IN THE COURT OF APPEAL FOR UGANDA

AT KAMPALA

CRIMINAL APPEAL NO. 18 OF 1977

BETWEEN

HENRY FRANCIS RUBINGO ………………………………………………..APPELLANT

AND

UGANDA……………………..……………………………………………… RESPONDENT

(Appeal from a conviction & sentence of

the High Court of Uganda at Kabale

(Ssekandi, J.) dated 12th September,1977

in

Criminal Session Case No. 21 of 1977)

JUDGMENT OF THE COURT

SAIED, C.J.:

The appellant is a young man aged about 25. He was convicted of murdering his father, Samuel Kayongwe, and sentenced to death. He now appeals from that conviction.

According to the post—mortem report (Exh. P1) of Dr. Tuunde, which was admitted, the deceased aged 50 had the following external injuries: (1) multiple cut wounds on the head, face and neck of such severity that the doctor stated that the face and the neck had been completely chopped to pieces and the wounds ran into each other down to the spine; (2) small wound on the right middle finger. Internally the doctor found that the cut wounds on the head penetrated the brain, and the spinal cord was completely transected. The cause of death was the severed spinal cord and, excessive loss of blood.

The undisputed facts of this case fall within a narrow compass. On 23rd January, 1976 the deceased and Bernard Karyabaruma (P.W.4) left a restaurant where they had been drinking non—intoxicant banana juice for home about l$^1/_2$ miles away, as the sun was setting. They were on a footpath, P.W.4 leading the way with the deceased following six yards behind him.

About a mile from the restaurant the path passes through a banana plantation. According to the Gombolola chief Tirwomwe (P.W.7), who visited the scene the same evening, the banana plantation starts some 20 yards on either side of the path. However, it was in the plantation that P.W.4 heard the deceased's cry: "Rubingo you have killing me." P.W.4 turned round and saw the deceased on the ground with the appellant bending over him and cutting him with a panga The witness dived at the appellant and grappled with him from behind to prevent him from striking the deceased. The appellant is alleged to have bitten him on both arms and just as P.W.4 eased his hold the appellant immediately ran away. P.W.4 gave the alarm which was answered by the appellant's brother James Karyagambwa (P.W.6) to whom p.w.4 reported that Rubingo (the appellant) had hilled the deceased. After some other people had gathered p.w.6 ran to the home of the gombolola chief to report his father's killing. Although James said that he made the report to this chieP.W.7 did not mention such a report, nor did he talk of telling James that the appellant was already in custody. The chief's testimony was that at about 8 p.m. he was called out by one of his askaris and, as a result of what he was told, he approached the appellant who appeared reluctant to speak in the presence of the askaris. The chief took him aside and the appellant confessed that he had killed his father with a panga which he had thrown somewhere he could not remember. The appellant was thereupon detained and the chief went to visit the scene. Under cross—examination the chief also testified about a threat which the appellant was alleged to have made to the deceased some two months previously arising out of the deceased's refusal to give his son some land. The chief said that he had warned the appellant not to quarrel with his father.

The appellant pleaded alibi. He said that he left Karabayi's bar where he used to work at about 9 p.m. for home, about a mile away. He heard an alarm half way to the effect that his father had been killed. He went to the scene and on enquiring from P.W.4 was told that the assailant was not known. The appellant testified that he reported to P.W.7 about the death of his father and accompanied the chief to the scone where for the first time P.W.4 accused him of killing the deceased.

The assessors were divided in their opinion. One was satisfied with the identification and guilt of the appellant, while the other doubted the evidence of the sole identifying witness, P.w.4.

For the appellant Dr. Byamugisha argued two grounds of appeal. First he submitted that the learned trial judge having correctly and properly directed the assessors and himself on the law concerning the evidence of a sole identifying witness erred in applying the facts of this case to those principles. His second criticism was that the learned trial judge did not properly consider the defence of alibi.

It is manifest that the prosecution case was based upon the evidence of the sole identifying witness, P.w.4, and. the confession allegedly made to the gombolola chief. The learned trial judge appreciated this as well as the danger inherent in accepting and founding a conviction upon such evidence. It is conceded and rightly in our opinion that he correctly directed the assessors and himself on the issue at identification, saying:

> "I also directed them as indeed I direct myself that while it is legally possible to convict on the evidence of a single identifying witness in practice it is unsafe to do so especially when the conditions favouring a correct identification are difficult. In such circumstances what is required is evidence' which supports the evidence of identification and which if taken together with it removes any doubt as to the correctness of the identification and the possibility of a mistaken identity; see Stephen Limbasia v. Rep., Cr. Appl. No.98/74 (EACA) and David Mukasa & Another v. Uganda, Cr. Appl. No. 41/76 (EACA)."

This direction sad the two which reliance was placed by the learned judge are based upon the celebrated authority of Abdalla bin Wendo v. Reg., cited with approval in Roria v. Rep., (1967) E.A. 583. We remind ourselves that the true test, in the case of a single identifying witness at night, is not whether the evidence of such a witness is reliable but whether the evidence of identification can be safely accepted as free from the possibility of error. We remind ourselves further, as was held in John Millichamp, (1921) 16 Cr. App. P. 83, that where the sole defence is an alibi, identification by a single witness must be conducted with great care and the summing up must deal carefully with the facts of the identification. During argument it was suggested by the appellant's learned counsel that the judge had not adverted to the sole defence of alibi when he considered the case for the prosecution. We are unable to agree. Reading his summing up to the assessors and his judgment in its entirety it seems to us that the learned judge was throughout conscious of such a defence which, for the reasons he gave, was negatived by the prosecution

evidence. This essentially centered round the evidence of evidence of P.W.4 whose testimony he subjected to very close and critical scrutiny. It was because of the different times mentioned by the prosecution and the defence that the learned judge dealt exhaustively with this vitally important aspect of the case, and came to the conclusion that P.W.4 was not only a truthful witness but also that the incident having happened soon after sunset was seen by P.W.4 in sufficient light so as to negative the possibility of mistaken identity. It is unfortunate that P.W.4 did not specify the time he and the deceased left the restaurant for their homes, about $1^1/_2$ miles away. We do not find this unusual nor is it odd for rural folk to estimate time by the position of the sun. But p.w.4 did categorically fix the time of their departure when he said under cross—examination. “We left Baritoto’s place when the sun was setting. It is about 1 mile from Baritoto to where the deceased was attacked.” Earlier on he had said that the attack came after sun—set during twilight. That would seem to be quite reasonable if they left the restaurant at sun—set and it would seem obvious that the attack occurred during the faint twilight. P.W.4 grappled with the assailant and was bitten on both arms. The man he identified as the appellant he had known since childhood. Notwithstanding the fact that he was excited and it was twilight the fact that he grappled with the assailant whom he had known for so long is a potent factor in favour of a correct identification by him. The learned trial judge who had the opportunity of hearing and seeing this witness was in a better position to adjudicate upon his credibility. We see no reason to differ from his findings.

Besides the learned judge went further to consider whether in the circumstances there was other evidence to support the identification made by P.W.4. He rejected the appellant’s claim that he was arrested at the scene when he returned with the chief. This was never put to the chief when he gave evidence; thus the chief’s testimony concerning the circumstances of the appellant’s arrest was unscathed. Likewise his assertion that he was arrested at the scene after being accused by P.W.4 for the first time in the presence of the chief was not put to the other main witnesses, P.W.4 and his own brother p.w.6. Neither of them saw him at the scene again after his escape from P.W.4. The learned trial judge accepted the chief as a truthful witness and we are not persuaded that he was wrong in this holding. Like him we too are left in no doubt that tile appellant went to the chief to give himself up. This is one circumstance which lends considerable support to the initial identification made by P.W.4.

It was brought out by the defence that the appellant had two months previously threatened to kill the deceased for refusing to give him land. None of the other prosecution witnesses including the appellant's brother seemed to know of such a threat, and the appellant himself denied making it in his testimony. We have given this matter anxious thought and have reached the conclusion that if the chief was a truthful witness and this evidence of a previous threat was brought out during his cross—examination it could not but be true. Just as such evidence of a previous threat to kill the deceased may corroborate a confession on the authority of Waihi And Another v. Uganda (1968) E.A. 278, we strongly feel that it can equally provide other evidence necessary for accepting the evidence of a sole identifying witness provided the standard set out in Waihi (supra) is satisfied. We do not know the circumstances in which the threat was made but it was apparently serious enough for the deceased to report his son to the chief. The chief also did not take it lightly and warned the appellant. It was made some two months previously and was due to the deceased's refusal to give the appellant land. Those who have had to deal with land matters will realise that such a desire to acquire land or disputes concerning land are seldom if ever at all forgotten. The interval of time between the utterance and the killing of about two months in the circumstances is not long enough in our opinion to make the utterance irrelevant. This is another factor by way of other evidence to provide support for the identification made by P.W.4.

Lastly there is the confession of the appellant to the chief. No objection to it a1rnissibilit was taken during the trial, but the appellant repudiated it during his defence. The learned judge directed himself and the assessors in conformity with the law on this subject set out in Tuwamoi v. Uganda, (1967) E.A. 84. For the reasons he stated and which have been reflected in our judgment he found not only that the chief was a truthful end reliable witness but that the appellant's confession that he had killed his father was true. We are the same opinion, the identification evidence of the solo witness P.W.4 being amply supported by other evidence and the previous threat also going to corroborate that confession being cogent evidence to its truthfulness.

There was thus an abundance of evidence against the appellant which demolished his defence of alibi. The manner of the killing and the serious injuries sustained by the deceased on vulnerable parts of his body irresistibly point to the conclusion that the brutal and savage attack by the appellant was with malice aforethought. Dr. Byamugisha submitted that the learned judge erred

in not considering whether there was any other possible defence, viz., provocation, available to the appellant. His argument was that the injuries inflicted upon the deceased could not have been possible without legal provocation having been given by the deceased. With respect we do not agree. The record of the evidence does not disclose any other alternative defence fit for consideration and we find no merit in counsel's argument. On the other hand the facts as found by the learned judge and our own analysis of the evidence indicate beyond doubt that this was a premeditated cud unprovoked attack on the deceased. In our judgment the appellant was properly convicted of murder and his appeal is dismissed.

DATED AT KAMPALA this 1st day of November, 1978.

Sgd: (M. Saied)
CHIEF JUSTICE.

(D.L.K. Lubogo)
PRINCIPAL JUDGE

Sgd: (P. Nyamuchoncho)
JUSTICE OF APPEAL.

Dr. J. Byamugisha of Byamugisha & Rwahere Advocates for the Appellant.
Mr. Kabatsi, Senior State Attorney, for the Director of Public Prosecutions.

I certify that this is a
true copy of the original

(M. Ssendegeya)
CHIEF REGISTRAR