

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

{ CORAM : ODOKI, C.J., TSEKOOKO, KATUREEBE, TUMWESIGYE AND
KISA AKYE, JJ.SC.}

CRIMINAL APPEAL NO. 14 OF 2009

BETWEEN

NAMWANJE PAULINE APPELLANT

VERSUS

UGANDA
RESPONDENT

{Appeal from the decision of the Court of Appeal at Kampala (Engwau, Kitumba and Nshimye, JJA.) dated 7th August, 2009 in Criminal Appeal No.62 of 2003}

JUDGMENT OF COURT

This is a second appeal arising from the decision of the Court of Appeal confirming the conviction of the appellant, Namwanje Pauline, by the High Court for murder. She was sentenced to death.

The facts of this case as found by the two Courts below are simple. The deceased, Urita Mukabuye, her mother Everlyn Kambabi Nalongo [PW5] and her daughter Najjuko Nunsiana, [PW4] and the appellant, Namwanje Pauline, lived on the same village called Kasambya. So did Katalanga, the husband of the appellant.

By 2001, Kintu Francis [PW6] was the Local Council Chairman [LC1] of that village. He had been such Chairman since 1986. Sometime back, before the murder of the

deceased, the husband of the appellant allowed PW5 to cultivate and grow crops on his

land. The appellant who had not been consulted on the matter did not like this. At one time, PW6, a very close neighbour to the appellant, instituted a criminal case against the appellant who he suspected to have stolen his matooke. She was acquitted. As evidence in this case reveals, it seems relationship between PW6 and the appellant was not all that good.

The death of the deceased occurred on 31/10/2000 and what happened was dramatically narrated by PW5 [an old woman aged 70 years] to the trial court as follows:

On 31st October, 2000 the deceased went to the garden. She had gone to collect onions and beans. She raised an alarm when she found accused stealing beans. I answered the alarm. When I reached the garden I asked deceased what was wrong. She told me Paulina Wife of Kafalanga was found stealing beans. It was in the evening. I cannot tell the specific time. The deceased showed where Namwanje had uprooted them and I saw where the beans had been thrown. The deceased suggested that we go and report the theft. I agreed with her. Before we left the deceased suggested that she should go back and collect the beans and treat them as exhibits. We had moved a distance from the spot where the beans were. The deceased went back. I proceeded to go and report the incident. On reaching Chairman's place I reported. The Chairman asked for an exhibit. I told him the deceased had gone back to collect the exhibit. The Chairman said that we wait for her. We waited for the deceased but she did not come. I went to check on the deceased. I called Najjuko to go with me. It was dark and a rainy season. Najjuko accompanied me. We got a torch. The torch was held by Najjuko. It

was bright. We proceeded **to the garden where the deceased had gone.** We **were not talking.** Najjuko flashed the torch. I saw Namwanje. She was bending. She was undressing the deceased. There was a man standing nearby. I did not identify this man. He was armed with a stick. Both Namwanje and the man run away. **We also run as we raised an alarm.** **The alarm was answered by one, Kaloori.** Kaloori asked us what the problem was. I told Kaloori that Paulina had killed my daughter. **Kaloori went to report to the Chairman L.C.1.** Many people gathered. They found us on the way. We had feared to go where the body was. We led the people to where the body was. The body was at the boundary between Namwanje's Kibanja and mine. The body had stick marks on both sides of the neck, forehead and ribs. The body was dressed in only a skirt. The blouse had been removed and put between the deceased's legs.

A report was made to police.....

The torch Najjuko had was very bright. It had new cells. The distance was as far as from where I am standing to a place behind the wall estimated at 15 yards. It was clear. There were beans in this area where the body was. There was no maize. There was 'Musa' type of bananas a distance away.

.....

The witness [PW5] was cross-examined and was consistent in her answers . She impressed the trial Judge. The Kaloori mentioned by this witness is PW7 [Munyakigeri Kaloori] who was the first person to answer the alarm. The Chairman [PW6] led a team [including Kaloori] to the appellant's home while searching for the appellant.

She was not there. PW6 and the team proceeded to report the murder of the deceased

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to Rwabenge Police Post where the team discovered that the appellant had reported. After PW6's team report, appellant was arrested and charged with the murder of the deceased.

During her trial the appellant gave sworn evidence. She denied murdering the deceased. She however admitted that she was on the village around the time of the murder of the deceased. According to the appellant, early evening of 31/10/2000, she saw the deceased and PW5 pass by her home going to the home of PW6 who was her immediate neighbor. She heard the deceased and PW5 report to PW6 that the appellant had stolen their beans. PW5 and PW6 went to the appellant's home where PW6 told her that because she had rejected his "*love affair advances*" he would "*fail her*". The group left. Soon thereafter she heard sounds of an alarm. As she proceeded to check on the cause of the alarm, she heard PW6 saying that "*they should chop off my [appellant's] head*". She therefore ran to the police post where she was eventually detained. She asserted that PW6 testified against her because of her refusing his love affair advances. The assessors and the trial Judge did not believe her. They rejected her defence and believed the prosecution evidence. She was convicted and sentenced to death. She unsuccessfully appealed to the Court of Appeal which agreed with the trial Judge that the appellant had been properly identified by PW4 and PW5 at the scene of murder.

The appellant has now appealed to this Court. Her memorandum of appeal filed by Messrs Kanyunyuzi & Co, Advocates, on her behalf, contains two grounds. Mr. Robert Tumwine of Kanyunyuzi & Co Advocates lodged a written statement of arguments for the appellant while Mrs. Damalie Lwanga, Assistant Director of Public Prosecution [Assistant DPP] made oral submissions.

1ST GROUND

In the first ground, the complaint is that “the Justices of Appeal erred in law and fact when they failed to correctly reevaluate all evidence on Court record as a whole that contained contradictions but had nevertheless been relied upon to convict the appellant.

The ground shows that whereas the appeal was made against the decision of the Court of Appeal, in his written statement of arguments, Mr. Tumwine, Counsel for the appellant, contends that the trial judge erred in his evaluation of the evidences as a whole and that the Court of Appeal failed to subject the whole evidence to fresh and proper evaluation and so wrongly upheld the decision of the trial Judge. Learned Counsel referred to the evidence of PW2 [P/C Angwadia Natal] and that of PW5 in regard to the distance between the points where the beans were from the deceased – whether beans were some meters away or very close to the body. He contended that these were material inconsistencies. Mrs. Lwanga, the Assistant DPP, submitted that there was really no inconsistency at all and that the ground has no basis. She contended that the appellant had been properly identified.

In her evidence, PW5 testified that the beans were near the body of the deceased whereas according to P/C Angwadia's [PW2's] sketch plan, and oral evidence, the heap of beans was a meter away from the deceased's body. In his well reasoned judgment, the learned trial Judge evaluated all the material evidence from both the prosecution and the appellant before he rejected the appellant's defence.

In our view whether the beans were a meter from the deceased or some other spot at the

scene the fact of the matter is that a heap of beans was at the scene of murder. There was no contradiction or inconsistency about the presence of the beans. Appellant's counsel has failed to show any error of law or fact. Ground one must fail.

2nd GROUND

In the second ground the complaint is that the Learned Justices of Court of the Appeal erred in Law and fact when they failed to properly reevaluate the doctrine of proper identification which the lower Court had relied upon to convict the appellant”.

We think that this ground is badly framed. We are not aware of such a thing as “**the doctrine of proper identification**”. Be that as it may, in his written arguments, Mr. Tumwine in effect contends that the identification of the appellant as the person who participated in the murder of the deceased is faulty and that the trial Judge and the Court of Appeal should not have relied on it.

Mrs. Damalie Lwanga, the learned Assistant DPP, submitted, correctly in our considered opinion, that the Court of Appeal reevaluated the evidence on record before it confirmed the decision of the trial Judge. She urged that there was no need for this Court to reevaluate the evidence. She referred to the four pages passage quoted by the Court of Appeal from the judgment of the trial judge to show that in effect the Court of Appeal considered the evidence. Strangely in his oral rejoinder, Mr. Tumwine agreed that indeed the Court of Appeal reevaluated the evidence but it did so incorrectly. Learned counsel did not point out where incorrect evaluation was. He wrongly claimed that PW4 and PW5's evidence shows that the murder took place between 08:00pm and 09:00pm. In fact PW4 stated both in the evidence in Chief and during cross examination that it was about 07:00pm. There is no substance in these arguments.

In our opinion, the learned trial judge was alive to the issue of identification. He referred, among other things, to the well known guidelines enunciated by the former Court of Appeal for Uganda in the case of **Abdallah Nabulele & Another V Uganda** [1979] HCB 76 and to our decision in **Moses Bogere & Another V Uganda Sup Court Criminal Sup Court Criminal Appeal -- No. 10 of 1979**. He analysed the evidence of PW4 and PW5 along side that of the appellant with due care before he concluded that the appellant was properly Identified. The learned Justices of the Court of Appeal must have been fully satisfied with the evaluation of the evidence by the trial judge before they quoted in extenso four pages of his judgment and held that his conclusions on identification were correct. We are unable to fault the two Courts on the question of identification.

We are satisfied that both the trial judge and the Court of Appeal were on the evidence available justified in their conclusions that the appellant was properly identified at the scene of crime participating in the murder of the deceased. This ground must fail.

The conviction is upheld.

We were urged to allow the appellant to make mitigations on the sentence. We note that the appellant was sentenced to death on 5/3/2003, long before our decision in the case of **Suzan Kigula & 417 Others V Attorney General [Supreme Court Const. Appeal**

No. 03 of 2006]. So no

submission in mitigation of the death sentence was made in the High Court. But submissions in mitigations were made in Court of Appeal. The Court of Appeal found no merit in those submissions and so the Court upheld the death sentence. There was no appeal on this aspect of the case. However, Mr. Tumwine in rejoinder to Assistant

DPP submissions, half heartedly asked us to pass a “sentence lesser than death”, if we uphold the conviction for murder.

Obviously, I earned counsel for the appellant was unable to point to any circumstances that go to mitigate the death sentence nor can we find any. Accordingly, we reject the plea. As a result we confirm the death sentence.

The appeal is dismissed.

Delivered at **Kampala** this17th.... day of **August**..... 2010.

B.J. Odoki
Chief Justice

J.W.N. Tsekooko
Justice of the Supreme Court

B.M. Katureebe,
Justice of the Supreme Court

J. Tumwesigye,
Justice of the Supreme Court

E.M. Kisaakye,
Justice of the Supreme Court