THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO. 0400 OF 2014

ARISING FROM HCT-CS-NO. 77 OF 2007

JAMADA NZABAIKUKIZE..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

Coram

Hon. Mr. Justice Remmy Kasule, JA
Hon. Mr. Justice Eldad Mwangusya, JA
Hon Mr. Justice F.M.S. Egonda Ntende, JA

JUDGMENT

The Appellant, **JAMADA NZABAIKUKIZE** alias **EMMANUEL** together with five others, namely **MUKIZA TOMASI, KARIMBANAHO DAMASENI, NZAMUKUNDA JOYCE, NAMUYE JOHN and KAMANZI** were indicted and tried for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. It was alleged that on the 21st day of January, 2007 at Ruhita village, Kasese District they murdered **ALIVERA NKWANO NALONGO**. The Appellant was convicted as indicted and jailed for life. All his co-accused were acquitted.

The Appellant being aggrieved and dissatisfied with his conviction and sentence appeals to this Court on the following grounds:-

1. **That the learned Trial Judge erred in Law and in fact when he relied on the evidence of a single identifying witness in absence of corroboration in convicting the Appellant thereby occasioning a miscarriage of Justice to the Appellant.**

2. **The sentence given by the learned Trial Judge was illegal, manifestly excessive, harsh and unfair in the circumstances.**

The facts accepted by the trial Judge, were that the deceased, **ALIVERA NKWANO NALONGO** was married to Safari Boniface who testified at the trial as PW3 and they lived at Ruhita village, Kasese District together with **MUKUMUSONI FAITH** (PW2) who was a step daughter to the deceased. On 21st January 2007 at about 7:30 p.m. the deceased was at home with her step daughter when the Appellant and **DAMASENI** who was one of those acquitted approached the home leaving four others standing fifteen meters away. The Appellant was offered a chair and PW2 went inside the house to pick another chair for Damaseni. As she was coming out of the house with the second chair she saw the Appellant grabbing the deceased and stabbing her. The deceased bled to death. The post mortem examination on the body performed by Dr. Maninuka (PW1) revealed severe deep cut wounds around the neck and a deep cut through the left forearm close to the elbow joint. The cause of death was haemorrhagic shock following excessive bleeding from stab wounds in the neck. According to the Doctor, the wounds were likely to have been caused by a sharp object such as a panga or knife. PW2 saw a panga near where the deceased was killed.

The appellant's version at the trial was that on 21.01.2007, when he is alleged to have killed the deceased in Kasese, he was at his home in Mubende and all his life he had never been to Kasese till he was taken there

after his arrest effected by the Police from his home in Mubende. He denied knowledge of PW2 whom he had never stayed with and despite being tortured denied having killed the deceased.

At the hearing of his appeal the Appellant was represented by Mr. Acellam Collins while the Respondent was represented by Ms Jenifer Amumpaire, a Senior State Attorney.

On the first ground of appeal Mr. Accellam submitted that the identification of the Appellant by PW2 was made under very difficult circumstances which did not favour correct identification. The conditions that made correct identification difficult were that at the time the alleged murder was committed it was getting dark and the witness was scared.

On sentence, Counsel submitted that the trial judge had not taken the period the Appellant had spend on remand into consideration which is a Constitutional requirement. The fact that the Appellant was a first offender had also not been considered. He prayed that if the conviction was maintained by the Court the sentence, which according to him is harsh and excessive, should be reduced.

Ms Amumpaire, supported both the conviction and sentence. She submitted that PW2 positively identified the Appellant during the commission of the offence. According to her, the prevailing conditions favoured correct identification. These conditions were that there was still light, the witness knew the Appellant before, there was a short distance between the witness and the Appellant when she saw him stabbing the deceased, the incident took sufficient time to enable the witness identify the Appellant and could not have been mistaken about his identity.

On sentence, Counsel submitted that the sentence given by the trial Court was not illegal or manifestly harsh and excessive as to warrant interference by this Court. This was in spite of the fact that there was no evidence that

the remand period had been taken into account and her concession that the Appellant was not given a an opportunity to say something in mitigation of his sentence.

It is the duty of a first Appellate Court to review and re-evaluate the evidence adduced at the trial and reach its own conclusions, bearing in mind that the Appellate Court did not have the same opportunity, as the trial Court had to hear and see the witnesses testify and observe their demeanor (see Rule 30 (i) (a) of the Court of Appeal Rules and **Pandya Vs R [1975] E.A. 336**.

The evidence at the trial, that is the subject to re evaluation by this Court, consists mainly of the evidence of PW2 who claims to have identified the Appellant as the one who came with others and did the stabbing of the deceased and that of the Appellant who set up an alibi to the effect that on the night the deceased was killed he was at his house in Mubende and not Kasese. In effect the case for the prosecution depended entirely on the evidence of visual identification by a single witness which has been a subject of discussion in a number of decisions of our Courts, including the Supreme Court where in the case of **Moses Bogere and Another Vs Uganda (Supreme Court Criminal Appeal No. 1 1997**) Court stated the approach to be taken by a trial Court in dealing with evidence of identification by eye witnesses in a criminal case as hereunder:-

> ***"This Court has in many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in Criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of mistaken identity. The Court should proceed to evaluate the evidence cautiously***

so that it does not convict or uphold a conviction unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole, namely, the evidence if any of the factors favouring correct identification together with those rendering it difficult. It is trite Law that no piece of evidence should be weighed except in relation to all the rest of the evidence. (see Sulaiman Katusabe Vs Uganda S.C. Cr. App No 7 of 1991) (Unreported).”

In the same case the Supreme Court cited with approval the case of **Roria Vs Republic [1967] E.A**. where the former Court of Appeal for East Africa highlighted the problems related to cases of visual identification especially when the evidence is by a single witness as it was in the instant case. This is what is stated in **Roria’s** case:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardener LC said recently in the House of Lords in the course of a debate ……” there may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if they are as many as ten – it is a question of identity – that danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction base on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances it is safer to act on such identification”

In the case before us the trial Judge was cautious of the danger of convicting the Appellant on the evidence of a single identifying witness. He also cautioned the assessors of the danger.

A number of decisions have evolved rules of practice to minimize the danger that innocent people may be wrongly convicted on a mistaken identity. The case of **Abudalah Nabulele & Two Others Vs Uganda (Court of Appeal for Uganda Criminal Appeal No 9 of 1978** is one of the leading cases and the following rules are stated therein:-

(a) The testimony of a single witness regarding identification must be tested with the greatest care.

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the Judge adverts to the danger of basing a conviction on such evidence alone.

The same authority highlights some factors which will assist Court to determine whether the conditions under which the identification is claimed to have been made were or were not difficult. This, according to the case of **Moses Bogere Vs Uganda (supra)** is the starting point. These factors are the length of time the accused was under observation, the distance, the light and the familiarity of the witness with the accused.

In the case before us, according to PW2 the time of the attack was 7:30 p.m. and it was getting dark. She together with the deceased were still outside. That is where they received both the Appellant and Damaseni. This is an

indication that it was not yet dark. The Appellant was offered a chair as a visitor whom PW2 knew as her uncle. This could not have been done in darkness. The relationship between the witness and the Appellant is another consideration in determining the reliability of the identifying witness and in the case of **Nabulere Vs Uganda** the Court makes a distinction between a witness who recognises an assailant and one who merely identifies him or her. This is what was stated in relation to the single indentifying witness who knew the assailants before:-

> ***" Mary knew all the three Appellants well before and in her case it was <u>more recognition than mere identification</u>. There was evidence at least from Kazimbye that soon after the attack Mary named all three Appellants to the first people to answer the alarm."***

In this case PW2 recognised the Appellant whom she offered a chair so when she saw him stabbing the deceased she already knew him. She was bringing a chair to a second visitor whom she also knew. When she saw the Appellant stabbing the deceased she was only a meter away.

Although one of the factors to determine the reliability of identification evidence is the length of time an accused is under observation, this is not so much of an issue here because PW2 recognised the Appellant before offering him a chair and this is instantaneous on a person well known to the witness. Like in the case of **Naburele** the witness named the Appellant to her father, Safari Boniface (P.W.3) and it was on this information that the Appellant was arrested from Mubende.

Apart from the light, Mr. Acellam submitted that because the witness was scared she could not have positively identified the Appellant. In the first place the witness never said anything on whether she was scared or not. Secondly, she welcomed the Appellant as a relative and there was nothing to

scare her at the time she offered him a chair. Thirdly, the Supreme Court in the case of **Moses Bogere Vs Uganda** (supra) made an observation in relation to alleged frightened victims who give evidence, as follows:

> ***"We would not wish to give the impression that frightened victims of attack cannot identify their attackers; nor that if one, in the panic of the moment, failed to identify his attackers initially, he cannot recognise him in the safety of hiding. What we wish to highlight, however, is that such are factors that must be taken into consideration in evaluating the evidence in order to determine if conditions were easy or difficult for identification."***

We have carefully re-evaluated the factors that could have made it difficult for the identifying witness to identify the Appellant as raised by Mr. Acellam together with the factors that favoured identification free from error. In our view the conditions prevailing at the time of the attack favoured a correct identification. In summary there was still light which enabled the witness to recognise the Appellant who was not a stranger to her. She recognized him when she offered him a chair and again when she saw him stabbing the deceased. It was not a fleeting glance. We also take into account the defence of alibi raised by the Appellant as guided by the Supreme Court in the case of **Moses Bogere Vs Uganda (Supra**) where it was directed as follows:-

> ***"what then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the Court must not base itself on the isolated evaluation of the prosecution***

evidence alone, but must base itself upon the valuation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denies it but also adduces evidence showing that he was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and hold that because of that acceptance perse the other version is unsustainable."

We agree with the above principle. In the instant case we have examined the circumstances under which the Appellant was allegedly indentified at the scene as well as bearing in mind his own version that he was away in Mubende and not Kasese on the evening the deceased was killed. The Appellant also denied knowledge of the witness who testified that she knew him and saw him at Kasese.

The conditions favouring correct identification and those against have been carefully considered as required by Law and we recognise the danger of acting on the evidence of a single indentifying witness as directed in the authorities cited in this judgment. We are satisfied that the Appellant's identification at the scene was positive and free from error. Proof to the required standard that the Appellant was at the scene at the material time has been achieved and his conviction is upheld.

On the appeal against sentence the criteria for interfering with the discretion of a sentencing Court by an Appellate is well settled. We rely on the authority of **Kiwalabye Bernard Vs Uganda Supreme Court Criminal Appeal No. 143 of 2001** which stated the criteria as follows:

"The Appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion, unless the exercise of the discretion is such that it results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

As already stated, Counsel for the Appellant, rightly in our view, submitted that the period the Appellant has spend on remand which the court ought to have considered under Article 23, (8) of the Constitution was not considered at all. Counsel for the Respondent conceded this fact. Counsel for the Respondent also conceded that the Appellant was not given an opportunity to say something which is a requirement under section 98 of the Trial on Indictments Act, Cap 23 Laws of Uganda. It was also stated in favour of the Appellant that he was a first offender which goes towards mitigation of his sentence. On the basis of all these factors, we consider this case to be one of those that the Appellate Court would interfere with the discretion of the trial judge, because an important matter was not considered without losing sight of the gravity of the offence and the brutality with which an innocent woman was attacked in her home and cut to death. We consider a term of imprisonment of twenty years would meet the ends of justice.

In the circumstances and for the foregoing reasons the appeal against conviction is dismissed while the one against sentence is allowed to the extent that instead of a life sentence the Appellant is to serve a term of imprisonment of twenty years from the date of his conviction.
It is so ordered.

Dated at Fort Portal this 18th day of December 2014

Hon Mr. Justice Remmy Kasule,
JUSTICE COURT OF APPEAL

Hon Mr. Eldad Mwangusya,
JUSTICE COURT OF APPEAL

Hon. Mr. Justice F. M. S. Egonda Ntende,
JUSTICE COURT OF APPEAL