IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO,D.C.J., ODOIU,J.S.C., & ODER.J.S.C.)

CRIMINAL APPEAL NO.2 OF 1993

BETWEEN

FRANK NDAHEBE========== APPELLANT

AND

UGANDA==========RESPONDENT

(Appeal from the Judgment of the High Court at Kabale (Berko, J) dated 5th February 1993

IN

IN CRIMINAL SESSION CASE NO.42 OF 1991)

REASONS FOR JUDGMENT OF THE COURT:

The appellant, Frank Ndahebe was indicted on the first count with aggravated robbery contrary to sections 272 and 273(2) of the Penal Code and murder contrary to section 183 in the second count. He was acquitted of aggravated robbery but convicted of murder and sentenced to death. He appealed to this Court against the conviction and sentence. We heard the appeal and allowed it. We reserved the reasons for our judgment, which we now give.

The brief facts of the case were that on 3.9.88 at about 2 a.m., a group of people attacked the deceased Jayiresi Muheirwekyi, broke into her house, shot her in the doorway where she fell down, and entered the house. She was staying in the house with her two grandchildren namely Charity Musimenta (PW5) and Robert Tukamubona (PW4). Charity was staying in the same room with the deceased and Robert in a separate room. According to Charity five assailants entered the house and started assaulting them demanding for money.

They also flashed torches around looking for property. She recognised four of the attackers whom she named as Rugude (identified as the appellant), Kanyankole originally charged with the appellant), Karyabukora, and Muzaale. She claimed that she recognised them with the

help of torch light. Robert who was sleeping in a separate room escaped and ran away after being assaulted by the assailants. He did not recognise any of the assailants.

After the attackers had left the house, the deceased asked Charity for water and requested her to call their neighbour Ndabonooha (PWI) who came and found the deceased already dead. According to the doctor who performed the autopsy the deceased died of bleeding due to damage to the heart and lower blood vessels as a result of gun shots.

The appellant was arrested later in the day after the burial of the deceased. In his defence the appellant denied participating in the offence and set up an alibi that he was at his home at the time of the commission of the offence. He claimed he had answered the alarm and participated in digging the grave for the deceased. He called his wife and father who testified in support of his alibi.

In disagreement with the unanimous opinion of the assessors, the learned trial judge found that the conditions favouring correct identification were present and that the sole eye witness Charity (PW5) correctly recognised the appellant. He rejected the appellant's alibi as false because the defence evidence was full of discrepancies.

The appellant filed three grounds of appeal. Learned Counsel for the appellant rightly, in our view, abandoned the first ground which complained that the learned Judge erred in law in that he did not put to the assessors nor direct himself on the failure of the prosecution to call as a witness the person who reported the incident to the police in order to clear doubts about the identity of the appellant. The remaining two grounds were:

2. That the learned Judge erred in law and fact in that he held that PW5 correctly identified the appellant and that the conditions for proper identification were favourable when this was not so for her evidence was conflicting, unreliable and uncorroborated.

3. That the learned Judge erred in law in that he rejected the appellant's alibi when there was no prosecution evidence to negative it and instead shifted the burden of disproving it onto the appellant.

Mr. Zaabwe, learned Counsel for the appellant, submitted that the identification of the appellant by PW5 was unreliable because the incident took place at night where the only light present was from 3 torches being flashed around a large room of 7 x 6 metres. Secondly, PW5 did not mention the name of the appellant or other assailants to those who answered the alarm. Thirdly she called the appellant by a different name, Rugude, which was not supported by any of the witnesses and denied by the appellant. Fourthly, there was no evidence of arrest and therefore it is not clear what name was given to the Police and under what circumstances the appellant was arrested.

Mr. Okwanga for the State sought to support the conviction and submitted that the identification of the appellant was proper because PW5 knew the appellant since infancy and her evidence was not challenged in cross - examination. He conceded that the State should have amended the indictment to include the name of Rugude among the names of the appellant, but argued that this lacuna was not fatal because the right person was before the Court.

In coming to the conclusion that the conditions under which PW5 recognised the appellant were favourable to correct identification, the learned judge said,

> ***"In the instant case the incident took place in a small room in which the alleged attackers were flashing three torches searching for properties. The witness PW5 had known the accused very well from infancy since they come from the same village. She was very close to the accused as the accused spoke to her and asked her to leave the room. She even described how the accused was dressed in a white shirt and a pair of black trousers. The whole operation lasted about one hour. Though the accused has denied he was present at the scene in my opinion all conditions which favoured proper identification were present.***

It is common ground that the only identifying witness in this case was PW5. At the time of the offence she was about 14 years although the learned judge found that she was 16 years. The judge found that she gave her evidence accurately and truthfully. He also found that the incident took place in a small room but we think that a room measuring 7x6 metres is not a small but large room. The attack was violent and took place at night in a badly lit room with only torch light. The only eye witness was a young girl who was being threatened and assaulted. There were at least five attackers. In these circumstances we are unable to hold that the conditions favourable to correct identification were present.

Therefore what was needed to support her identification was other evidence tending to connect the appellant with the offence. This evidence is conspicuously absent. The evidence available tends to weaken rather than strengthen evidence of identification. One of those weaknesses is the failure of the eye witness PW5 to mention the name of the appellant and other attackers to those who answered the alarm and the authorities. When PWI asked PW5 whether she had identified anybody, she replied that she had identified six people who were not named. According to PW2 who was the mother of PW5, the children told her the appellant as the killer. PW3 who was the RCI Chairman went to the scene in answer to the alarm. PW5 and another small child called Betty (who never testified) told him that they had identified the assailants without disclosing their names. He then went and reported the matter to the Police. None of the people, including the Police, who arrested the appellant were called as witnesses. The question therefore is if PW5 recognised the appellant, why did she not mention his name to her relatives or authorities? The evidence on record is silent on this matter. This tends to show that she was either not sure of his identity or she did not know his name.

The evidence on record indicates that PW5 did not know the appellant’s proper name. She called the appellant Rugude but the appellant denied having such a name. There is no witness who supported her claim that the appellant was also known as Rugude. The appellant called evidence to establish that he was not known as Rugude. The prosecution did not seek to amend the indictment to include the name of Rugude as one of the names of the appellant.

In dealing with the issue of the name the learned Judge said,

> ***"PW5 said she knew the accused as Rugude. Accused said that is not his name. To my mind the error is not fatal. The witness knows the accused person. The mere fact that she referred to the accused by a name accused said was not his name is of no consequence. The right man is before the court and it is not a case where a man chose to suffer for the sins of another. Ombeka v. Republic (1968) EA 132".***

In ***Ombeka v. Republic*** (1969) EA 132, the appellant 'whose true name was Augustino Ombeka was convicted in the name of Daniel Maranga of offences under the Wild Animals Protection Act. He appealed on several grounds including one that he was convicted in another name. At the trial he answered to the name of Daniel Maranga and admitted that he was guilty of acts (namely being in possession of game trophies received from unauthorised persons which trophies he resold without sale permits to a third party) upon which he was convicted.

The High Court of Kenya dismissed the appeal and said,

> ***"This was not a case where a man choose to suffer for the sins of another. Such cases raise special problems no doubt and the objection to allowing the situation which arises in such cases to go unchanged does not need stating. But in this case the right man has been convicted and punished on the most satisfactory of all evidence his free unequivocal and unretracted admission of guilt."***

The facts in the above case are clearly distinguishable from those in the present case. In **Ombeka's** case the appellant did not only answer to the apparently false name, but admitted the offence and was convicted on his own plea of guilty. Therefore there was no issue of his identity or participation in the offence. In the present case the appellant denied the false name of Rugude and answered to the proper name under which he was charged. He denied

participating in the offence. The issue of his proper identification was therefore crucial.

In his judgment the learned Judge directed himself on the principles relating to visual identification of witnesses as laid down in the cases of ***Roria v. Republic*** (1967) EA *583,* ***Tomasi Omukono v Uganda*** Cr. App. No. 4 of 1977 (unreported) ***Emmanuel Nsubuga v. Uganda*** Cr. App. No. 16 of 1988 (unreported) and ***Isaya Bikumu v. Uganda,*** Cr. App. No. 24 of 1989 (unreported). In this connection he correctly stated the principles as follows:

> ***"Briefly stated the principles are that in a case resting entirely on identification the court has a duty to satisfy itself that in the circumstances of the case it is safe to act on such evidence, which must be free from mistake or error on the part of the identifying witness or witnesses. The evidence of such witnesses must be tested as to its truthfulness and any possibility of a mistake or error excluded. Where conditions for correct identification are favourable such task will be easier. But where the conditions are difficult it would be unsafe to convict in the absence of some evidence connecting the accused with offence."***

We are of the view that the evidence of identification in this case did not meet the stringent tests laid down in the above cases. PW5's identification was not free from the possibility of error or mistake in view of the difficult conditions under which she claimed to have recognised the appellant and her subsequent conduct. There was no other evidence connecting the appellant with the offence. It was therefore unsafe to act on her evidence alone respecting the identification of the appellant. The second ground of appeal must therefore succeed.

As regards the third ground of appeal, learned Counsel for the appellant conceded that the learned Judge did not shift the burden of proof but maintained that the appellant's alibi ought to have been believed because the contradictions were minor and should have been ignored.

The appellant's defence which he gave on oath was that on the material day he went with his wife win Tukwasibwe (DWI) to cultivate in his farm. He returned to his house at 1 p.m. where he remained till he went to bed. During the night at about 2 a.m. he heard an alarm and went with his father (DW2) to answer it where the deceased had been killed. He named some of the people he found at the scene. He stayed there for a night. The following morning to took part in digging the grave after which he returned to his home. The following day he was arrested by soldiers from his home and sent to military barracks. He was later handed to the Police and charged. He denied knowing PW5.
The appellant called his wife (DWI) and his father (DW2) who substantially supported his evidence. However the learned Judge rejected his defence because he found that the evidence of the witnesses was contradictory on some details. For instance the appellant said that when he came out of his house he found his father outside whereas his wife said that it was the father who woke them up. There seems to be no serious contradiction here, since finding his father outside is not inconsistent with being woken up by his father. The second contradiction was that the appellant said that he returned to his home from the scene at 1 p.m. whereas the wife claimed he had clone so at 10 a.m. A difference in the estimation of time cannot be said to be serious. The third contradiction was about how the appellant was dressed when he went Co the scene. The appellant and the two witnesses gave different descriptions of the clothes he wore on that day. The judge observed that it was impossible for the appellant to be in different attire at the same time. Again we do not think that such inconsistence in the description of how the appellant was dressed is a serious discrepancy in view of the lapse of time and the nature of the occasion.

However, the appellant's alibi was that he was at his home with his wife at the time the offence was committed. His claim was supported by his wife and there was no discrepancy or contradiction on this aspect. By pleading an alibi, the appellant did not assume the burden of proving his innocence, but it was sufficient that there was some evidence to show that his alibi might possibly be true. We are satisfied that the prosecution failed in its duty to disprove the appellant's alibi and therefore the learned judge was not correct in rejecting it as false. We accordingly find merit in the third ground of appeal.

For those reasons we allowed the appeal, quashed the conviction and set aside the sentence of death imposed against the appellant. We ordered that the appellant be released unless

otherwise lawfully held.

Dated at Mengo this 31st day of December 1993

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

B.J. ODOKI
JUSTICE OF THE SUPREME COURT

A.H.O. ODER
JUSTICE OF THE SUPREME COURT