred in acting on the evidence of identification by a single witness when the conditions under which the identification was made did not favour correct identification and there was no corroboration. Mr. Emesu, learned counsel for the appellant pointed out:

(i) That there was no evidence of any source of light which aided PW2 to identify the appellant when the attackers suddenly entered the hut where PW2 and the deceased were,

(ii) **There was no evidence that the torch which the attackers had was ever flashed. Even if there was a bright moon light outside, there was no evidence that it lit inside that hut,**

(iii) **the attack was sudden,**

(iv) **PW2 was cut almost immediately the assailants entered the hut and the blood covered one of her eyes thereby impairing her vision,**

(v) **Even when the attackers went out to and from the hut without a door, the blood which covered PW2's eye could have impaired her vision from accurately identifying the appellant,**

(vi) **The duration of PW2's observation of the attackers as they went to and were returning from the hut without a door was not stated but was only a part of the minutes, the duration of the entire operation. As PW2's eye was covered in blood, her vision must have been impaired,**

(vii) **There is evidence that the appellant had accused the deceased of being responsible for the death of the appellant's child. That made the appellant a prime suspect and it is not far- fetched that PW2 could have been influenced by this that the appellant was one of the attackers.**

Learned counsel submitted that identification in the above conditions could not be free from error. He contended that there was need for corroboration to confirm that the identification was accurate. In his view there was no such corroboration. He prayed that the appeal be allowed.

Mr. Wagona Principal State Attorney who appeared for the State supported the conviction. He contended that despite the unfavourable factors mentioned Mr. Emesu, the appellant was accurately identified. In his view, the factors which favoured correct identification outweighed the unfavourable ones. He pointed out the favourable factors as:-

1. **That there were only two assailants which made it easy for PW2 to identify the appellant whom she had known for 16 years,**
2. **the attackers had a torch which PW2 explained was not flashed directly into her face,**
3. **there was bright moonlight outside,**

4. **the distance between PW2 and the appellant when the attackers went to and returned from the hut without a door was only 6 meters.**

According to Mr. Wagona those conditions favoured correct identification. He submitted that having given the assessors and himself the requisite warning, the trial judge was justified in acting on the evidence of identification even without corroboration. In his view the appellant's alibi was properly rejected since the evidence of identification squarely placed him at the scene of crime.

The law governing the evidence of a single identifying witness was restated in **Abdallah Nabulere vs. Uganda (1979) HCB 77.** It is that court can convict on such evidence after warning the assessors and itself of the special need for a caution before convicting the accused on reliance on the correctness of the identification. The reason for the special caution is that there is a possibility that the witness may be mistaken. The court should therefore, examine closely the circumstances in which the identification was made, particularly the length of time the witness spent with accused., distance between them, source of light, whether the witness knew the accused before the incident All these factors go to the quality of identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality the greater the danger. Where the conditions were difficult, what is needed before convicting is other evidence pointing to guilt.

In the instant case, the trial judge found that the conditions in which PW2, the sole identifying witness, identified the appellant favoured correct identification and relied on her evidence.

We have, as a fist appellate court, reviewed the evidence on record and we agree with Mr. Emesu that the conditions under which PW2 made the identification of the appellant were difficult. The attack took place at night inside a hut. There was no satisfactory evidence of any source of light in that hut where PW2 claimed to have identified the appellant. Even her claim of identification of the appellant from outside in a bright moonlight when the attackers went to and returned from the hut without a door was not satisfactory. Though she sat at the door way, PW2 had already been cut on the head and her one eye was covered in blood thus impairing her vision. She never

claimed to have identified the appellant by his voice. In those circumstances the identification cannot be said to have been free from error.

There is evidence that the community had suspected the deceased to have been responsible for the death of the appellant's child. This puts the appellant a prime suspect in such an attack on the deceased to avenge the death of his child. The possibility that PW2 was influenced by that suspicion and mistakenly identified the appellant as the attacker is not farfetched.

What is needed here is some corroborative evidence to confirm the appellant's guilt to give weight to this evidence of identification. Unfortunately there is no such corroborative evidence. We therefore, think that it is unsafe to allow this conviction to stand on the evidence of identification made under such a difficult condition.

In the result, we allow the appeal, quash the conviction and set aside the sentence of death. We order the appellant to be set free forthwith unless he is being held on some other lawful ground.

Dated at Kampala this 16th day of May 2002.

L E. Makasa-Kikonyogo
DEPUTY CHIEF JUSTICE

G. M. Okello
JUSTICE OF APPEAL.

A. E. N. Mpagi-Bahigeine
JUSTICE OF APPEAL.