THE REPUBIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA

[CORAM: Egonda-Ntende, Obura &Musota JJA]

CRIMINAL APPEAL NO. 105 OF 2012

(Arising from High Court Criminal Session Case No.081 of 2010 at Masaka)

BETWEEN

BALIKUNDDEMBE ALEX ....APPELLANT

AND

UGANDA ....RESPONDENT

(*An appeal from the judgement of the High Court of Uganda [Akiiki – Kiiza, J.,] delivered on 11th April 2012*)

JUDGEMENT OF THE COURT

Introduction

1. The appellant was indicted and convicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that on the 11th day of June 2008, the appellant at Kibuye village in Masaka District murdered Nakirembeka Teopista. On 11th April 2012, the learned trial judge sentenced him to serve a period of imprisonment for 25 years.

2. The appellant now appeals against the conviction on the following ground;

> 'The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record as a whole and relied on hearsay, contradictory, insufficient, untruthful and unreliable prosecution evidence and hence arrived at a wrong conclusion that the appellant was guilty of the offence of murder contrary to section 188 and 189 of the Penal Code Act which is a miscarriage of justice.'

3. The respondent opposes the appeal

Submissions of Counsel

4. Mr Sserunkuma Bruno appeared for the appellant and Ms. Ann Kabajungu appeared for the respondent. Mr Sserunkuma submitted in general that the evidence which the learned trial judge relied on to arrive to the conclusion the conditions of identification were favourable is credible. He referred to the evidence of PW2 and PW3 who were identifying witnesses. He submitted that there were contradictions and inconsistences in the evidence of the PW2 and PW3. That prosecution failed to place the accused at the scene of the crime. He referred to the case of Kazarwe Henry v Uganda SCCA No. 17 of 2015. He further submitted that evidence of PW1 and PW4 contained hearsay evidence which is not admissible. He prayed that this appeal is allowed.

5. Ms. Ann Kabajungu in reply submitted that the appellant was properly identified and placed at the scene of the crime. That the conditions of identification were favourable. That there was ample lighting and PW2 and PW3 had enough interaction with the accused, that the contradictions in the prosecution case are minor and do not go to the root of the case. She prayed that the appeal be dismissed.

Analysis

6. The case for the prosecution was that on the night of 11th June 2008 at Kibuye Village, the deceased aged 70 years, was moving with her grandson Kigoye Sam (PW2) when the accused who was holding something in a polythene bag came across them and asked to be directed to the house of "mukadde Anyirira" which name was used to refer to the deceased. Kigoye Sam revealed to the accused that the deceased was the person he was moving with and went with the latter to her home. The accused was given a seat and the deceased sat near him. The deceased's grandchildren left the accused with the deceased for a short while only for the accused to assault the deceased. The deceased was cut by the appellant on the head. She was rushed to hospital where she died shortly after

7. The appellant in effect denied the offence in his unsworn statement though he did not refer to the crime at all.

8. As the first appellate court, it is our duty to review and re-evaluate the evidence adduced at the trial and reach our own conclusion, bearing in mind that this court did not have the same opportunity, as the trial court had to hear and see the witnesses testify and observe their demeanour. See Rule 30(1) (a) of the Rules of this Court, Pandya v R [1975] E.A 336, Kifumante Henry Vs Uganda, (Cr. App. No. 10 of 1997 (unreported), Bogere Moses & Anor, v Uganda, SC Criminal Appeal No.1 of 1997.

9. The evidence at trial that is the subject of re-evaluation consists mainly the evidence of PW2 and PW3. We find it necessary to state the law on how the evidence of identification witnesses should be handled.

10. In the case of Moses Bogere & Anor v Uganda, (SC Criminal Appeal No.1 of 1997), the Supreme Court stated the approach to be taken by the trial court in dealing with evidence of identification by eye witnesses in a criminal case as hereunder;

> 'This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the 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 it difficult. It is trite law that no piece of evidence should be weighed except in relation to all the rest of the evidence (See Sulemani Katusabe Vs Uganda SC Criminal Appeal No.7of 1991 unreported).'

11. The Supreme Court went on to state that the need for care stressed in the above passage is not required in respect of a single eye witness only but is necessary even where there are more than one witness where the basic issue is that of identification. The Court has to consider the conditions

available for proper identification.This point was stressed in Abdalla Nabulere &Another Vs Uganda, Criminal Appeal No. 9 of 1978 (1979) in the following passage in the judgment:

> 'Where the case against an 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 that 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 a 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.'

12. Turning to the evidence on record, PW2 testified that on 11th June 2008 at 8.30pm, the appellant approached him and the deceased on their way to home from Kibuye Trading Centre. He was looking for the deceased. PW2 introduced him to the deceased whereupon they went home together. Upon reaching home, PW2 brought for the appellant a chair and they sat outside the house. Thereafter, he went inside the house and switched on the radio but after 3 or 4 minutes he heard footsteps running. Then he heard and saw Fazira Nansonve run to him and told him that her grandmother had been slapped and he fell and that the assailant had ran away. When he ran to the scene, the deceased was lying down kicking and she had been cut on the head. He then ran raising an alarm for help.

13. On cross examination, PW2 testified that before the incident, he had never seen the accused and that it was the first time he was seeing him again after the incident. He also testified that she lit a lamp (tadoba) and took it

outside where the appellant was sitting with the deceased before entering the house. He was about 1½ metres away from him and he had a white polythene bag but he did not know its contents. That he spent around 20 minutes with the appellant from the time they met on the way to the time he lit the tadoba and brought the chair. He testified that at the time he met the accused, there was moonlight hence he was able to see him.

14. PW3 was a child of tender years. A voire dire was conducted and court found that she possessed sufficient knowledge and understanding and appreciated the nature of an oath to give sworn evidence.

15. She testified that she doesn't know the accused name but knows him because he came to the deceased's home, with whom she was staying, looking for the deceased at around 9:00pm. She was with Lanyani, who was about 9 years at the time of the testimony, in the kitchen preparing food. There was no one older than her. She had never seen the appellant before that incident and even at that time she didn't see him but heard a voice.

16. That upon the return of the appellant with the deceased and PW2, she was able to see the appellant when she brought a chair for him and lit the tadoba. She was able to see him because the tadoba was placed on the chair the accused sat on. It was a bench chair. She greeted him and went back to the kitchen which was about 5 meters away. That she saw the accused go into a banana plantation and retrieve a black polythene bag after the deceased had greeted him and hid it behind his back. He removed a knife from the polythene bag and cut the deceased on the head who was facing them. He got the polythene bag and then ran away. She went and looked at the deceased and then ran to call PW2.

17. The appellant in his defence did not allude to the crime at all. He testified that while in Lyantonde in his village in Kyewamule, around five months after his arrival, a land wrangle ensued between him and his neighbour. He consulted his brother who told him he would handle the matter. That his brother called the neighbour three times but he did not come to resolve the issue. That after three days the chairman came with a man quarrelling. They started quarrelling which resulted into a fight. At the end of the fight, the chairman promised to do to him a thing that he would never forget. He was arrested after one month and taken to Lyantonde Police station. He

was then taken to Kalagala hospital where he spent two weeks before his arrest and being brought to Masaka.

18. Although there was moonlight and light from the tadoba, the witnesses had never seen the appellant before. This lighting could not have been sufficient for the witnesses to properly identify the appellant. During trial, it was not established whether the light from the tadoba was sufficient. Even though PW2 testified that she had been with the appellant for over 20 minutes, the fact that it was at night coupled with the fact that the bigger part of the time she was relying on moonlight leaves doubt as to whether she properly identified the person to draw the right conclusion.

19. PW3 observed the appellant when she took the chair, lit the tadoba and greeted him. Was this time sufficient? Judging from the nature of the lighting, we don't think so. She testified that she was seated in the kitchen which according to the sketch plan was around 4 meters from where the deceased and the appellant was seated. This is a short distance but in the circumstances the lighting was not sufficient for a proper identification. It was not established which direction the appellant was facing when seated.

20. It was at the trial that the witnesses first identified the accused since the commission of the offence. This is unusual and irregular given the circumstances of identification. An identification parade ought to have been carried out for the witnesses to identify the said assailant. Neither PW2 nor PW3 knew the accused's name hence it is questionable how the appellant came to be arrested and indicted. PW1 stated that it is PW3 who told him that she had seen the accused in the area. However, PW3 testified that she did not know the appellant's name.

21. In the case of Sentale vs Uganda, [1968] E A 365 where the Court of Appeal for East Africa stated,

> 'If there was a case in which an identification parade was essential this was it because the robbery took place at near mid-night, although there was moonlight as well as street lights. The assailant was never known to the complainant prior to the incident.'

22. The learned trial judge observed in his judgement that the evidence of PW2 and PW3 was reliable judging from their demeanor. There were no notes on record describing such demeanor. Court has to bear in mind that even a mistaken witness can be convincing. In conclusion, the conditions were not favorable for proper identification.

23. In Moses Kasana vs Uganda, Cr. App. No. 12 of 1981 (1992-93) HCB A7 which was cited with approval in Moses Bogere & Anor v Uganda (supra), the Supreme Court underscored the need for supportive evidence where the conditions favouring correct identification are difficult. It stated;

> 'Where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification…'

24. The other evidence on record is that of PW1 and PW4. PW4, Kagoro Albert was attached to Ndagwa Police Post in Lwengo District as officer in charge of the C.I.D. He testified that he received information from PW1 that the deceased had been cut on the head whereupon he rushed to the scene of the crime and found the deceased lying in a pool of blood. He was told that Dembe Deogratious who was the relative to the deceased had come to the village and was suspected to have assaulted the deceased and disappeared.

25. PW1, the chairman testified that he had never handled any land wrangles with the deceased and the appellant though he used to hear that there were land wrangles between Waligo (appellant's father), his sons and the deceased. He testified that when he reached the scene, he received information from the village mates that it was the appellant Balikuddembe Deogratious who had been seen that day in the village. That he had disappeared, they tried to look for him but could not find him. On cross examination, he stated that it was PW3 who had told him that she had seen the accused in the area.

26. The evidence of PW1 and PW4 is hearsay. The trial judge relied upon this evidence which is erroneous. The learned trial judge ought to have decided the case solely on evidence that is admissible. PW4 testified that upon searching the accused in his home area of Kyewamule, in Lyantonde, he

was told by the accused's mother that he had come home while panicking and left for Mbarara. This is also hearsay evidence, the appellant's mother ought to have been called as a witness.

27. It is well established that in all criminal cases, the burden of proof is upon the prosecution to prove the guilt of the accused person beyond all reasonable doubt. The burden never shift save in exceptional cases provided by the law. See Woolmington v D.P.P, (1935) AC 462, Miller v Minister of Pensions, [1947] 2 ALL E.R372. The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused puts in issue each and every ingredient of the offence with which he is charged and the prosecution has the onus to prove each and every ingredient of the offence before a conviction is secured. See Ssekitoleko v Uganda, [1974] EA 531

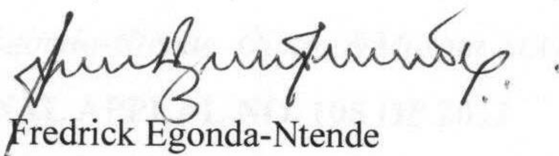
28. The failure of the state to hold an identification parade for PW2 and PW3 to identify the appellant as the person who committed the murder of the deceased leaves only the dock identification made by PW2 and PW3 that it was the appellant that committed this offence. This is of very little value. The witnesses had never met the appellant before. They did not know him. The crime was committed at night outside her residence. The conditions for favourable identification were suspect. It was essential that the Police hold an identification parade for the 2 eye witnesses to identify the appellant as the person who had committed the crime in question. Not having done so, in order to secure a conviction, there must be other evidence pointing to the guilt of the appellant. There is none in this case.

29. The prosecution failed to adduce sufficient evidence to prove beyond reasonable doubt that the appellant participated in or committed the murder of the deceased.

Decision

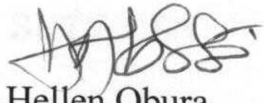
30. Therefore we allow the appeal, quash the conviction and set aside the sentence against the appellant. The appellant is to be set free forthwith unless held on some other lawful charge.

Signed, dated and delivered at Masaka this 30th day of July 2018.



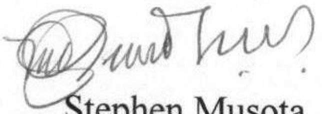
Fredrick Egonda-Ntende

Justice of Appeal



Hellen Obura

Justice of Appeal



Stephen Musota

Justice of Appeal