

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

**(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, AND
KANYEIHAMBA, JJ.SC)**

CRIMINAL APPEAL NO. 18 OF 2003

BETWEEN

1. **KWIJUKA MISAKI :::::::::::::::::::: APPELLANTS**

2. **IGA JACKSON**

AND

UGANDA :::::::::::::::::::: RESPONDENT

(Appeal from the judgment of the Court of Appeal (Mukasa-Kikonyogo, D.C.J. Mpagi-Bahigeine, and Kitumba, JJA) dated 6/6/2003 in Criminal Appeal No. 149 Of 2001)

REASONS FOR JUDGMENT OF THE COURT

This is a second appeal. The appellants, Kwijuka Misaki (A.1) and Iga Jackson (A.2) were jointly convicted by the High Court, at Mubende of the offence of aggravated robbery, contrary to sections 272 and 273 (2) of the Penal Code Act, and sentenced to death.

Their appeals to the Court of Appeal were dismissed. We also dismissed their appeals to this Court for lack of merit, reserving our reasons for doing so, which we now proceed to give.

The facts as found by the two courts below are briefly these: During the night of 30/9/1999 at Nakwanya Village in Mubende District, the appellants broke into the house of one Francis Kuteesa (hereinafter referred to as "the deceased") and demanded money from him, which his wife Janet Nantale (PW.1) gave to them. When they ordered the deceased to lie down and he resisted, A.2 stabbed him with a knife, killing him instantly. PW.1 gave the attackers Shs: 500,000/=, but they demanded for more money and she gave the attackers additional Shs: 300,000/=. By a combination of torchlight which the robbers flashed at her and dim electric lights available in the house, PW.1 was able to see both the attackers. The incident took one hour. After the robbers had fled, PW.1 reported the incident to neighbours and the local LC 1 chairman. Consequently, a chase was made of the robbers and they were apprehended at daybreak at Migina trading centre, about six miles from the scene of the robbery. They were moving along a cattle track, not the normal way, and their clothes were wet with morning dew. On their way, they stopped at a shop for a drink of soda, and were asking their way around. Their pursuers included Kukunda Manuel (PW.6), a cattle keeper and L.C.2 Chairman and Musoke Kazimiri (PW.4) a special police constable and other villagers, who caught up with them. When their pursuers asked for their identity, A.1 and A.2 resisted. The latter had a stick and tried to beat off the villagers. The appellants were found to be in possession of bags, which contained clothes, some money and a cattle syringe in A.2's bag. Both robbers attempted

to run away. However, A.1 was apprehended when he fell down, but A.2 managed to escape but was arrested later the same day. They were handed over to Busunju Police Station. Subsequently, they were indicted for the offence. At their trial each of the appellants set up an alibi, which the learned trial judge rejected as false. He acted on the evidence of PW.1 and circumstantial evidence which he believed to be true and convicted the appellants.

There was some confusion in designations of the appellants in the Courts below. At their trial, Kwijuka Misaki was accused No. 1 (A.1) and Iga Jackson accused No. 2 (A.2). In the Court of Appeal Iga Jackson was appellant No. 1 and Kwijuka was appellant No. 2. In this Court their positions were reversed from what they were in the Court of Appeal. It appears that for that reason, Mr. Henry Kunya the learned counsel for Iga Jackson (A.2) argued his appeal first before the learned counsel for Misaki Kwijuka (A.1) Ms. Diana Musoke argued Kwijuka's appeal. Needless to say that such confusion is unhelpful to counsel and to the Courts in their efforts to follow the evidence and arguments in respect of each of the appellants. Courts, (and counsel when drawing up memoranda of appeals), should consistently adhere to the first numbering of the accused persons or the appellants, as the case may be.

A2's grounds of appeal as set out in his memorandum of appeal are that:

- 1). The learned Justices of Appeal erred in law and in fact in upholding the conviction and sentence of the appellant on the basis of unsatisfactory evidence of a single identifying witness, PW1.

- 2). The learned Justices of Appeal erred in law and in fact in upholding the conviction and sentence of the appellant on the basis of unreliable circumstantial evidence.

A.1's grounds of appeal are that:

1. The Hon. Justices of Appeal erred in law and in fact when they relied on the uncorroborated evidence of a single identifying witness whereas the conditions for identification were not favourable.

2. The Hon. Justices of Appeal erred in law and in fact when they failed to consider the appellant's defence of alibi.

The respective first grounds of the appellants' memoranda of appeal are similar as they both complain against the Court's findings on identification. They also relate to evidence from the same prosecution witnesses. We shall therefore consider them together. This also

necessarily involves consideration of the circumstantial evidence at the same time since such evidence is corroborative of evidence of identification, and is a subject of A.2's complaint in his second ground of appeal. That leaves out the second ground of the A.1's appeal to be considered last.

Under the first ground of Jackson Iga's appeal, his learned counsel, Mr. Henry Kunya, submitted that P.W.1's evidence of identification of the appellants at the scene of crime was unsatisfactory, because, the assailants were strangers to her since she was seeing them for the first time. Moreover, lighting was poor. According to her own evidence, electricity light was dim, although it was on throughout the incident. In her statement to the police, she said the assailants also flashed torches, but she did not say so in her evidence. Torchlight would have been unnecessary to the robbers if electricity was available. In her testimony she also described how the assailants were dressed, but in her police statement, she said that she could not say how they were dressed. Further in her testimony, she said that the incident lasted one hour, but this is missing from her police statement. Learned counsel contended that the inconsistencies between her evidence in court and her statement to the police and the poor conditions for identification, made P.W.1's evidence unreliable. The Court of Appeal should not have upheld the trial judge's acceptance of her evidence. It erred for doing so.

Under the second ground of appeal, Mr. Kunya criticized the Court of Appeal's upholding of the trial court's reliance on circumstantial evidence as having corroborated PW.1's evidence of identification of A.2. The learned counsel contended that the evidence that the

appellants were seen following a cattle track and being in clothes wet with dew did not irresistibly point to the appellants' guilt. Any other pair of villagers could have been seen following that track and in wet clothes at that time of the early morning. Although the time was 6.00 a.m. learned counsel contended that the appellants could have been innocently walking in the area where the prosecution -witnesses said they saw them. After making the points about wet clothes and A.2's movement in the area so early in the morning, Mr. Kunya said that he was abandoning the arguments, but he did not say that he conceded that these were pieces of circumstantial evidence, which implicated his client in the crime. Mr. Kunya also criticized the trial court's reliance on the evidence of a stick having been used by the appellants during the robbery and at the scene of their confrontation with villagers and the Court of Appeal's upholding of that finding. On those grounds Mr. Kunya prayed that Iga Jackson's conviction be quashed and the sentence of death set aside.

Under A.1.'s first ground of appeal, his learned counsel Ms Harriet Diana Musoke's submission was similar to Mr. Kunya's submission in respect of A2's first ground of appeal. She submitted that the evidence of identification of A.2 at scene of crime, was from a single identifying witness only, namely P.W1. As the appellant was a stranger to her and the quality of light was poor, she could not have properly identified the appellant. Conditions for identification were not favourable. Consequently, the first ground of appeal should succeed.

Mr. Vincent Okwanga, Principal State Attorney, for the respondent, did not agree with the submissions of the learned counsel for the appellants. He contended that favourable conditions for identification of the appellants did exist. There was electric light throughout the attack; there was also light from a candle; the incident took a long time - one hour; and PW1 was not far from the attackers. Learned Principal State Attorney contended that these conditions enabled P.W.I to observe and recognize the assailants, and that P.W.1's identification of her attackers were free from error. He therefore contended that the learned Justices of Appeal therefore correctly upheld the trial court's finding that the appellants were properly identified at the scene of crime. Regarding discrepancies between the evidence of P.W.I and her previous statement to the police, the learned Principal State Attorney contended that the police officer who recorded the statement was not called to prove it against P.W.1. Consequently, the statement cannot be used to contradict her evidence. The inconsistencies were minor and should therefore be ignored.

Regarding circumstantial evidence, the learned Principal State Attorney contended that what implicated the appellants were that the robbery took place at about midnight; at 6.30 am they were arrested in the area where they were strangers; their clothes were wet with morning dew; they drank soda in a shop where they asked for direction; they were walking along a cattle track instead of on normal paths; they were avoiding to meet other people; when challenged they at first resisted revealing their identity. Iga Jackson beat the villagers with a stick during their confrontation with the villagers; Iga Jackson ran away from the scene; and they had some money, which was found in their bags, which they could not explain in other way. All these pieces of circumstantial evidence,

the Learned Principal State Attorney contended corroborated P.W.1's evidence of identification of the appellants at the scene of crime.

The learned Justices of Appeal re-appraised the evidence of P.W1 and that of P.W4 and P.W6 and came to the same decision as the learned trial Judge as corroborating P.W 1's evidence of identification and reached their own conclusions in the following terms: -

"We think that P.W 1's evidence with that of P.W 6 and that P.W 4 was impeccable. We are satisfied that though she did not know the appellants before, the confrontation lasted for an hour long enough to enable her recognize them. They were talking to her, demanding money and threatening her to meet the same fate as her husband, whom the second appellants had already stabbed to death if she did not lower her voice. Of course, it was only natural to feel scared under the circumstances even without the death of her husband, but considering the length of the time they had spent together moving around the house and to the shop, it would be impossible to talk to them without observing their faces. We, therefore, think that P.W 1 had ample opportunity of observing the appellants and the quality of her identification was unassailable - see ABDULLA NABULERE AND OTHERS VS. UGANDA CRIMINAL APPEAL NO 25/78. Her evidence in court, which was on oath and was tested by cross-examination, was correctly preferred to her police statement, which was not on oath and was not properly tendered in evidence.

Coupled with the foregoing is the corroborative evidence of P.W 4 and P.W 6 regarding their arrest. Their clothes were wet with morning dew. Their furtive movements along cattle tracks rather than on main paths was circumspect. A.2 still had the stick P.W 1 had seen during the attack. This coupled with long-winded defences of alibi went to destroy their porous defences. We have no doubt that the learned Judge properly appraised the evidence".

In our view the Court of Appeal cannot be faulted in its re-appraisal of and conclusions on the evidence as shown by this passage of its Judgment. In the circumstances, the first and second grounds of appeal

of Iga Jackson (A.2) and the first ground of appeal of Kwijuka Misaki (A.1) must fail.

On the issue of alibi in the second ground of A.1's appeal his learned counsel submitted that A.1 admitted that he was in Migina to see his brother and not in connection with the commission of this offence. He contended that this ground of appeal should therefore succeed. The learned Principal State Attorney for the respondent did not agree. He submitted that A.1's alibi was disproved by the evidence of P.W 1, P.W 4 and P.W 6. He was arrested together with A.2, disproving A.1's alibi that he was going to the place of his Uncle, one Magezi.

The learned trial Judge considered A.1's alibi in detail and rejected it as false, because, A.1 did not leave Kampala for Kiboga that morning, and, on his own admission, the circumstances of his arrest agreed with the evidence of P.W 4 and P.W 6. In the passage

of the Court of Appeal's judgment to which we have just referred, that court upheld the learned judge's finding rejecting A.1's alibi as false and, consequently, providing corroboration for the evidence of P.W 1 , P.W4 and P.W 6. In our opinion, the Court of Appeal was correct in doing so. A.1's second ground of appeal must also fail.

In the result, the respective grounds of appeals of A.2 and A.1 must fail.

We are satisfied that there was ample evidence to support their conviction which the Court of Appeal rightly upheld.

For the foregoing reasons, we dismissed the appeals of both appellants.

Dated at Mengo this 1st day of September 2004.

B.J. ODOKI

CHIEF JUSTICE

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N.KAROKORA

JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT