THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 19 OF 2015

(***Corum**: Tumwesigye, Kisaakye, Mwangusya, Opio Aweri, Mwondha JJ.S.C)*

LT. JONAS AINOMUGISHA ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala (Mpagi Bahigeine, Byamugisha and Kavuma, JJA) dated 21st October, 2009

JUDGMENT Of THE COURT

The appellant Lt. Jonas Ainomugisha together with four others, namely, Elifazi Rukazana, Elisama Rubondo, No. RA 146419 Lopeyok Pascal and Rose Kekimuri were indicted for murder contrary to sections 183 and 184 of the Penal Code Act. It was alleged in the indictment that the five and others still at large on the 9th day of February 2001 at Nyakahita village in Bushenyi District murdered Tibarabihire John.

At the commencement of the trial at the High Court Elifazi Rukazana had died in Prison and the case against him had abated. No. RA 146419 Lopeyok Pascal and Rose Kekimuri were acquitted on a submission of no case to answer while the appellant and his father Elisama Rubondo were acquitted after the trial Court found that their participation in the killing of the deceased had not been proved beyond any reasonable doubt.

The Director of Public Prosecutions being dissatisfied with the acquittal of the two appealed to the Court of Appeal.

At the time the appeal was heard at the Court of Appeal Elisama Rubondo had died and the case proceeded against only the appellant. After a re-evaluation of the evidence, the Court of appeal reversed the finding of the learned trial judge and found the appellant guilty of the murder of John Tibarabihire. His acquittal was set aside and substituted with a conviction for

murder and sentenced to death. It is against the conviction and sentence of death that his appeal lies.

In the Memorandum of appeal filed in this Court the appellant raises the following grounds:-

1. The learned Justices of Appeal erred in law and fact when they held that the appellant was identified at the scene of crime yet there is no evidence on record to support such identification and conditions favourable to correct identification were not present.

2. The Learned Justices of Appeal erred in law and fact when they dismissed the appellant's defence of alibi yet the prosecution did not destroy it in anyway by way of evidence by investigation.

3. In the alternative but without prejudice to the above, the learned Justices of Appeal erred in law and fact when they sentenced the appellant to suffer death which sentence was manifestly harsh and excessive.

In a supplementary memorandum of appeal the appellant raises an additional ground of Appeal which states as follows:-

4. The learned Justices of Appeal grossly erred and misdirected themselves in law when they conducted sentence proceedings and issued a sentence to the appellant like a trial Court (High Court) which jurisdiction is not vested in the Court of Appeal.

The brief facts of the case as found by the two Courts are quite clear except that the two Courts came to different conclusions as to the culpability of the appellant in the killing of the deceased. It is for this reason that although this is a second appeal Court finds it necessary to analyse the entire case.

The facts are that the deceased, Tibarabihire John lived at Nyakahita village, Muhunga Parish, Mitoma sub county, Bushenyi District. His three brothers namely Rukazana Elifazi, Rumondo Elisama and Elly Kikwabe lived in the same village and were close neighbours. The appellant who is a son of Elisama Rumondo was a UPDF officer stationed in Gulu. There was a long standing land dispute between the deceased and his brothers and the appellant sided with his father and the two uncles in the land dispute which by the time the deceased was killed was pending hearing in Court.

On numerous occasions the deceased made reports to the Police and Local Councils of the threats by his brothers and nephew to kill him if he did not vacate the land. He stood his ground and stayed on the land.

On the night of 9th February 2001 at about 10:00 p.m. the deceased and his wife, Irene Tibarabeihire (PW1) had retired to their bed when they were attacked by a gang of people who broke into the house, assaulted them and demanded for money. A sum of Shs100,000/= was given to the assailants from outside the house. One of the assailants who was armed with a gun then shot the deceased who died on the spot. A post-mortem examination conducted on the body of the deceased revealed that he had died of hypovolemic shock caused by bleeding from the gunshot wounds into the chest and injuring the heart.

Following the death of the deceased, a number of arrests were made in the area. The appellant was arrested from Gulu about seven months after the incident. At his trial he stated on oath that at the time his uncle was killed he was in Gulu where he had returned after the expiry of his Pass Leave which he had spent in the village. He called two witnesses who confirmed that he had been granted the Pass Leave and returned to his duty station in Gulu at the expiry of the Leave. The witnesses did not establish the exact date the appellant resumed duty in Gulu.

The trial Court disbelieved the prosecution evidence that the appellant had been positively identified as one of the assailants. On the other hand after a re-evaluation of the same evidence the Court of appeal found that there was overwhelming evidence against the appellant who according to the Court, was properly identified at the scene. The Court of Appeal also rejected his alibi which in the words of the Court was no alibi.

The appellant was represented by Mr. Andrew Sebugwawo, Counsel on a State brief, while the respondent was represented by Ms Jacqueline Okui, Senior State Attorney, Directorate of Public Prosecutions. Both Counsel filed written submissions which were adopted at the trial. Mr Sebugwawo also made oral submissions in rejoinder to the Respondent's written submissions in reply.

In his submissions on the first ground, Mr. Sebugwawo stated that given the difficult conditions under which the appellant was allegedly identified, the possibility that the

witnesses were mistaken could not be ruled out. He singled out the testimony of PW1 who testified that she did not identify any of the attackers who entered the house because it was dark and only identified the attackers outside the house where there was bright moonlight. Counsel submitted that the witness could not have identified the appellant outside the house where according to her there were many people some of whom were wearing military uniform and armed with guns. She could have been mistaken or merely suspected the appellant because of the subsisting land dispute between the deceased and the appellant, and her failure to mention any of the attackers in her statement to the police strengthens this hypothesis.

On the second ground Mr. Sebugwawo submitted that by raising the defence of alibi the appellant did not assume the burden of proving it. In this case the appellant produced witnesses to support his alibi and in consideration of the fact that PW1 had initially told the Police that she had not identified the attackers but only suspected the appellant because he is an army man and has access to guns, counsel asked Court to find that the appellant had raised doubt about his presence at the scene on the night the deceased was killed which is all he was required to do.

Ground 3 is on sentence. According to Mr. Sebugwawo the death penalty imposed on the appellant is in contravention of Article 22 and 24 of the Constitution on peoples rights to life and prohibition of torture, cruel, and inhuman or degrading treatment or punishment. He also cited S.98 of the Trial on Indictments Act (TIA) which provides that the Court before passing a sentence other than a sentence of death may make such inquiries as it think fit in order to inform itself as to the sentence to be passed and may inquire into the character and antecedents of the accused which denies an accused convicted of murder a fair hearing on sentence in contravention of Article 22(I) 28(I)) and 44 of the Constitution.

In reply to ground I the respondent submitted that the Court of Appeal had properly re-evaluated the evidence in relation to the identification of the appellant before coming to the conclusion that the prevailing conditions favoured correct identification. She heavily relied on the case of **Bogere Moses and another vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997** where this Court discussed the condition that must be considered before coming to a conclusion that the identity of an assailant or assailants has been

established. The conditions include, the length of time it took the witnesses to identify the accused, the distance between the witness and the accused, the light and the familiarity of the witnesses with the accused. She stated that all the witnesses who claimed to have identified the appellant had sufficient time to do so, they saw him at close range, there was sufficient light and all of them knew him as a relative and villagemate whose voice they were familiar with.

On ground 2 she submitted that the Court of Appeal considered the alibi raised by the appellant and dismissed it after finding that it was weak vis-a-vis the prosecution evidence on identification of the appellant at the scene of the crime. She argued that the movement order produced by the appellant and his witness only indicated the appellant's movement between 5th January, 2001 and 29th February 2001 and not the appellant's presence in Gulu on 9th February, 2001 when the deceased was murdered. She also questioned the admissibility of the Photostat Copy of the movement order without any plausible explanation as to where the original movement order was.

On ground 3 Counsel for the respondent submitted that the sentence of death passed on the appellant was a legal sentence and was passed on the appellant after mitigation. According to her the merciless manner in which the deceased was brutally killed deserved no less than the death penalty.

On ground 4 the Respondent submitted that under Section II of the Judicature Act the Court of Appeal is seized with all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction from which the appeal originally emanated. She cited the case of **Amba Jacob and Another Vs Uganda (Supreme Court Criminal Appeal No. 10 of 2009)** where the Court in interpreting Section II of the Judicature act held that where the Court of Appeal reverses a decision of the Court from which the appeal originates it has the same powers, authority and jurisdiction as the Court of first instance to pass the sentence or make any order which the Court of first instance could have made.

In rejoinder to the submissions of the respondent on the 1st ground of appeal, Counsel for the appellant referred this Court to the evidence of PWI's Police statement in which she stated that she never recognised the assailants but only suspected the appellant because he

was a soldier and had access to guns. In the same statement she mentioned Robert whose voice is similar to that of the appellant.

On the second ground he submitted that the alibi of the appellant was disclosed at the time the appellant made his statement but there was no effort to investigate it to establish as to whether or not it was true.

On ground 3 Counsel submitted that because there was no appeal against sentence the Court of Appeal had not jurisdiction to pass an original sentence thus denying the appellant an opportunity to appeal against it. According to him S. II of the Judicature Act is applicable only to the matters raised on appeal and the issue of sentence did not arise on appeal because the appeal was against acquittal. The proper procedure would have been to refer the matter to the High Court for sentencing.

The issue raised by ground 1 is whether the appellant was identified by any of the witnesses who claim to have recognised him by his appearance and by voice.

On visual identification both Counsel cited the case of **Moses Bogere and Another (Supreme Court Criminal Appeal No 1 of 1997**) where this Court faced with a similar situation regarding identification of the assailants came up with factors which we consider pertinent when the issue of visual identification comes up as in the present case. These are:-

1. Whether there were factors or circumstances which at the material time rendered identification of the attackers difficult, notwithstanding that there were those which could facilitate identification;

2. Whether the absence of evidence of arrest and or police investigation had any or no adverse effect on the cogency of the prosecution case;

3. Whether the appellants defences of alibi were given due consideration.

In respect to the first issue the Supreme Court gave the following guidelines:-

> **"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by**

eyewitnesses in criminal cases. The starting point is that a Court ought to satisfy itself from the evidence whether the conditions under which identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The Court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole, namely the evidence if any, of factors favouring correct identification together with those rendering if difficult. It is trite law that no piece of evidence should be weighed except in relation to the rest of the evidence. (see Suleman Katusabe Vs Uganda SC Cr. App. No. 7 of 1991) (unreported)"

The Supreme Court cited with approval the following passage from the case of **Abdala Nabulele & Another Vs Uganda, Supreme Court Cr. App. No. 1978 reported in (1979) HCB 77** that has been followed in numerous other cases:-

"where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger....

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution"

Both the High Court and the Court of Appeal cautiously approached the evidence relating to the conditions under which the appellant was allegedly identified. While the High Court found that the appellant was not properly identified as one of the assailants who killed the deceased, the Court of Appeal found that the identity of the appellant was positively established. We shall examine the conditions which made identification of the appellant easy and those which made it difficult before coming to the conclusions as to which of the two Courts made the correct finding.

There were four witnesses who under, different conditions claimed to have identified the appellant.

The first of these witnesses was Irene Tibarabeihire (PW1), the widow of the deceased. She testified that on the night of 9th February 2001 she together with her husband had retired to bed when she heard two bangs on the roof of their house followed by a bang on the window which got broken. The assailants entered the room adjacent to their bedroom where they fired a bullet on the wall. She heard the voice of the appellant telling them that they were holding axes which would not assist them after a bullet had been fired. The assailants demanded for money. She together with her husband were assaulted. The assailant who entered the bedroom led them to the sitting room and then outside. According to her, the house was in total darkness. While outside where there was bright moonlight, the assailants continued beating them while asking for money. The deceased directed her to go back inside the house and bring out the money. She was followed inside the house by an assailant who was armed with a gun. Another assailant remained outside guarding the deceased pointing a gun at him. She picked the money from inside the house and handed it to the deceased who in turn handed it over to one of the attackers who continued to beat them. The deceased got up and held the assailant who was putting him at gunpoint. She then saw the appellant joining the group which was surrounding the deceased. She was able to identify Rumondo and Robert S/O Rukazana. She escaped and hid in a coffee shamba bordering the compound. She then heard gunshots. She crawled from the coffee shamba and crossed a stream. She went to the home of her brother in law called Karokora who was not at home. His wife told her that she heard what happened. From the home of Karokora, she went back to the scene where she found the body of her husband lying in a pool of blood.

During cross examination, the witness reiterated that she had seen the appellant outside the house among the assailants. She had also recognised his voice while inside the house. Her Police statement which was recorded on 13th February, 2001 was put to her but she denied its contents. According to her she was not in her senses when she recorded her statement because of the loss of her husband. In her statement she is quoted to have stated that she did not recognise any of he assailants but suspected them because of the long standing dispute between the deceased and his brothers and the appellant who is a nephew. This is what was recorded in her statement:-

"I wish to confirm that the people who attacked us were not identified but I recognised the voice of among the assailants to be of Lt. Ainomugisha- Kihuguru or Robert because I know the voice because we stay in the same area and we belong to the same family and the voice of Lt. Ainomugisha- Kihuguru and Robert are similar.

And I wish to conclude that although I did not see particular persons who killed my husband, I do suspect the following people namely Rumondo and Rukazana because of the land dispute and words they were uttering, then Lt. Ainomugisha-Kihuguru the words he uttered and being an army man he has access to the gun which killed my husband and at the time of killing my husband Lt. Ainomugisha was in the area and I also suspect Kekimuri because she used to come with people on motorcycles to the village and she was the one keeping Lt. Ainomugisha-Kihuguru.

And furthermore I got information that the family of Rumondo and Rukuzana were removing their properties and talking to their relatives a prior knowledge of the murder of my husband...."

The assailants went to the home of Elly Kikwabe (PW2) after the first attack on the home of the deceased. PW2 testified that on 9th February 2001 at about 10.00 p.m. he had gone to sleep when he heard stones being hit at the doors of the deceased's house. He awakened his wife. He heard gunshots at the home of the deceased. He together with his wife and children made an alarm. As they were raising the alarm the door to his sitting room was smashed open and a shot was fired inside. A second shot was fired into his bedroom. He hid himself under the bed. His wife hid behind a cupboard. A third shot was fired. The assailants had a

torch which enabled him to see them. A fourth shot was fired. That is when the appellant turned and saw his wife leaning against the wall near the cupboard. The appellant told his wife that they should not make more noise. **"They were flashing a torch and that is how I recognised the other one he had."**

During cross examination he stated that he did not inform Julius Rwenzigye LCI Secretary for defence or anyone else that he had seen the appellant among the attackers. He explained that Rwenzigye did not ask him and he was not in his normal senses.

Natuhwera Aden (PW5) a daughter of PW2 was at home with her father and mother, Peace Kikwabe (PW6) when she heard gunshots from the direction of the deceased home. The homes are in the same compound. She raised an alarm. She heard gunshots at the door which got broken. The assailants entered the house. She was struggling to open the door leading to the kitchen when she heard the voice of the appellant saying " you open and I kill you" She was familiar with the appellant's voice because she used to stay with him.

She first ran to the home of Tono and then his neighbour called Julius, LCI Secretary for defence. She told Julius that she had identified the appellant among the attackers. She also told her father that she had identified the appellant among the attackers.

Peace Kikwabe (PW6) is a wife to Elly Kikwabe (PW2). She testified that on 9th February 2001 at about 10:00 pm. he was at home with her husband when she heard banging on the house of the deceased. Her husband told her that the deceased had been attacked. She raised an alarm. She heard a person talking like Jonas Ainomugisha saying "You open and I kill you." She was near the cupboard. He was holding a torch. He saw her and asked her why she was making noise. He hit her with the barrel of the gun. She ran away to the home of Tono whom she told that the appellant was one of the assailants.

The witnesses who testified that the appellant was one of the assailants claim that his identification was both visual and by his voice. On visual identification Irene Tibarabeihire testified that there was total darkness inside the house but there was bright moonlight outside by which she was able to identify the appellant among the attackers. He was well known to her. Elly Kikwabe, brother of the deceased claimed that he had hidden under the bed but was able to see the appellant by help of torch light which the assailants were holding. Peace Kikwabe wife of PW2 testified that she was hiding behind a cupboard but was able to see the

appellant who was holding a torch. Natuhwera Aden, daughter of Elly and Peace Kikwabe and a niece of the deceased claimed that she had been helped by bright moonlight filtering into the house to see the appellant whom she knew very well.

In our view, the circumstances under which the witnesses claim to have seen the appellant were difficult. The widow of the deceased testified that there was no light in the house in which they were attacked but there was bright moonlight outside which enabled her to identify the appellant. This evidence has to be tested against the statement she gave at the Police in which she stated that she had not recognised any of the assailants but only suspected the appellant because he is a soldier and has access to guns. She explained that she did not reveal identity of the assailants including the appellant because she was not in her right state of mind after the manner in which her husband was killed. But whatever the state of her mind, it is incomprehensible that a witness would positively identify the person who killed her husband and make statement stating the opposite.

Elly Kikwabe and Peace Kikwabe stated that they indentified the appellant by aid of a torch which according to Peace Kikwabe was being held by the appellant. Elly Kikwabe was hiding under a bed while Peace Kikwabe was hiding behind a cupboard. We do not see how from their hiding places the torchlight would help them recognise the appellant especially if he was the one holding the torch as stated by Peace Kikwabe.

Aden Natuhwera's testimony was that the moonlight filtered into their house through a broken door. It is not clear as to how the moonlight filtering into the house could enable her to positively identify the appellant if she was in a room other than the one which had been broken. We also do not see how moonlight would filter into a house and enable an occupant to identify an assailant or assailants.

Three of the witnesses, namely Irene Tibarabaheire (PWI), Atuhwera Aden (PW5) and Peace Kikwabe (PW6) claimed to have identified the appellant by his voice. In Court Irene testified as follows:-

> **" I heard the voice of Ainomugisha Jonas say I think now you are holding your axes which are helpless to you, which will not assist you after a bullet has been fired. "**

But in her statement to the Police already referred to she had stated:-

" I wish to confirm that the people who attacked us were not identified but I recognised the voice of among the assailants to be of Lt. Ainomugisha- Kihuguru or Robert because I know the voice because we stay in the same area and we belong to the same family and the voice of Ainomugisha Kihuguru and Robert are similar..."

She is not positive as to whether the voice she heard was that of the appellant or Robert's whom she also names as one of the assailants.

Peace Kikwabe (PW6) testified as follows:-

" as I was about to open the door, I heard a person talking like Jonas Ainomugisha saying that you open then I kill you"

Atuhurera Aden (PW5) testified that**:-**

"When he reached the door of my parent's bedroom the person I recognised as Lt Jonas stated that you open the door and I kill you"

We have already observed that the widow did not name any of the assailants at the first opportunity and neither did Elly Kikwabe (PW2) who testified as follows:-

"Among those who answered the alarm was the LCI Secretary for defence called Julius Rwenzigye. My son is called Katusiime. I forget his second name. Apart from Rwenzigye there came Lillian Nkereirwe who was General Secretary LCA (From LC authorities). I did not tell Julius Rwenzigye that night that I had seen Lt Ainomugisha Jonas among the attackers because he did not ask me. Even the people in the village knew Lt. Ainomugisha was there and we reported several times. I did not tell Katusiime my son that the Lt. was among the attackers that night.

Atuhwera Aden (PW5) testified that she reported the incident to a neighbour of Tono called Julius who was Defence Secretary.

But none of them was called by the prosecution.

The desirability of the evidence of the persons in authority to whom an immediate report is made was stressed in the case of **Kella And Another V Republic (1967) E.A. 809** where the

former Court of Appeal for East Africa cited with approval the following passage from **Shabani Bin Ronald v R (1940) E.A.C.A. 60**:

> **"We desire to add that in cases like this and indeed in almost every case in which an immediate report has been made to someone who is subsequently called as a witness evidence of details of such report (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all."**

That which applies to the police in this regard also applies to the chiefs. Another case **Tekerali S/O Korongozi and others vs. Reg (1952) 19 E.A.C.A 259** emphasizes the same point at page 260 in the following terms:-

> **"Their importance can scarcely be exaggerated for they often provide a good test by which the accuracy of the later statements can be judged, thus providing a safeguard against later embellishments or the deliberately made up case. Truth will often come out in a statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."**

The omission by the Prosecution to adduce evidence of persons to whom the witness reported the incident and revealed the identity of the assailants whom she had identified coupled with the statement of the widow of the deceased that she did not recognize any of the assailants makes their evidence unreliable. This Court finds it unsafe to base a conviction on the visual and voice identification of the appellant unless there is some other evidence to support it. We shall revert to this issue after a re-evaluation of the other evidence in relation to the issue as to whether or not the appellant participated in the killing of the deceased.

We now turn to the issue of alibi. The appellant stated that although he had been in the village from 5th January 2001 on pass Leave, he had returned to Gulu on 28th January 2001 and resumed his duties on the 29th January 2001 and up to the time of his arrest on 30thAugust 2001 he had not gone back to the village. He adduced evidence of the officers who had

granted him the pass Leave but none of them remembered when he had returned to Gulu from the pass leave. The prosecution witnesses who claim to have identified the appellant on the night the deceased was killed also claim to have seen him in the village a day or so before the killing of the deceased. The Court of Appeal observed as follows:-

"We refer to the defence of alibi as a "so called defence" because no defence of alibi was in fact raised. The deceased was killed on 9th February 2001. The so called defence even if it was credible covered only the dates between 5th January to 29th January 2001. We have shown that the evidence of P.W.I,PW.5 and P.W.6 put the respondent squarely at the scene of crime. <u>He was in his home area destroying fences and uprooting poles on the disputed land. He was seen moving around on motor cycles with strange men in a very menacing fashion. This was very evident during the last 7days before the deceased was killed</u>. That evidence was never shaken at all. In light of the fact that it was not proven when the appellant returned to Gulu from Bushenyi raises the credibility of the prosecution evidence. <u>The movement warrant which could have helped to establish the fact was deliberately withheld</u> because it would perhaps have revealed exactly when he returned to Gulu. It is our holding that the so called defence of alibi was no defence at all since it did not cover the period he was seen in Bushenyi and certainly does not purport to explain where he was on the day and night of the 9th February 2001."

With due respect the Court of Appeal misdirected itself in some aspects. First of all the evidence that the appellant was seen in his home area destroying fences and uprooting poles on the disputed land had nothing to do with his alibi. According to the evidence of Irene Tibarabaihire (PWI) and Elly Kikwabe (PW2) the alleged cutting of the wire fence and uprooting of the poles took place on 7th January 2001 which coincides with the period when the appellant was on Pass Leave. The appellant's alibi was that he left for Gulu on 28th January 2001 and never returned to Bushenyi till his arrest. Secondly there was no evidence that the movement warrant was deliberately withheld. Thirdly it is trite that by setting up an alibi, an accused person does not assume the burden of proving its truthfulness so as to raise a doubt in the prosecution case. The appellant's testimony and that of the officers who issued him with the warrant was sufficient to raise the alibi which the prosecution was duty bound to disprove.

One of the ways of disproving an alibi is to investigate its genuiness as was stated in the case of **Androa Asenua & Another Vs Uganda (Cr. Appeal No 1 of 1998) [1998] UG SC 23** where the Supreme Court of Uganda cited with approval the authority of **R Vs Sukha Singh S/O Wazir Singh and Others 1939 (6 EACA) 145** where the Court of Appeal for East Africa observed that:-

"If a person is accused of anything and his defence is an alibi, he should bring forward the alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuiness proceedings will be stopped."

In the same judgment the Supreme Court made the following observation:-

"Before leaving the issue of alibi we would like to point out that in England, evidence in proof of Alibis has since 1967 been largely regulated by Statute. Thus Section 11 of the Criminal Justice Act, 1967 of the United Kingdom provides as follows

"11 (I) on the trial on indictment the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.

2. Without prejudice to the foregoing subsection, on any such trial the defendant shall not without leave of the Court call any other person to give such evidence unless:-

(a) the notice under that subsection includes the name and address of the witness, or if the name and address is not known to the defendant at the time he gives notice, any information in his possession which might be of material assistance in finding the witness."

It is unnecessary to reproduce here the rest of the provisions of Section 11 of that Act save to say that these provisions basically reflect the view stated by the Court of Appeal for Eastern Africa in the case of R. – v. Sukha Singh(Supra)

We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK Statute cited above, such belated disclosure must go to the credibility of the defence. We would therefore, strongly recommend that a Statutory Provision of similar effect to Section 11 of the United Kingdom Act ought to be made part of our Criminal Justice"

We reiterate the above observation. We also observe that since the recommendation was made in a judgement delivered in 1998 no provision similar to the one in the UK. Act has been enacted in our Law. In absence of a statutory provision one would expect the prosecution to adduce evidence of the investigating officer who would testify as to whether or not an accused person raised the alibi at the earliest opportunity and the evidence would be one of the factors to take into account before admitting or rejecting the alibi.

Unfortunately, the prosecution did not adduce evidence of the investigating officer or arresting officer. This Court cannot tell as to whether or not the appellant raised his alibi at the earliest opportunity and whether or not anybody bothered to investigate its genuiness. The investigating officer or arresting officer, if he had been called would have provided the evidence. He would also have explained as to why , if the eyewitnesses were positive in their testimony in Court that they had seen the appellant in the village during the period the deceased was killed, it took almost seven months before he was apprehended when his whereabouts were well known.

In the case **of Bogere Moses and Anor vs Uganda** (Supra) this court discussed two cases where the desirability of calling as witnesses police officers who investigated a case was reiterated. The first one was **Rwaneka Vs Uganda 1967 E.A. 768** where Sir Udo Udoma, Chief Justice, as he then was, stressed that it is a duty of prosecutors to make certain that police officers who had investigated and charged an accused person, do appear in court as

witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person.

The second one is **Alfred Bumbo And Others Vs Uganda Criminal Appeal No 28 Of 1994** (unreported) in which this court said.

> **"While it is desirable that the evidence of a police investigating officer and the arrest of an accused person by the police should always be given where necessary, we think that where other evidence is available and proves the prosecution case to the desired standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition, to prove the charges"**

In the instant case, the evidence of the investigating officer and arresting officer was essential. The evidence would have assisted court on the issue as to the basis for arresting the appellant and why it took the police so long to arrest him. We have already observed that the widow of the deceased reported that she did not recognize any of the attackers and it is not clear as to what stage she changed her story and implicated the appellant as one of the assailants.

The prosecution also omitted to adduce evidence of the persons to whom other witnesses revealed the identity of the attackers, if at all. The evidence of the arresting officer would have gone a long way in strengthening the prosecution case especially by destroying the alibi of the appellant that he was on duty in Gulu from 29th January 2001 to 30th August 2001 when he was arrested. The truthfulness of this alibi should have been investigated before its rejection as no alibi.

In the case of **Bogere vs Uganda** (Supra) this court drew adverse inference from the failure of the prosecution to adduce police evidence of arrest and investigation in absence of explanation as to why such evidence was not adduced. In this case the same inference is made for the failure of the prosecution to adduce such evidence given the nature of the evidence relating to the participation of the appellant in the murder of the deceased.

The other way of disposing of an alibi is for the prosecution to adduce cogent evidence which puts the accused at the scene of crime. The quality of the evidence (already analysed) which allegedly put the appellant at the scene of crime lacked the cogency that would

disprove the accused's alibi and establish beyond reasonable doubt that he participated in the killing of the deceased.

In summary where a Court is faced with a case entirely dependant on the correctness of an identification or identifications of an accused, the evidence ought to be considered as whole. The factors favouring correct identification have to be weighed against those factors which made correct identification difficult. In this case one factor that favoured correct identification is that the appellant was well known to all the witnesses but the lighting as described by the various witnesses was not conducive to an identification so positive that a possibility of an erroneous identification would be ruled out.

The identification by voice was not that definite either. The evidence by the various witnesses that the appellant was seen in the village at the time he claimed he was on duty in Gulu has to be weighed against the accused's alibi which should have been investigated.

We do not agree with the Court of Appeal that there was overwhelming evidence on which to base the appellant's conviction. Rather, we find that the evidence relied on by the prosecution regarding the identification of the appellant was no so congent and safe as to base a conviction on it. We are in agreement with the trial Court that the circumstances under which the visual and voice identification was made did not exclude any possibility or error.

We, therefore, allow the appeal against the appellant's conviction which is quashed.

We do not find it necessary to delve into the grounds of appeal regarding sentence which, as a consequence of the quashing of the conviction is set aside.

Dated at Kampala this ...28th ..... day .....April..... 2017

Hon. Justice Jotham Tumwesigye
Justice of the Supreme Court

Hon. Justice Esther Kisaakye
Justice of the Supreme Court

Hon. Justice Eldad Mwangusya
Justice of the Supreme Court

Hon. Justice Opio Aweri
Justice of the Supreme Court

Hon. Lady Justice Faith Mwondha
Justice of the Supreme Court