THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 126 OF 2008

[Arising out of the conviction and sentence passed by the High Court (Gidudu J) at Bushenyi on 20-10-2008]

BETWEEN

1. KAKUBI PAUL

2. MURAMUZI DAVID::APPELLANTS

AND

UGANDA ::RESPONDENT

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ

HON. JUSTICE.A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE. A.TWINOMUJUNI, JA

JUDGMENT OF THE COURT

This is an appeal from the conviction and sentence passed by the High Court (Gidudu J) at Bushenyi on 20-10-2008. The appellants were convicted of murder contrary to **sections 188 and 189 of the Penal Code Act** and were sentenced to death. Hence this appeal.

The facts giving rise to this appeal are that on 13-07-04, at about 8.00 pm, at Kangwe village in Bushenyi District, one Ntegyerize Jolly hereinafter referred to as the deceased was preparing dinner in her kitchen, in the company of her grand children Nimusiima Richard, (PW3) and Ahimbisibwe Wilbert (PW7) when she stepped out briefly to get some water from the main house. Before reaching the main house she was attacked by two men. Her screams for help attracted PW3 and PW7 from the kitchen who rushed out to check what was happening. These two saw both appellants attacking the deceased.

However, due to fright, PW3 and PW7 hid in the room adjoining the kitchen from where they could peep and see what was happening outside. They saw the 1st appellant who was armed with a panga grabbing the deceased and cutting her. As they ran out to call the neighbours they could hear the deceased crying "*Kakubi you are killing me.*"

They soon returned with the neighbours only to find their grandmother lying dead in a pool of blood. The body had cut wounds on the arm and back of the neck. The grandchildren told the neighours that they had recognized the appellants as the assailants. The appellants had all along been threatening to kill the deceased for being a witch.

The appellants were subsequently arrested, indicted and prosecuted for murder **c/s and 189 of the Penal Code Act**. By way of defence they set up an alibi to the effect that they were keeping vigil at a deceased relative's home, some kilometers away.

The learned judge rejected the defence and believed the identification evidence of PW3 and PW7. He convicted the appellants as charged and sentenced them to death.

Four grounds of appeal were raised, namely:

1. **That the learned trial judge erred in law and fact when he convicted the appellants on the basis of unsatisfactory identification evidence.**
2. **That the learned judge erred in law and fact as regards the application of the law regarding circumstantial evidence.**
3. **That the learned trial judge erred in law and fact when he disregarded the appellant's defence of alibi which was credible.**
4. **That the learned judge erred in law and fact when he failed to adequately evaluate all the material evidence adduced at the trial and hence reached an erroneous decision which resulted into a serious miscarriage of justice to the prejudice of the said appellants.**

Mr. Henry Kunya appeared for the appellants while learned State Attorney, Ms. Faridah Nakayiza represented the respondent.

Mr. Kunya contended that the identification evidence of PW3 andPW7 who were at the scene of crime was unsatisfactory. The evidence of PW3 specially brought out matters

which were ignored by the judge. The offence was committed at 8.00 p.m. PW3 told court of the struggle between the appellants and the deceased but decided to run away to a neighbour who was never called to testify. She was too terrified and never mentioned the names of the assailants. During the attack the appellants kept on pacing up and down as the incident happened outside. It was thus difficult to see who was doing what at what time. Despite the fact that there was moonlight and fire in the kitchen, it was not established whether she saw the 1st appellant cut the deceased or not.

Mr. Kunya criticized the judge when he believed that PW3 heard the 1st and 2nd appellants talk but they did not estimate the time the encounter lasted. It was also stated that the appellants had a panga but it was also said that they had knives. These contradictions were not resolved. PW3 had run into the banana plantation to hide. She, thus, did not observe anything correctly. The learned trial judge thus wrongly accepted the evidence of PW3 and PW7 which was not judicially evaluated. He cited **Kanakulya Muhamed v. Uganda, C.A.C.A No**. **60 of 2003** in support thereof and prayed court to allow this ground of appeal on the ground that the trial judge did not take into account the negative aspects of the prosecution evidence.

In reply, Ms. Nakayiza (SA) contended that the identification of the appellants was proper. It was based on the evidence of PW3 and PW7 who are the deceased's grandchildren. This was direct evidence. PW3 said that prior to the incident he had known both the 1st and 2nd appellants for about two years. The circumstances were favourable for identification. PW3 said that the attack was at about 8.00 p.m. There was moon light. The 2nd appellant went to the kitchen where PW7 and PW3 were. There was fire in that kitchen by which PW3 and PW7 were able to identify the 1st appellant. After running to the banana plantation, PW3 hid about 10 meters away and was able to see, identify and observe what was going on with the help of the moonlight and the kitchen fire. PW3 watched the 2nd appellant for 2 minutes as he kept on glancing into the kitchen. PW3 also saw the 2nd appellant trying to cut the deceased's hand with a panga. Both the appellants were at the scene of crime and PW3 also heard the deceased mention the name of the first appellant.

Concerning the contradiction of the weaponry used the witnesses got confused as to whether it was a panga or knife, due to the lapse of time. Moreover, the issue of the weaponry did not come up during the trial. Ms. Nakayiza therefore prayed for dismissal of ground I.

The learned trial judge ruled:

"…….both A 1 and A 2 are said to have been seen at the scene and were seen by both PW3 and PW7. There would be no justification to reject the evidence of PW3 and PW7 regarding identification, moreover, the issue of PW3 and PW7 being young did not arise during the trial. At the trial they were not of tender years and their evidence does not require corroboration. What is important is for this court to find the witness truthful which I hereby do for the reasons I have given above. The accused were neighbours known to PW3 and PW7. PW3 heard A2 speak. There was enough time for observation. See Nabulere & Ors Vs. Uganda [1979] HCB 77".

We are unable to fault the learned trial judge's finding. The circumstances under which PW3 and PW7 identified both appellants were sufficiently favourable. Both PW3 and PW7 had prior to the incident known both appellant for about two years. The two appellants were their neighbours. Though the attack occurred at around 8.00 p.m. there was moonlight and the fire in the kitchen by which PW3 and PW7 able to recognize them. The 2nd appellant also struggled with and injured PW7. PW7 exhibited his scar to the court. PW3 finally heard the deceased cry out, "*Kakubi and David you have killed me*" PW3 explained the reason why he did not immediately tell the people that it was the appellants who had killed the deceased because he was so afraid to mention that it was his neighbours who had killed the deceased. We endorse that judge's findings on ground I and dismiss it forthwith.

Regarding ground 3

Mr. Kunya contended that the appellant's defence of alibi was credible and available to the appellants. D/Sgt Ngambeki the police officer who arrested the 1st appellant received information that the 1st appellant was not at the scene of crime. Kyomuhendo Juliet

(PW5) also testified that she saw the appellants going to attend a funeral. Katunda Apollo (DW4) testified that he last saw the 1st appellant at the funeral. The Chairman also confirmed his presence at the funeral. Mr. Kunya concluded that, therefore, the learned Judge erred in law and fact in dismissing the appellants' alibi. He prayed that the court allows this ground of appeal.

Ms. Nakayiza, the learned State Attorney, submitted that the trial judge relied on the direct evidence of PW3 and PW7. Even PW4 and PW6 gave circumstantial evidence that three days prior to the killing of the deceased the 1st appellant, Mutembe Boniface, approached (PW4) about a witch to be dealt with within three days. PW8 also met the appellants somewhere in the nearby trading centre. Their presence at the funeral rites held 5 km away was just a ploy to deceive the public that they were there yet they escaped back to execute their plans and went back again to the funeral rites. The judge critically and judicially analyzed their alibi, evaluated all the evidence and thereby came to a proper conclusion. Counsel prayed that the appeal be dismissed.

While rejecting the appellants' alibi, the trial judge had this to say:

"**I find that the alibi of the accused in regard to the time when murder occurred to be false. The prosecution evidence of PW4 and PW6 who saw the accused retire from Buhweju late evening destroys the alibi. While PW3 and PW7 placed the accused at the scene. The letter by the LCI was a valid only for the fact that the accused had been at Omukashenyi during day for burial of DW4's daughter and returned there in the night to stay at the vigil till the morning of 14/7/04 after they had accomplished their mission. The burial and vigil just provided the opportunity for the accused to plead after they had murdered the deceased".**

It is well settled that it is not up to the accused person to establish his alibi but rather the burden is on the prosecution to satisfy the court beyond reasonable doubt that the accused person was at the scene of crime at the material time See **Bogere Moses & Another v. Uganda SCCA No. 1/1997.**

In their defence, the appellants testified that on the material night, they were attending funeral rites in the home of Muramuzi David (DW2) some 16 kms away. In support of their testimonies, Rugwira Silvesta (DW3) and Katunda Apollo (DW4) said that both

appellants were at the funeral They were surprised to hear from Karyeija George William (DW5) in the morning that they had been implicated in the death of a one Jolly Ntengyereize. In support of the appellants DW3, the Chairman of the village wrote a letter that was signed by other LC committee members that both appellants had been at the said funeral rites all night long.

While PW4 and PW6 saw the appellants persons return from Buhweju late evening, PW3 and PW7 placed them at the scene of crime. PW8 estimated that the distance between the scene of crime and the place of the funeral to be just about 5 kms. It is clear the distance between the two places was not prohibitive. Considering all the circumstances it is clear that the appellants were able to commit the crime and immediately retire to the funeral venue to cover their deed up. On the other hand, the defences did not indicate at what time of the night the appellants were at the funeral. Funerals tend to be chaotic affairs with mourners milling around, some leaving and others arriving or sleeping, it cannot be said with certainty that a person seen this minute will be around the next minute. The appellants' conduct of fleeing their home on the night of the incident, their absence from the funeral of the deceased despite the fact that they were the next door neighbours to the deceased, their perpetual complaint that the deceased was bewitching them and their avowed intent to harm her if she did not leave the village are factors pointing to their guilt; this coupled with the letter written by DW5, the LC Chairman and signed by other LC committee members stating that AI and A2 had been at the said funeral leave no doubt that the appellants murdered the deceased and were trying to cover it up with the assistance of the village authorities, who were quietly nursing a grudge against the deceased for being a witch.

The trial Judge thus rightly held that the prosecution placed the appellants at the scene of crime. Ground No. 3 also fails.

Concerning grounds 2 and 4, Mr. Kunya submitted that it was the appellants' contention that no circumstantial evidence existed concerning this case at all The learned Judge said in his judgment that Saverino told the people that the 1st appellant said on 10/7/2004 that he would kill the deceased and that the deceased was actually killed on 11/7/2004 yet Saverino was not called to testify. This matter was neither reported to the police nor the

LC. If the deceased was a witch known to the people in the village why should it be the appellants to be blamed for her murder? As far as the conduct of appellants is concerned, they only took cover for fear that the relatives of the deceased would kill them. The 1st appellant reported to the police after 5 days whereas the 2nd appellant reported to the LCs where he was detained for safety. Mr. Kunya thus prayed this court to find that the learned trial judge did not consider the negative aspects of this case. Had he done so, his findings would have been different.

In her response, Ms. Nakayiza learned State Attorney submitted that the trial judge relied on the testimony of PW4 and PW6 who gave circumstantial evidence that three days prior to the killing of the deceased the 1st appellant approached PW4 about a witch to be dealt within three days. On the fateful night PW8 also met the appellants somewhere in the nearby trading centre. The 1st appellant had a panga under his arm. Their presence at the funeral rites 5 kms away was just to deceive the public that they were there yet they escaped to execute their plans and went back to the funeral rites. The judge critically evaluated all the evidence and came to the correct conclusion. Thus, the appeal should be dismissed.

The learned trial judge ruled:

"Apart from the direct evidence of PW3 and PW7 which I accept, I find ample circumstantial evidence to connect the accused to the crime. Three days after complaining to PW2, the deceased is murdered. AI had vowed to do so and refused to buy the idea of holding a meeting with Katabarwa heir to the family of the deceased. Two days after PW5 had found DW5 hatching a plan to kill the deceased, she is murdered. Then the morning after the murder, the homes of AI and A2 plus their father DW5 who were the next neighbours are deserted in pre-planned style. When DW5 goes to DW4's village at Omukashenyi where AI and A2 had whiled away on beer at the funeral, a letter is written and was actually given to the accused and their father DW5 as a form of defence and the accused and their father went to Kyanyenyi sub-county with their letter while other families scattered amongst

relatives…… The circumstantial evidence on record is incapable of any other explanation other than the guilty of the accused"

The principles governing circumstantial evidence have been set down in numerous authorities including **Akol Patrick and 4 others v. Uganda Criminal Appeal No. 60/2002** where this court observed:

"**Where the evidence is circumstantial, it must be such that it produces moral certainty beyond reasonable doubt that it is the accused who committed the crime. The facts proved by the prosecution must be such that there is no other co-existing circumstances which would destroy the inference of guilty. That is to say, in order to support a conviction, circumstantial evidence must point irresistibly to the appellant as the one who committed the offence for which he/she is charged"**

On a thorough perusal of the record we are in complete agreement with the learned trial judge that the only logical conclusion on the available circumstantial evidence is that the appellants are the ones who committed the offence in question. Beside, PW4 and PW6 testimony that they saw the 1st and 2nd appellant riding a bicycle on their way home (towards the scene of crime) tallys DW4's testimony that he saw the appellants with a bicycle at the funeral rites which was just 5 kms away. Furthermore, PW2 also testified that the appellants had previously threatened to kill the deceased and although PW2 informed the Local Council, the deceased was killed before any action could be taken.

This circumstantial evidence is corroborated by the evidence of PW3 and PW7 who saw and identified the appellants at the scene of crime. All the evidence direct and circumstantial irresistibly points to the appellants' guilt and is incompatible with their innocence.

We therefore dismiss this appeal forthwith.

Dated at Kampala this 29th Day of December 2009.

Hon. Justice L.E.M.Mukasa-Kikonyogo

DEPUTY CHIEF JUSTICE

Hon. Justice A.E.N.Mpagi-Bahigeine

JUSTICE OF APPEAL

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Hon. Justice A.Twinomujuni

JUSTICE OF APPEAL