THE REPUBLIC OF UGANDA

IN THE SUPREME OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ., KAROKORA, MULENGA, KANYEIHAMBA, KATO, JJ.SC).

CRIMINAL APPEAL NO.30 OF 2001

BETWEEN

MUSISI JACKSON.....APPELLANT

AND

UGANDA.....RESPONDENT

(Appeal from the Judgment, of Court of Appeal by G.M. Okello, A.E. Mpagi-Bahigeine, A. Twinomujuni, JJ.A at Kampala in Criminal Appeal No. 120 of 1999 dated 22nd May 2001.)

*J*UDGMENT OF THE COURT.

This is a second appeal. The appellant was indicted before the High Court for murder contrary to sections 183 and 184 of the Penal Code Act. He was convicted and sentenced to death. His appeal to the Court of Appeal against the conviction and sentence was dismissed, hence this appeal.

The brief facts of the case are as follows. On the evening of 24/9/97 at about 5.00 p.m. the appellant who was armed with a panga and wearing a green shirt and black trousers was seen by Christopher Sekito (PW1) moving towards the deceased's home. He did not greet Sekito and his group and he was not passing through the usual path. At about 7.30 p.m. the deceased, Christine Namayanja went to the goats' hut to make fire. She was in the company of her two grandchildren; Derick Bazanye, (PW2) and Oliva Ntabade (PW3). She left the children in the hut and went out to collect some grass to add to the fire. Immediately she was out of the hut, the appellant emerged out of the coffee trees and cut her with a panga on the neck and head. She fell down and died instantly. The two grandchildren saw the appellant cutting her to death and running away. He was still wearing a green shirt and black pair of trousers. The two children went and reported the incident to Namutebi Scovia (PW4), who raised an alarm. The alarm was answered by neighbours who included the appellant. He had changed to a different attire. Derick informed the parish chief, Emmanuel Kakumba (PW6), that the appellant was the one who had killed the deceased. The appellant was arrested and taken to Bukomera Police Post. He was later charged with the murder of Christine Namayanja.

At his trial the appellant denied ever having killed the deceased. The learned trial judge believed the case as presented by prosecution but rejected the appellant's denial. He convicted him.

There are four grounds of appeal, namely:-

1. THAT the learned Justices of Appeal erred in fact and in law for having upheld the finding that the Appellant was identified at the Scene of Crime as the assaillant.

2. THAT the Learned Justices of Appeal erred in fact and in law when they failed to properly and adequately evaluate or re-appraise the evidence as a whole.

3. THAT the Learned Justices of Appeal erred in fact and in law for having upheld to conviction based on uncorroborated evidence of P.W.2 and P.W.3 and as a result came to a wrong conclusion.

4. THAT the Learned Justices of Appeal erred in fact and in law for having considered theories not canvassed in evidence and as a result arrived at an erroneous decision.

Mr. Damulira Muguluma, who appeared for the appellant, argued grounds one and three together and the remaining two grounds separately. He submitted that the prevailing conditions at the time the offence was committed were not conducive for proper identification of the appellant by the two witnesses who claimed to have seen him cutting the deceased. According to counsel, the fire from the goats' hut could not have provided enough light as the hut was surrounded by some coffee trees. According to him, if the children (PW2 and PW3) had identified the appellant, they could not have failed to mention his name to their aunt (PW4) to whom they reported the attack immediately after the incident.

Mr. Michael Elubu, Principal State Attorney, who appeared for the State, submitted that conditions favouring correct identification existed. He contended that the light from the fire in the goats' hut was enough to light the place. In his view the coffee trees could not have impaired the children's view since they saw the appellant after he had emerged from them (coffee trees).

This issue of identification was raised before the Court of Appeal which held:-
"We are satisfied that the learned trial judge after properly directing himself that the evidence of PW2 and PW3, both children of tender years, required corroboration and that such corroboration could be found in circumstantial evidence proceeded to scrutinize their evidence along the above guidelines. We agree that the circumstances of identification as outlined by Mr. Okwanga and as accepted by the learned trial judge favoured a correct identification without any doubt and the quality of their evidence was good."

We agree with this finding of the learned Justices of Appeal. Mr. Muguluma's argument that the night was dark is not supported by evidence since even the appellant himself in his statement said: "There was enough light that night". The two eye witnesses, (PW2 and PW3) testified that their grandmother had just stepped out of the hut when the appellant emerged

from the nearby coffee trees which means the appellant was in the open but not in the coffee shades at the time of the attack. So there was no question of the children's vision being obstracted by the coffee trees. We are satisfied that the two courts below correctly held that the appellant was positively identified at the scene of the crime. Mr. Muguluma further submitted that the evidence of PW2 and PW3 was not corroborated as required by law. According to him the evidence of Sekito (PW1) was not capable of corroborating the evidence of PW2 and PW3, because he (Sekito) did not know where the appellant was going when he saw him. Learned counsel also argued that the evidence of Kakumba Emmanuel (PW6) could not be taken as corroborating the testimonies of the two children as he was not in the room where the green shirt and black pair of trousers were found. Learned counsel also complained that the green shirt and black pair of trousers were not exhibited in court as evidence.

On his part, Mr. Elubu, submitted that the evidence of the children was sufficiently corroborated by the evidence of Sekito (PW1) and that of Kakumba (PW6).

It is true that the two eye witnesses were children of tender age and gave their evidence not on oath. By the provisions of section 38 (3) of the Trial on Indictments Decree, a conviction can only be validly sustained if such evidence is corroborated by some other material evidence implicating the accused. In the case now under consideration, the two courts below held that there was enough corroboration from the evidence of PW1 and PW6. We cannot fault the holding of the Justices of Appeal on that point of corroboration. The evidence of PW2 and PW3 that the appellant was wearing a green shirt and black trousers is corroborated by the evidence of PW1 who saw the appellant, a few hours before the incident, wearing the same clothes which were recovered from appellant's house the following morning in the presence of PW6. The mere fact that those items were not exhibited in court does not per se mean that the witnesses did not see them. This Court has, however, in the past expressed its concern over the failure by prosecution to produce exhibits in court.

In some situations the prosecution case may fail if it is wholly based on the existence or absence of exhibits. We must reiterate our view on the exhibits. However, it must be said that each case must be considered on its own facts. In the instant case, an explanation was offered by prosecution as to why the exhibits could not be produced. The explanation was that the policeman who handed the exhibits to the storekeeper could not be traced and the one who received them had left the police force and joined the army. The explanation was accepted by both courts below as genuine. It is our view that failure to produce the exhibits in this particular case did not result in a miscarriage of justice at all. We find no merit in grounds one and three. They must fail.

Mr. Muguluma, did not specifically argue ground two, being satisfied that it was covered by his submission on grounds one and three. The gist of this ground is that the Court of Appeal did not adequately evaluate the evidence. We do not agree with this complaint. The record shows the contrary. Ground two must also fail.

We now turn to the fourth and last ground of the appeal which is a complaint that the Justices of Appeal relied on a theory which was not supported by evidence. The theory complained of was that villagers can see even when there is little light. Mr. Elubu conceded that their Lordships were not justified in advancing that theory. He, however, argued that the decision of the court was not based on the theory but on the actual evidence which was given at the trial.

The passage in the judgment of the Court of Appeal, which is the subject of this complaint reads.-

"We should also add that the villagers living in villages where there is no electricity to supply strong lighting get accustomed to seeing things in the light shed by ordinary fires. In this case the time was dusk but was illuminated by a fire in the goats' hut. These people's eyesight gets conditioned to and becomes accustomed to such situations. Their powers of seeing were therefore not diminished by the circumstances that the incident was only

illuminated by a small fire or that there were coffee shrubs around. This ground of appeal fails."

There was no expert evidence on record about the power of sight of the villagers of this particular village at night when there is little light. With due respect, the observation of the learned Justices of Appeal, was certainly uncalled for. It is trite law that the decision of a court must be based only on evidence as presented in the court by the parties, not on the imagination of the presiding judge. The position on this principle of the law was stated in: Okethi Okale and others -V- Republic (1965) EACA 555 at page 557 as follows:

"With all due respect to the learned trial judge, we think that this is a novel proposition, for in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches. (See R. V. Isaac (I)). This theory by the learned judge was inconsistent with the evidence of *J*oyce that the injury on the head was caused by the second appellant with an axe, neither is it supported by the medical evidence."

In that case the learned trial judge rejected the evidence given by the witnesses as to what was the cause of death and put up his own theory as to what might have been the cause of death in the following words:-

"This is a case in which reasoning has to play a greater part than actual evidence."

In the case now before us the Court of Appeal did not base its decision on the theory complained of They relied on the evidence as presented by witnesses in the High Court.

In our view therefore, though the reference to "the theory" or conjecture was a misdirection, it did not cause a miscarriage of justice. The instant case is clearly distinguishable from Okale's case (supra).

In the result, we find no merit in this appeal. It is accordingly dismissed.

Dated at Mengo this 24th day of May 2003.

B. Odoki

Chief Justice

A.N. Karokora

Justice of the Supreme Court

J.N. Mulenga

Justice of the Supreme Court

G.W. Kanyeihamba

Justice of the Supreme Court

CM. Kato

Justice of the Supreme Court