THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Barishaki Cheborion, Muzamiru Kibeedi, JJA*]

CRIMINAL APPEAL NO. 148 OF 2018

(*Arising from High Court Criminal Session No. 68 of 2011 at Mbale*)

BETWEEN

Mwanja Peter alias Ndifuna==========Appellant no.1
Wegulo Martin==========Appellant no.2

AND

Uganda==========Respondent

(*On appeal from the judgement of the High Court of Uganda [Musota, J] delivered on 23rd April 2012*)

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and the offence of kidnapping with intent to murder contrary to sections 243 (1) (a) of the Penal Code Act. The particulars of the offence of murder were that the appellants and others still at large on the 17th day of November 2010 at Tirinyi village in Pallisa district murdered Mugabe Muzamiru *alias* Taire. The particulars for the offence of kidnapping with intent to murder were that the appellants and others still at large on the 17th day of November 2010 at Tirinyi in Pallisa district by use of force kidnapped Mugabe Muzamiru alias Taire with the intent that he may be murdered.

[2] The learned trial judge convicted and sentenced each of the appellants to death on both counts but suspended the sentence for the offence of kidnapping with

intent to murder. Being dissatisfied with both the conviction and the sentence, the appellants have now appealed on the following grounds:

> '1. That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record concerning identification by relying on weak circumstantial evidence of PW2, PW3, PW4, PW5 & PW6 to convict the appellants thereby occasioning a miscarriage of justice to them.
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> 2. That the learned Trial judge erred in law and fact when he imposed a harsh and excessive death sentence on the appellants thereby occasioning a miscarriage of justice to them.'

[3] The respondents opposed the appeal.

Submissions of Counsel

[4] At the hearing the appellants were represented by Mr. Kyabakaya Enoch and the respondent by Mr. Ojok Alex Michael, Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions. Counsel filed written submissions.

[5] Counsel for the appellants drew our attention to the duty of a first appellate court as laid out in Pandya v Republic (1957) EA 336, Baguma Fred v Uganda [2005] UGSC 24, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

[6] With regard to ground 1, counsel for the appellants submitted that the reckless running of the victim as testified by PW2 describes the character of a mad person and that this explains his disappearance in Tirinyi river where his body was discovered. Counsel for the appellant submitted that the behaviour of the deceased cast doubt as to whether he was forcefully seized because he could not give consent as a mad person.

[7] Counsel for the appellants submitted that there was no direct evidence that placed the appellants at the scene of the crime and all the evidence of PW2,

PW3, PW4, PW5 and PW6 was largely circumstantial. Counsel submitted that PW2 and PW3 stated in their testimonies that they did not know the appellants before the incident. Counsel relied on Bogere Moses v Uganda [1998] UGSC 22 where the Supreme Court stated what it means to place the accused at the scene of the crime. Counsel for the appellants submitted that it was held in Teper v R (1952) AC 480 that it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there were no co-existing circumstances which would weaken or destroy the inference. He also referred to Simon Musoke v R (1958) EA 715. Counsel for the appellants also relied on Katende Semakula v Uganda [1995] UGSC 4 where it was held that circumstantial evidence should be narrowly examined because evidence of such kind is susceptible to fabrication in order to cast doubt on another person.

[8] Counsel for the appellants submitted that the learned trial judge did not consider the evidence of DW1. He submitted that DW1 stated in his testimony that he never hired any motor cycle, did not know the deceased person nor the allegations against him. Counsel for the appellants concluded by stating that the learned trial judge did not properly evaluate the evidence otherwise he would have known that there was a possibility of mistaken identity.

[9] In relation to ground 2 of the appeal, counsel for the appellants submitted that in Joseph Arissol v R (1957) EA 447, the court of appeal of Kenya was of the view that it is unusual to impose a maximum sentence on a first offender. Counsel for the appellants submitted that there was no justification for sentencing the appellants to death since they were first time offenders. Counsel was of the view that such a sentence was harsh and excessive and that the learned trial judge did not take into consideration the mitigating factors.

[10] Counsel for the appellants submitted that Guideline 17 of the Constitution (Sentencing Guidelines for courts of Judicature) (Practice) Direction 2013 provides that a sentence of death should only be passed in the rarest of rare cases and that under Guideline 18(1), rarest of the rare cases include cases where the court is satisfied that the commission of the offence was planned or meticulously premeditated and executed. Counsel for the appellants also relied on Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 142 of 2007 (unreported) and Kizito Senkula v Uganda [2002] UGSC 36 that

lay down the principles under which an appellate court can interfere with the sentence imposed by the trial court.

[11] Counsel for the appellants submitted that in Attorney General v Susan Kigula & 417 others [2009] UGSC 6, the mandatory death sentence was declared unconstitutional and Susan Kigula was given a sentence of 20 years imprisonment. That in Akbar Hussein Godi v Uganda [2015] UGSC 17, the appellant was convicted of the offence of murder and sentenced to 25 years imprisonment. In Rwabugande v Uganda [2017] UGSC 8, the appellants were convicted of the offence of murder and sentenced to 35 years' imprisonment but on appeal to the Supreme Court, the sentence was reduced to 21 years. Counsel for the appellant relied on Kamya Abdullah & others v Uganda [2018] UGSC 12 where the appellants were convicted of murder and sentenced to 30 years imprisonment but on appeal, the sentence was reduced to 18 years imprisonment.

[12] Counsel for the appellants submitted that in light of the above precedents, the sentence of death imposed against the appellants considering the circumstances of the case was not exercise of proper discretion in sentencing. Counsel for the appellants prayed that this court quashes the convictions and set aside the sentences against the appellants or in the alternative substitute the sentence of death with 10 years' imprisonment.

[13] In reply ground 1, counsel for the respondent submitted that the evidence of PW2 and PW3 shows that the appellants were properly identified although the witnesses did not know the appellants before the incident. Counsel for the respondents submitted that the incident took a considerably long time which gave the witnesses an opportunity to properly identify the appellants. He submitted that the identification was done during broad day light with no impediment. Counsel for the respondent submitted that the circumstantial evidence linking the appellants to the offences of kidnapping with intent to murder and murder is incompatible with no other reasonable hypothesis other than their guilt. Counsel for the respondent prayed that this court finds that this ground lacks merit.

[14] In reply to ground 2, counsel for the respondent relied on Mboinegaba James v Uganda [2016] UGCA 80 and Livingstone Kakooza v Uganda [1994] UGSC 17 for the principles under which an appellate court can interfere with

the sentence imposed by the trial court. Counsel for the respondent submitted that it has not been shown by the appellants that the sentence is illegal or that the trial court did not exercise its discretion judiciously to warrant interference with the discretion of the sentencing court. Court for the respondent prayed that this court dismisses the appeal for lack of merit.

Analysis

[15] As a 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, Kifamunte Henry v Uganda, [1998] UGSC 20 and Bogere Moses & Anor v Uganda, [1998] UGSC 22.

[16] We shall proceed to do so.

[17] The facts of this case according to the prosecution are that the appellants were seen with the deceased on 17th November 2009 at Tirinyi-Iganga stage at about 3:00pm. The deceased tried to run away from the appellants until he was detained within Tirinyi trading centre with the help of other people. The appellants claimed that the deceased was a mad person and that they were taking him to a witch doctor. The appellants put the deceased on a motorcycle and rode towards Namutumba district. The body of the deceased person was eventually found floating in water at river Mpologoma, just a short distance from Tirinyi trading centre. The deceased was examined at Pallisa hospital and he was found to have suffered external injuries that is; peeling of skin due to immersion in water. He also had internal injuries that is; broken neck bones, broken clavicle bone and a broken hip joint. The cause of death was strangulation.

Ground 1

[18] The appellants contend that the learned trial judge failed to properly evaluate the evidence of identification by relying on circumstantial evidence of PW2, PW3, PW4, PW5 and PW6 that was weak.

[19] PW2, Tengeka Peter stated in his testimony that he knew the appellants although he did not know their names. He saw the appellants on 17th November 2009 at Tirinyi-Kampala stage along the main road at around 3:00 pm for the first time. The appellants came holding a person and when they inquired about him, the appellants told them that he was mad. He described the alleged mad person as fairly tall, brown, with small eyes and about 25 or 26 years. PW2 stated that as the appellants were holding the person, he broke loose and ran to a corridor. Together with his friend Sisiye, PW2 ran after the alleged mad person and managed to retrieve him from a ditch he had fallen into. The appellants had requested them to assist them in the recapturing of the person because they intended to take him to a witch doctor. Thereafter, the appellants came with two ropes, tied the person's hands and carried him to the stage. The appellants tried to get a taxi for transportation but in vain until it was suggested that they hire a motorcycle. PW2 stated that the appellants got onto a motorcycle together with the alleged mad person and left the place. He stated that they stayed in that area for about 30 minutes.

[20] Upon cross examination, PW2 stated that appellant no.1 was dressed in a white shirt, blackish jacket and greenish trousers. He stated that appellant no.2 was dressed in a kitengi shirt with beads on the edge and blackish trousers. He stated that the alleged mad man was wearing a striped T-shirt and jean trousers. When he found him in the ditch, he was crying and struggling to get out.

[21] PW3, Watubome Sam, also stated in his testimony that he knew the appellants but did not know their names. He stated that he also knew the deceased because he was with them. He was hired to transport the appellants on 17th November 2009 at around 3:00pm at Tirinyi trading centre at the stage. He did not know the appellants before the incident. PW2 stated that it was appellant no.2 who approached him and asked him to transport them and their patient. They had removed the patient's shirt and tied his hands with a rope.

PW3 stated that the deceased was wearing sort of khaki trousers, he was still young in his late 20s, slender, of medium height and of brown skin colour. He stated in his testimony that the appellants and the deceased sat on the same motorcycle. Appellant no.1 sat behind him with the patient in between and appellant no.2 at the backend of the motorcycle. The appellants told him to take them to Kitantalo which is about 2kms from Tirinyi trading centre. He dropped them along the road at a place commonly known as Michael's place. He stated that reaching Kitantalo took them about 30 minutes.

[22] Upon cross examination, PW3 stated that he had never seen the appellants before they hired him. He stated that appellant no.1 was wearing a white shirt but he did not observe the trousers, appellant no.2 was wearing a kitengi shirt with two lower pockets. The patient was not talking but was making some sounds. He never saw the appellants and the deceased again after dropping them off.

[23] PW4, Mukose Yunus stated in his testimony before the trial court that he came to know appellant no.1 when he got a problem with the deceased's death and that he came to know appellant no.2 because of this case. He knew the deceased because he used to do business with him. He stated that he gave the deceased UGX 4, 500,000 on 16th August 2009 to buy maize from Sebei and transport it to Jinja. He gave the deceased the said money at his home in Busembatia and that the deceased was with his friend called Siraje Gonda. They left for Jinja thereafter. He stated that Zeki, a sister to the deceased rang him and informed him that the deceased had ran mad and was in Tirinyi. He went to Tirinyi and inquired about the deceased. A lady showed him the person who was holding the deceased. He reported the disappearance of the deceased to the police. Together with the police they arrested the person who knew the whereabouts of the deceased. This person showed them the motorcycle that was used to transport the deceased which was in the names of PW3.

[24] PW4 stated that he went to Kampala and came back with the Rapid Response Unit which carried out further investigations on the matter. He stated that PW3 admitted to having been hired by two people that were with the deceased and that he gave them a ride on his motorcycle up to the swamp at Tirinyi bridge. This last portion is not only hearsay but is inconsistency with the testimony of PW3, which stated that he took the deceased and appellants to Kitantalo

village in Kibuku District and not to the swamp at Tirinyi Bridge. PW4 stated that the deceased was recovered from the water at Tirinyi bridge in his presence. He saw the body and identified it. He identified the body by the shirt that the deceased used to wear, it was brownish with stripes and he also identified him by his goatee that was still intact. He stated that the deceased had never been mentally sick and he was normal when he gave him the money.

[25] On cross examination PW4 stated that he gave the deceased money at 8:00am and he received the call from Zeki at around 4:00pm the same day. The deceased was with Siraje Gonda on that day and that he introduced him as a friend. He had known the deceased for 10 years and that at all times he was normal. He never saw Siraje Gonda and the deceased after that day.

[26] PW5, Mugabe Bangi Samuel stated that he knew appellant no.1 as a witchdoctor because his daughter went to him for treatment and he accompanied her. He stated that he knew appellant no.2 because he once came to visit them with his friend Siraje around 2009 and that the deceased was his nephew. He stated that he last heard of the deceased when he went with Siraje to his relatives after he had ran mad. They found the body of the deceased trapped in water at Tirinyi bridge. He helped in the identification of the deceased, he recognized the deceased by his face, feet and goatee that was still intact. He stated that appellant no.2 ran away from the village of Nabweyo to Mabirizi village in Mayuge district. He met him in Mabirizi village during his business trips in January 2010 and reported to police who arrested the appellant.

[27] On cross examination, he stated that he believes that the appellants killed the deceased because appellant no.1 used to assure them that that the deceased would be recovered in a week using his mother's phone and appellant no.2 hid in another area. PW5 stated that the deceased told him on phone that he was with the appellants in Namutumba on 17th November 2009. PW6, the investigating officer upon cross examination stated that the appellants were on the run when they were arrested.

[28] The appellants testified, not oath, in their defence. The testimony is short and I can set it out in full.

[29] Appellant No.1 stated,

> 'I am Mwanja Peter male adult 43 years. I am a cultivator of Nabweyo village, Kagulu Parish, Magada Namutumba District. What I can say is one Siraje Gonda is a clanmate. Since 2005 when he stopped going to school he went to Jinja. Since I do not know what happened to him. That is all. Regarding the motor cycle I know nothing. I never even hired any motor cycle. When could I be a patient? He alleged he took us from Tirinyi but I know nothing.'

[30] Appellant No. 2 testified thus,

> 'I am Martin Wegulo, male adult 29 years old. I am a cultivator. Before arrest, I was resident at Nabweyo, Kagulu Parish, Magada. What I know is only I saw people arresting me for something I did not know about. Even the deceased I did not know. I was arrested and was taken to police. What I say is my children are suffering. I know nothing about this case. Even I know none of the witnesses. I ask to be acquitted and I care for my children.'

[31] We note that the prosecution case rests entirely on circumstantial evidence. As cautioned in Simoni Musoke vs. R. [1958] E.A. 715 at page 719, circumstantial evidence is quite susceptible to fabrication to cast suspicion on an accused person. See also Katende Semakula v Uganda [1995] UGSC 4. On that note, before court draws any inference of guilt from circumstantial evidence, it must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt. Therefore, it is the duty of the court to apply well-established tests, to establish whether the circumstantial evidence adduced before it proves the guilt of the accused person beyond reasonable doubt as is required by law. In Byaruhanga Fodori vs. Uganda [2004] UGSC 24 the Supreme Court stated, in part, as follows:

> 'It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which

weaken or destroy the inference of guilt. (See S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480).'

[32] From the evidence of PW2 and PW3, the deceased was last seen with the appellants. The evidence shows that he was being held forcefully since the deceased made attempts to escape and ended up falling into a 4 feet deep ditch. PW2 and PW3 identified the appellants in court despite the fact that they had never seen them prior to the incident. They met them during broad day light and there was sufficient time to identify the appellants. They spent about 30 minutes with the appellants and were able to recall the clothing the appellants and the deceased were wearing on that day. A one Siraje Gonda was with the deceased when he received the money from PW4. The deceased was last seen on that day by PW4 with Siraje Gonda.

[33] The alleged disappearance of the appellants following the discovery of the body of the deceased is suspicious conduct which may not point to their innocence. However, the persons that arrested the appellants did not testify, though PW5, claimed that that he had reported to Mabirizi Police and they arrested A2 on 13th February 2010 from Mabirizi in Mayuge District. That date would be many months before the crime in this case was committed on or about 17th November 2010! The officers who did the arrest the appellant did not testify. PW4 testified that he reported the matter to the Rapid Response Unit in Kampala who came over to investigate the matter and apparently supervised the recovery of the body and the initial arrests of some people. None of those officers testified in this case.

[34] We note with dismay that Zeki, the deceased's sister, according to PW4, who apparently took the deceased to the witchdoctor in Tirinyi, did not testify to show which person or persons that they took the deceased to on the evening of 17th November 2010. No explanation is provided if the police ever recorded a statement from her or not. This witness would have established whether it was the appellants or not to whom they had delivered the deceased for treatment.

[35] In addition, PW4 testified that he travelled to Tirinyi and talked to a lady who showed him the person who was supposed to be keeping the deceased. He stated that they notified the police and this person was arrested. This person

showed them the motor cycle which had carried the deceased. It is odd that both the lady and this person that was initially arrested are not named. Nor is there any explanation as to why they did not testify in this matter or why the initial suspect that was first arrested was not arraigned with the appellants.

[36] The evidence against the appellants is entirely circumstantial in this regard. Firstly, that they were the last persons seen with the deceased alive on the 17th November 2010. They were left with the deceased at Kitantalo village in Kibuku District, by PW3. The deceased's body was recovered from the river, about a week later. It has been claimed by PW4 that the appellants disappeared from their homes were arrested by the Police later. The cause of death of the deceased was strangulation.

[37] The defence to the charge in this case by the appellants was that they knew nothing about this crime, thus disputing the evidence adduced by the prosecution in this case.

[38] In Kurong Stanely v Uganda [2008] ULR 40 the conduct of the appellant before and after the death of the deceased was found to be inconsistence with his innocence. He was the last person seen with the deceased in Kapchorwa and Gulu. And they had stayed in the same room in a hotel in Gulu, prior to the disappearance of the deceased and eventual discovery of his body. The appellant disappeared for about 2 weeks prior to the discovery of the body of the deceased.

[39] The evidence of the flight of the appellants in this case is too sketchy to be reliable. None of the arresting witnesses for both appellants testified. It is therefore not known when and where they were arrested from. There is no firm evidence that the police sought to initially arrest them from their homes on their village they were not available for extended periods of time. There is no evidence of the date when the investigations revealed them as possible suspects in this case. The only evidence that points to the alleged flight of the appellants is that of PW5 and PW6. PW5 testified that he reported to the Police of the presence of A2 in Mabirizi. The police then arrested him. The arresting officer did not testify.

[40] PW6 was the investigating officer at some of point of the investigations. However, she was not the arresting officer and appears to have taken over

when many other people had been arrested as suspects in this case and 2 of whom been taken to court. These persons were released from prison on bail, presumably after a year in jail. It is after those persons jumped bail that the current appellants were arrested on the same judge. From the investigation angle of this case it is not clear when they first became suspects.

[41] The identification of the appellants by the witnesses in this case amounts to what could be referred to as 'dock identification' or 'in-court identification'. The identifying witnesses in this case had never seen the appellants before seeing them in Tirinyi and thereafter they only saw them in court. This is the kind of situation where it would have been necessary to have evidence of prior identification of the appellants by these witnesses, through an identification parade that would show that these were the persons they had seen at the time and place they allege, in connection with the crimes in question.

[42] The likelihood of mistaken identification in circumstances of the present case cannot be overstated. In Abdalla Nabulere v Uganda [1978] UGCA 14 the Supreme Court stated in part,

> '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 be made, particularly, the length of time the accused was under observation, 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.

[43] Whereas Nabulere v Uganda (supra) deals with the quality of observation by a witness, it does not deal with the dangers inherent in dock identifications.

The dangers of dock identifications are discussed in Archbold (2000), page 1329, in the following words,

> 'The practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock has long been regarded as undesirable and to be avoided if possible. See R v Cartwright (1914) 10 CR App R 2019, CCA. Although a trial judge retains a discretion to permit a dock identification, it is submitted that in practice it is not permissible even to consider the exercise of such discretion unless: (1) a defendant has refused to comply with a formal request to attend an identification parade, and (2) none of the other identification procedures has been carried out as a result of the defendant's default. However, as the police may adopt a satisfactory identification procedure in respect of a refractory defendant... it is now difficult to conceive of circumstances in which a trial judge would permit a dock identification. Different considerations apply in summary trials; Barnes v Chief Constable of Durham [1997] 2 Cr App R 505, DC. Where a witness volunteers a dock identification, the summing up should make it plain that such evidence is undesirable; that the proper practice is to hold a parade; and that the evidence should be approached with great care: Williams v R [1997] 1 WLR 548, PC. If a jury is not discharged after such an identification, it is submitted that the safer course would normally be to inform them why such evidence is unreliable and to direct them to disregard it.'

[44] The High Court of Australia (Mason, J.,) in Alexander v The Queen [1981] 145 CLR 295, stated thus:

> 'Traditionally it has been accepted that a witness identifies the accused at the trial as the person he observed at the scene of, or in connection with, the crime. **This "in court" identification, sometimes described as primary evidence, is of little probative value when made by a witness to identify the accused in the dock.** It has been the practice to reinforce this "in court" identification by proving that the witness had earlier identified the accused out of court in a line up or by selecting his photograph from a collection of photographs, ..., though the

propriety of proving photographs has been challenged by the applicant.' (Emphasis is ours.)

[45] In the Alexander v The Queen, (supra) Gibbs, CJ., explained the value of an identification parade in the following words,

> 'The value of holding an identification parade is not only that, if properly carried out, it provides the most reliable method of identification, but also that it is necessarily held in the presence of the accused, who is thereby enabled to observe, and later bring to light, any unfairness in the way in which the parade was conducted, or any weakness in the way in which the witness made the identification.'

[46] In Patrick Isimbwa and Anor v Uganda SCCA No. 13 of 1991, (unreported), the Supreme Court explained the value of identification parades in the following words,

> 'An identification parade is usually intended to test the consistency of a witness regarding her or his identification of a suspect whom he or she claims has participated in a crime of which she or he was an eye witness. At such a parade, the witness would be expected to identify a stranger who she may have seen for the first time at the scene of crime.'

[47] The Privy Council has addressed the value of identification parades and weaknesses of dock identifications in several cases. In Holland v HM Advocate [2005] UKPC D1, para 47, it stated,

> 'identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate-depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security

guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When is a witness is invited to identify the perpetrator in court, there must be considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. **So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification.**' (Emphasis is ours.)

[48] In our view the foregoing principles are applicable to the circumstances of this case.

[49] PW2 and PW3 who were the identifying witnesses in this case, testified to have seen the appellants with the deceased in Tirinyi. They testified that the events they observed took about 30 minutes and it was in broad daylight. This would point to the existence of favourable conditions for correct identification. However, after that the only time they were asked to identify the appellants was in the course of the trial court while giving evidence. Prior to the alleged observation of the appellants they had never seen the appellants at all. Appellants were total strangers to them. As was observed in Alexander v The Queen, (supra) this evidence is of very little probative value, without an out of court identification parade accompanying such identification. These witnesses though honest could be easily mistaken that the persons in the dock are the people that they saw in connection with the crime.

[50] In addition to the failure to hold an identification parade, the police failed to, or did not, produce as a witness, the sister of the deceased, Zeki, who later that day, on 17th November 2009 called PW4 and said the deceased had ran mad and they had taken him to a traditional healer or witchdoctor.

[51] Thirdly when PW4 went to the area where the deceased was supposed to have been taken, and a lady showed him the person, who was keeping the deceased, it is not clear that a statement was recorded from this lady and her identity is not disclosed. Fourthly there is no record of the names of the person, and what happened to him, of the person that PW4 reported to the police as keeping the deceased, and who was the first person arrested in connection with this crime.

[52] From the testimony of PW6, the investigating officer, it is clear that Siraje Gonda, was arrested and charged with the murder of the deceased but he appears to have jumped bail at some point. PW6 stated that when she took over the case many people had been arrested over this offence and they finally zeroed on three people, including the 2 appellants. No reasons are provided why they 'zeroed' in on the said three people, and not the others. She did not disclose the particulars of the many people who had been arrested in regard to this offence, and why in the end they decided not to charge them for this offence.

[53] The appellants in their unsworn testimony denied having anything to do with this crime, and they stated that they were residents of Nabweyo village in Magada, Namutumba District. If PW4 is believed the person, who Siraji Gonda and Zeki took the deceased to, was in Tirinyi and not in Namutumba district.

[54] In light of the foregoing gaps in the prosecution case, we are of the view that it is not possible on the evidence on record to conclude that it irrevocably points to the guilt of the appellants in the murder of the deceased in this case. The unexplained gaps in addition to the little probative value of the evidence of identification of the appellants in connection with this crime cannot exclude the possibility of some other persons being responsible for the murder of the deceased.

[55] We allow ground 1 of the appeal. In the circumstances we do not find it necessary to consider ground 2 which is against sentence.

Decision

[56] This appeal is allowed. The conviction of the appellants is quashed. The sentences imposed upon the appellants are set aside. We order the immediate release of the appellants unless they are being held on some other lawful charges.

Signed, dated and delivered at Mbale this 15th day of September 2020.

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Kibeedi
Justice of Appeal