THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL NO. 0161 OF 2016
AND
CRIMINAL APPLICATION NO. 0003 OF 2018
(Arising from High Court of Uganda at Masaka Criminal Session Case No. 14 of 2013).

MUTENDE GONZAGA DODOVIKO :::::::::::::::::::::::::::::: APPELLANT
VERSUS
UGANDA :::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Masaka before Tibulya, J. delivered on 17th June, 2016 in Criminal Session Case No. 0014 of 2013).

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF THE COURT

Brief Background

The appellant was charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120. He was duly committed and tried on an Indictment containing the above mentioned offence. The facts as accepted by the learned trial Judge were that the appellant had, on the 11th day of April, 2012 at Gayaza LC I "A" Village in the Rakai District, committed the multiple murder of two persons, namely Nakanwagi Paulina and Nagawa Justine. She then convicted the appellant despite his having denied any involvement in the commission of the offences in question and sentenced him to imprisonment for the rest of his natural life. Being dissatisfied with the decision of the trial Court, the appellant appealed to this Court on grounds which were set forth in the memorandum of appeal as follows:

"1. **The Learned Trial Judge erred in law and in fact when she failed to properly evaluate the evidence on record thereby reaching a wrong decision.**

2. **The Learned Trial Judge erred in law and in fact when she rejected the appellant's defence of alibi which occasioned a miscourage (sic) of justice.**

3. **The Learned Trial Judge erred in law and in fact when she held that the appellant was properly identified thereby reaching an erroneous decision.**

4. **The learned trial Judge erred in law and in fact when she held that the contradictions in the prosecution evidence were minor and did not go to the root of the case which prejudiced the appellant."**

Representation

At the hearing of the appeal, Mr. Kalule Fredrick Robert, learned Counsel, represented the appellant on Private Brief, while, Ms. Nyanzi Macrena Gladys, learned Assistant Director of Public Prosecutions from the Office of the Director of Public Prosecutions, represented the respondent. The appellant was present in Court. Counsel for both parties made oral submissions.

Ruling in Criminal Appeal No. 003 of 2018

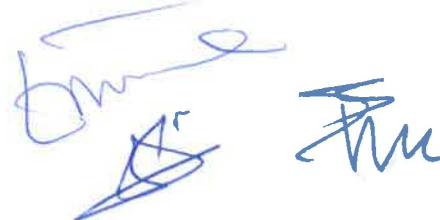
When the appeal came up for hearing, the appellant made an application to adduce additional evidence. The said application, which had a bearing on the substantive appeal, was argued and dismissed. We promised to give the reasons for the decision to dismiss it later when determining the main appeal. We do so now. The application was brought for orders that:

"a) **Leave be granted to the Applicant to adduce additional evidence in respect of Criminal appeal No. 161 of 2016 which is pending before this court.**

b) **That the additional evidence be by way of affidavit and the deponent thereof be availed for cross-examination by the Respondent and this honourable court on the testimony.**

c) **Costs of the application be in the cause."**

The primary case for the applicant was that he should be allowed to adduce additional evidence because it would assist this Court to reach a fair and just determination of the substantive appeal. The evidence in question was the testimony of his fiancée which would support the applicant' alibi to the effect



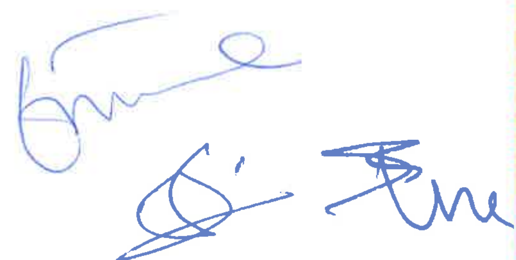
that on the date of the commission of the offences in question, he was at his fiancee's home tending to their sick child.

The respondent opposed the application making the following submissions. First, that the additional evidence sought to be adduced for the appellant would not disclose any new matter. Secondly, that the evidence in question would be adduced to prove an alibi yet the burden of proof concerning alibis lay with the prosecution. In counsel's view, the testimonies of PW1 and PW7 had ably destroyed the appellant's alibi by squarely placing him at the scene of crime. Therefore, counsel contended that this Court should exercise its discretion to refuse the present application as the evidence sought to be adduced could not influence the outcome from the trial Court.

We note that exercising the discretion on whether or not to allow an application seeking to adduce additional evidence on appeal should be approached cautiously. This is for obvious reasons. The parties to the appeal would have already had the opportunity to bring the necessary witnesses to support their respective cases at the trial. On appeal, a party would be aware of the decision of the trial Court and any additional evidence, may therefore be contrived to alter it which would make a mockery of the justice system.

However in appropriate cases, an appellate Court may admit evidence which was not laid before the trial Court. Such evidence is referred to as "further evidence" or "additional evidence" in various laws. For example **Section 41** of the **Criminal Procedure Code Act, Cap. 116** provides that:

> **"41. Further evidence.**
>
> **(1) In dealing with an appeal from a lower court, the appellate court, if it thinks additional evidence is necessary, may record its reasons and may take that evidence itself or may direct it to be taken by the lower court.**
>
> **(2) When the additional evidence is taken by a lower court, that court shall certify the evidence to the appellate court which issued the direction which shall thereupon proceed to dispose of the appeal.**
>
> **(3) Unless the appellate court otherwise directs, the accused person or his or her advocate shall be present when the additional evidence is taken.**



(4) Evidence taken under this section shall be taken as if it were evidence at a trial before the lower court.

(5) In dealing with an appeal from a lower court, the appellate court may, if it thinks fit, call for and receive from the lower court a report on any matter connected with the appeal."

Furthermore, this Court may, in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner. **(See: Rule 30 (1) (b) of the Judicature (Court of Appeal Rules) Directions. S.I 13-10.** The above provision indicates that this Court, as an appellate Court, may exercise the discretion to take additional evidence on appeal.

Judicial discretion must be exercised judicially and judiciously. On whether to take additional evidence, we are persuaded by the guidelines followed in **Naveed Ahmed vs Uganda, Court of Appeal, Criminal Appeal No.129 of 2015.** There the Court gave a ruling on an application for leave to adduce additional evidence wherein it observed that:

> **"The principles which court must apply before granting an application of this nature were set out in the case of Ladd vs Mashall (1954) 1 WLR 1489 at page 1491 by Denning LJ (as he then was) at P. 1491 as follows;-**
>
> **"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words; it must be apparently credible, though it need not be incontrovertible.**
>
> **We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to tell the truth" It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as being credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion."**

These principles were recently discussed and applied by this court in General Parts (U) ltd v Kunnal Pradip Karia (court of Appeal Civil Application No. 266 of 2013) as follows;-

The principles to be applied by the Appellate court when considering whether to call an additional evidence was laid down since the decision of Lord DENNING in the case of Ladd VS Mashall [1954] IWLR 1491:-

"Those principles are as follows:-

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(2) The evidence must be such that if given it would probably have an important influence on the result of the case though it need not be decisive.

(3)The evidence must be such that as is presumably to be believed or in other words it must be apparently credible though it need not be incontrovertible.

The decision in Ladd vs Mashall was approved in Skone VS Skone [1971 IWLR 817]. In East Africa it was followed in Mzee Wanje and others vs Saikwa & others [1976-1985] I.E.A 364 (CAK) and A.G vs P.K Ssemogerere & others Constitutional Application No. 2 of 2004(SCU).

In the case of Mzee Wanje (Supra) the court of Appeal of Kenya had this to say:

"It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court's decision. I consider that the same test should be applied to our rules for otherwise it would open the door to litigants leave until an appeal all sorts of material which should properly have been considered by the court of trial" Emphasis added.

In Uganda, Rule 30 of the Court of Appeal Rules grant the Court of Appeal discretionary power to hear additional evidence, for sufficient reasons. The above rule is the handmaid of Article 126 of the Constitution which advocates that in essence means that the role of the Court of Appeal is not only about law but about justice.

Sufficient reasons were defined by the Supreme Court in Attorney General VS Paul K. Ssemogerere & others, Constitutional Application No. 2 of 2004. In that case, the Supreme Court relied on the authorities in

Ladd vs Mashall and Skone VS Skone (Supra), among others, and observed that an appellate court may exercise it discretion to adduce additional evidence only in exceptional circumstances, which include:

(i)Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.

(ii)It must be evidence relevant to the issues.

(iii)It must be evidence which is credible in the sense that it is capable of belief.

(iv)The evidence must be such that if given it would probably have influence on the result of the case although it need not be decisive.

(v)The affidavit in support of an application to adduce additional evidence should have attached to it proof of the evidence sought to be given.

(vi)The application to adduce additional evidence must be brought without undue delay.

(vii) As noted from above, the court expanded the principles in Ladd VS Mashall and emphasized the doctrine that litigation should come to an end in the following terms:-

(viii)These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put in full case before the court. We must stress that for the same reason courts should be even more stringent to allow a party to adduce additional evidence to reopen a case, which has already been completed on appeal"

From the above authority, additional evidence may be allowed to be adduced on appeal upon the satisfaction of the following three requirements:

"1. The evidence could not have been obtained with reasonable diligence for use at the trial.

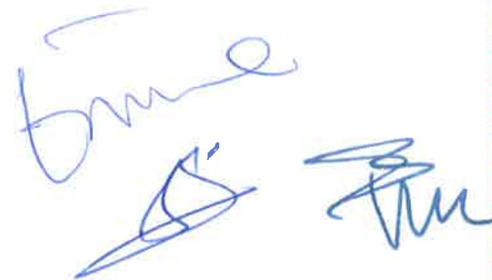
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

3. The evidence must be such as is presumably to be believed, or in other words; it must be apparently credible, though it need not be incontrovertible."

We shall now examine whether the applicant satisfies all the above three requirements. We note that the applicant did not substantiate on what steps he took to procure the evidence in question. The said evidence would have consisted of evidence from his wife purportedly in favour of an alibi of sorts. We gather from the relevant application and the accompanying affidavit that the reasons for not presenting that evidence had to do with the "supersonic" speed with which the trial was heard and concluded. The applicant also stated that he was oblivious as to why his wife did not testify and yet he expected her to do so. He does not indicate what diligence if any, he exercised at the material time to have his wife testify.

When he was put to his defence in the trial Court, the appellant unequivocally stated that he would only call one witness who would give sworn evidence. That witness would be the appellant himself. Indeed the record shows from page 19 that the appellant testified at length and his testimony was considered. To us, the allegations that the applicant failed to procure the evidence sought to be adduced now on appeal are an afterthought. Had the appellant intended to call his wife to testify, the record would have revealed the extent of his efforts. It does not. Therefore, the applicant failed to satisfy the first requirement necessary for the grant of an application to adduce evidence on appeal. The said evidence could have been obtained during the trial if the applicant had expressed interest in obtaining it. It was available to him at all material time of the trial.

For the reasons immediately above, the application would have failed. However, we pause here to make some observations on the evidence sought to be adduced on appeal. We observe that the learned trial Judge considered the possibility that the appellant was at his wife's home on the night he committed the offences in question hence setting up the defence of alibi. In her judgment, she correctly adverted to the relevant legal principles at page 44 of the record that an accused person who sets up an alibi assumes no burden to prove its truth. She further stated that the burden to prove such



an alibi by adducing credible evidence placing the accused at the scene of crime at the particular time lay with the prosecution.

The learned trial Judge analysed the evidence in a highly methodical manner and concluded that the evidence of PW1, the sole identifying witness, had disproved his alibi. She reasoned that PW1 had seen the applicant at the scene of crime which evidence destroyed the alibi that he was at his home on the material time. She further made a finding that the applicant had been spotted near the scene of crime by PW7, a security guard at a nearby health facility. The applicant had gone there and asked PW7 whether he could buy medication to which PW7 responded that the facility had closed for the day. She then concluded, that the above evidence had established that the applicant was not at his wife's home at Kalisizo at the time of commission of the offence; but was rather at the scene of crime.

It is hard to fault the learned trial Judge's findings. It is thus unlikely that the evidence sought to be adduced would have changed the outcome of the trial. The appellant's alibi had been considered and rejected and that was that. We therefore, formed the opinion that the relevant application in this Court did not satisfy the second requirement too, as the evidence sought to be adduced on this appeal was considered by the trial Court and rejected. It cannot be reasonably stated that it would have had an important influence on the decision of the trial Court.

For the above reasons, we dismissed Criminal Application No. 003 of 2018. We shall now proceed to determine the substantive appeal, Criminal Appeal No. 0161 of 2016.

Resolution of the Appeal

We have carefully considered the submissions of counsel for each side, the court record as well as the law and authorities cited, and those not cited which are relevant in the determination of the present appeal. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with its own inferences and conclusions. **See: Rule 30 (1) of the Rules of this Court** and **Kifamunte Henry vs. Uganda Supreme Court Criminal Appeal No. 10 of 1997.**

We shall keep the above principles in mind as we determine this appeal.

On 11th April, 2012 (although PW1 Ssenoga John Bosco said that it was the 12th, there is unison in the evidence of all the other prosecution witnesses that it was the 11th), at about 8.00 p.m the victims, all residents of Gayaza Village in Rakai District were shot dead.

The victims were related to PW1, as wife and mother respectively, and they all lived together in the same household compound. There were two detached houses in the compound, one where PW1 lived with his wife, and the other, where PW1's mother lived. The three were together, in their compound on the night of the attack.

According to PW1, on the fateful day, he returned home at around 8 p.m. It was a dark night, but he had a torch which supplied him with light to aid his actions that night. He was in the compound, with his mother and wife when he saw the appellant and another unidentified man make their way into the said compound from behind the toilet, which was presumably at one edge of the compound. PW1 testified that shortly thereafter, he saw the appellant shoot his mother in the arm.

The three people were panic-stricken due to the shooting and decided to run inside their houses for protection. The mother, who had been shot in the arm, managed to run, first, to her house, and then back to the house where PW1 and his wife lived. Meanwhile, the latter couple had already run inside their house for protection. It was the evidence of PW1 that his mother attempted to gain entry into the said house but his wife was holding the door from inside to stop the attackers from gaining entry, too.

Further according to PW1, he told his wife to move away from the door and find cover but no sooner had he done so, than she was fatally shot at. PW1 stated that the whole time while his wife struggled to hold onto the door, he was standing behind her holding a torch. With the aid of the torch light, he was able to see that it was the appellant who fatally shot his wife inside their house. The incident was reported to the nearby Police Station. Police officers then went to the scene of crime and inspected it. A postmortem was carried out on the deceased persons' bodies at the scene of crime.

PW1 was therefore, a single identifying witness. He was the only survivor from the shooting and was the only one who saw the appellant committing the alleged offence.

The appellant was later arrested on suspicion that he was the perpetrator of the murders in question. He was subsequently charged for the said offences. At the trial, he raised the defence of alibi, he said that on the night of the shooting he was at his fiancee's home several kilometres away from the crime scene tending to their sick child. He was adamant that he could not have been at the scene of crime while at the same time he was at his fiancee's home. He therefore maintained that he did not participate in the murder of the deceased persons.

The past jurisprudence of the Supreme Court has enunciated several principles on the subject of the evidence of a single identifying witness. Recently in **Kazarwa Henry vs. Uganda, Supreme Court Criminal Appeal 17 of 2015** the Court observed that:

> **"...it has been reiterated time and again in a series of decisions by this Court and its predecessors, that where prosecution is based on evidence of a single identifying witness the Court must exercise great care so as to satisfy itself that there is no danger of basing conviction on mistaken identity."**

Therefore, it is important that any court which is faced with the evidence of a single identifying witness should examine it carefully to rule out any mistaken identity of the alleged assailant by the witness. The Court in **Kazarwa (supra)** referred to the decision in **Adalla Nabulere & Another vs Uganda Supreme Court Criminal Appeal No. 9 of 1978** and said that:

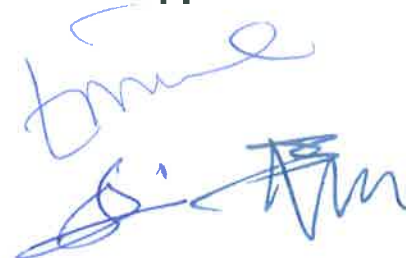
> **"It was stressed in the case of Abdulla Nabulere and another vs. Uganda supra, that "apart from the lighting during the incident and familiarity of the assailant to the victim, other factors, such as distance between them, length of time the victim had to observe and even the opportunity to hear the assailants are factors to look out for. The Court said. "All these factors go to the quality of the identification evidence. If the quality is good the 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."

The evidence on record reveals that at the time of the shooting, PW1, the single identifying witness, had a torch which supplied him with light. He was therefore able to make the necessary observations. According to PW1, he had been using the said torch when the appellant gained entry into his compound from behind the toilet. This was just before the shooting began. Shortly thereafter, PW1 had seen the appellant shoot his mother in the arm while in the compound. He had also seen the appellant shoot at his wife after they had run inside of their house for cover. This evidence was not seriously attacked during cross-examination.

Further, we observed that the PW1 stated that the appellant had fired three shots in the process. This evidence was confirmed by PW4 Semwangu Joseph, a police officer who went to the scene of crime the day after the incident, and who testified that while there he recovered three spent gun cartridges. The appellant also testified about the struggle which occurred at the door to his house between his mother who was pulling the door from outside in order to enter the house for protection, and his wife who was pulling the door from inside in order to keep it shut and keep away the attackers. This piece of evidence was supported by the testimony of PW4 who testified that when he got to the relevant house, he found two dead bodies of women, one at the entrance and the other inside the house. This tends to show that PW1's testimony was truthful. For that reason, the learned trial Judge was justified to believe PW1's testimony. This is because the appellant was PW1's cousin who was well known to him. This ruled out the possibility of mistaken identity.

Counsel for the appellant further attacked PW1's evidence for being filled with major contradictions that went to the root of the prosecution's case. The law on contradictions was recently re-iterated in **Kato John Kyambadde & another vs. Uganda, Supreme Court Criminal Appeal No. 0030 of 2014** where the Court stated that:



"The law of contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones on the other hand will only lead to rejection of the evidence if they point to deliberate untruthfulness (see Alfred Tajar Vs Uganda EACA Cr. Appeal No. 167 of 1969 (unreported)."

Bearing in mind the above principles, we shall now examine the alleged inconsistencies in the evidence of PW1. First, it was submitted that PW1 had testified that he had not revealed the name of the appellant as the assailant to one of the people who came to the scene; yet later he stated that he had seen the appellant very well at the scene of the crime. We observe that at pages 9 to 10 of the record, PW1, had, during cross-examination stated that:

"I am Senoga J.B. The attack took place at 8:00 pm on 12/4/12. I used torch light to identify the attacker otherwise it was dark. I no longer have that torch, I handed it over to the police. By help of that torch, I saw people, I recognized one of them, the one I had known before, that is the accused. Other than me, Mayanja also identified the accused. At home no one else identified the accused. Mayanja told me that one person had gone to the clinic asking for drugs. I described to Mayanja the features of the deceased. Mayanja said he had seen such a person at the hospital before. <u>I didn't tell the name of the accused (sic).</u> Police rung (sic) us around 10 am and told us they had arrested the accused from Kalisizo where he had a wife. He rang me at the same time the accused was arrested. Kalisizo is far, about twenty five miles.

I heard three gunshots. My wife was hit by one bullet and my mother two bullets. Two bullet shells were recovered. The accused was a prison warder at the time working at Lwamagwa Prison. <u>I saw him very well at the scene of the crime</u>."

Counsel for the appellant contended that the above underlined parts were contradictory. We find it difficult to accept those submissions, in the first underlined part, PW1 testified that he did not tell Mayanja the name of the assailant. Indeed he had no obligation to do so, since the said Mayanja was not a police officer. In the second part, he testified that he saw the appellant at the scene of crime. This was consistent with his entire testimony in which he was unshaken that he saw the appellant at the scene of the crime. Counsel's submissions are innovative and at best seem to make a mountain

out of a mole hill. In our view, there was no major contradiction in the testimony of PW1 or any contradiction at all. We maintain that the said evidence was credible.

In this appeal, it was further submitted for the appellant that the evidence of PW1 did not destroy his alibi. It is well established that the duty to disprove an alibi raised by a criminal defendant lies on the prosecution which can disprove the alibi by adducing evidence to put the defendant at the scene of the crime. In **Bogere Moses vs. Uganda, Supreme Court Criminal Appeal No. 001 of 1998,** the Court observed that:

> **"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."**

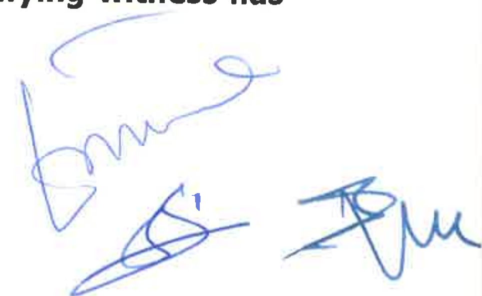
Having made a finding in agreement with the learned trial Judge that the identification evidence of PW1 was reliable, we would be right to make a further finding that that evidence had put the accused at the scene of crime. Further still, we find that the evidence of PW7, Mayanja Fred established that the appellant was near the scene of crime and not his home on the fateful night. PW7 was a security guard at a health facility near the crime scene. He testified that he had seen a man at the facility on the day the offences were committed. The man had come to the facility seeking for medicine for ulcers. PW7 had told him that the facility had closed for the day at which point the man left. This was at around 6 p.m. PW7 testified that he had spoken to the man for a considerable time on that day.

PW7 further stated that later on, as it was approaching 8 p.m, he heard bullets, "shouting in the neighbourhood." This was followed by mourning

from the direction of PW1's home. PW7 was later to discover that the victims had been murdered. Later, police came to the crime scene and PW7 told them about the man he had seen. When he was asked whether he could identify the man the next day, he said he could. Subsequently, he went to an Identification Parade from where he was able to identify the appellant as the person he had seen. PW7's identification evidence was also attacked by counsel for the appellant. We understood the somewhat incoherent criticism to be as follows. Counsel for the appellant said that Identification Parade had been carried out in an improper manner that whatever came from it should not be relied on. Counsel stated that it was not possible to get 9 people with identical features and size of the appellant in order to properly carry out an identification parade. As such, he contended that PW7 had been tutored on the features of the appellant so that when he went to the parade, he would just point out the appellant. This was because, PW1 had told PW7 about the features of the appellant which made it inevitable that at an identification parade, it was the appellant he would pick out.

We have considered the above complaints about the manner the relevant Identification Parade was carried out. The issue was handled in a very methodical manner by the learned trial Judge. She re-iterated the following guidelines which were recommended for the proper carrying out of an Identification Parade by Sir Udo Udomma in **Ssentale vs Uganda [1968] 1 EA 365** that:

> **"1. That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.**
>
> **2. That the officer in charge of the case, although he may be present, does not carry out the identification.**
>
> **3. That the witnesses do not see the accused before the parade.**
>
> **4. That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.**
>
> **5. That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.**



6. Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.

7. Exclude every person who has no business there.

8. Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.

9. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.

10. See that the witness touches the person he identifies.

11. At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.

12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "Pick out somebody", or influence him in any way whatsoever.

13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably."

PW6 Nansamba Regina who conducted the identification parade had this to say at pages 14 to 15 of the record:

"On 12/4/2012 at 1600 hrs I conducted an identification parade where Mr. Mutende happended to be a suspect in a case of murder. I called him, Mr Mutende, I talked to him explaining to him what I was going to do-an identification parade. I explained to him his rights e.g to choose the position he feels like. I got some people, eight people of similar features like him he was the ninth. He then positioned himself somewhere. Before that he was in our cells. I had told him not to come out so that he is not seen. Meanwhile, the person who was to identify him remained outside the station, hidden. He did not look at him. After they were paraded, then the other person Mayanja came. When he came, I talked to him telling him he had a right to tell the person that he wants to see him walk, talk or in a particular position. The parade was conducted and Mayanja managed to identify Mr. Mutende. When we paraded these people, Mayanja asked me to tell them to move around and they moved around and even talked. He'd seen the person move. After moving around they stopped and Mayanja touched Mr. Mutende. Thereafter Mayanja was taken somewhere in a certain room and I asked the

suspect whether he was satisfied in what he had done. He said he was satisfied. After that, we repeated the exercise but this time we changed the position of the suspect and the dressing. Still after that Mayanja managed to identify Mutende. He still touched on him. We'd told the accused he was free to put on any shirt belonging to any person so the (sic) exchanged shirts. I asked the accused whether he was satisfied and he said yes. There were witnesses e.g IP Mukasa Martin. Accused was taken back to the cells and Mayanja also went back. I wrote a statement."

PW6 who conducted the relevant Identification parade confirmed that PW7 who identified the appellant never met the said appellant at the police station prior to the identification parade in issue. In view of that, we are in agreement with the learned trial Judge that, by and large, the identification parade was satisfactorily conducted. This is despite our observation that there was a variance between the number of people said to have attended the said parade (PW6 stated that there were 9 while PW7 stated that there were 8). We are satisfied that this variance was not intended to mislead court and may have arisen due to PW7's miscomputation and/ or the passage of time from the time of the parade and when he testified in Court. As PW6 recorded the relevant evidence in a report, we shall believe it.

We must state that the evidence of PW7 did not place the appellant at the scene of crime. That was achieved by the evidence of PW1. However, PW7's evidence would show that the appellant had been near the scene of crime at the material time contrary to his alibi that he was not. In **Bogere (supra)**, the Court stated that:

"In Moses Kasana Vs Uganda Cr. App. No. 12 of 1981 (1992-93) HCB A7 this court which cited the two foregoing decisions with approval, underlined the need for supportive evidence where the conditions favouring correct identification are difficult. It said at p.48

"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. <u>Other evidence</u> may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, <u>and of fabricated alibi.</u>"

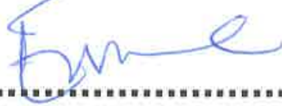
Indeed in the present case, although the conditions favouring correct identification were difficult, we confirm the finding of the learned trial Judge that the appellant was properly identified at the scene of crime by PW1. The respondent's case was further strengthened by the evidence of a fabricated alibi set up by the appellant when he said that he was at his home on the fateful day yet he was clearly seen by PW7 only a few metres from the scene of crime soon before the crime was committed.

The long and short of the above analysis, therefore, is that the appellant's alibi was judiciously rejected by the learned trial Judge, who, on the basis of the evidence on record was right to reach the decision to convict the appellant as she did. We, therefore uphold that conviction. All grounds of this appeal relating to conviction are hereby disposed of accordingly.

As the appellant did not appeal against the sentence imposed by the trial Court, we take it that he did not contest it and it is hereby maintained. Accordingly, the relevant conviction of the appellant by the learned trial Judge and the sentence arising therefrom are upheld. This appeal stands dismissed.

We so order.

Dated at Masaka this ....10th.......... day of ....March.......... 2020.



....

Elizabeth Musoke

Justice of Appeal

....

Ezekiel Muhanguzi

Justice of Appeal

....

Remmy Kasule

Ag. Justice of Appeal