THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

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

Criminal Appeal No. 518 of 2015

(*Arising from High Court Criminal Session Case No. 29 of 2012 at Soroti*)

BETWEEN

Engonu Cornelius==========Appellant

AND

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

(*On appeal from a judgment of the High Court of Uganda (Wolayo, J.), sitting at Soroti delivered on the 5th day of June 2015.*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted with Ojange Gabriel on 2 counts of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of offence for count 1 are that the appellant, Ojange Gabriel and others still at large on the 2nd day of July 2011 at Odapakol village in Kateta Sub county in Serere District with malice aforethought murdered Ekaju Justine. The particulars of offence for count 2 were that the appellant, Ojange Gabriel and others still at large on the 2nd day of July 2011 with malice aforethought murdered Ochom Emmanuel.

[2] The appellant and Ojange Gabriel were tried and convicted on both counts and sentenced to 26 years imprisonment on each count to be served consecutively. The appellant and Ojange Gabriel appealed against the said conviction and sentence, setting forth the following grounds of appeal:

> '1. The learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence of a single

identifying witness and instead relied on speculative and inconsistent evidence of the prosecution to convict the appellants which occasioned a miscarriage of justice.

2. The learned trial Judge erred in law and in fact when she sentenced the Appellants to a harsh and excessive sentence of 26 years in the circumstances which occasioned a miscarriage of justice.'

[3] The respondent did not oppose the appeal of Ojange Gabriel whose appeal was immediately allowed and was acquitted of the offences charged. The sentences against him were set aside.

[4] The respondent opposed the appeal by the appellant.

Submissions of Counsel

[5] Ms Faith Luchivya, appeared for the appellant, while Mr Sam Oola, Assistant Director of Public Prosecutions, in the Office of the Director, Public Prosecutions, appeared for the respondents. Both parties filed written submissions.

[6] Ms Luchivya submitted it is questionable how in the circumstances described by PW1 as to how he met the appellant on that fateful day early in the morning he could have been able to flash a torch in the face of the appellant and recognise him. It was dark and the only source of light was a torch. If the other assailants were masked how come the appellant would not have been masked like the others. PW1 testified that the appellant did not ask for anything. No motive is evident for for commission of the offences in question. Ms Luchivya contended that it is doubtful that one could kill for nothing and at the same not care about being recognised.

[7] No medical evidence was adduced in relation to PW1's alleged injuries to show that they were the result of a gun shots. Much as he showed the court a scar that scar could have been caused by something else.

[8] Ms Luchivya further submitted that while the summary of the case stated that PW1 was in a party of 3 including Ochom and Ekaju Justine walking to the lake early in the morning of 2nd July 2011 when they met the assailants, PW1, in his testimony stated that he was only moving with Ochom, his brother, and makes no mention of Ekaju Justine at all as being in their company.

[9] Ms Luchivya referred this court to Kirabira Salongo Abasi and Anor v Uganda CA Criminal Appeal No. 3 of 2011 (unreported) and Moses Bogere & Anor v Uganda SC Criminal Appeal No 1 of 1997 (unreported) for guidance on the law in relation to a single identifying witness.

[10] Counsel for the appellant argued that PW2, a former spouse of the appellant, whose dowry had not been refunded to the appellant, gave shaky evidence in fear of the police. Her evidence that she had previously seen the appellant with a gun is questionable as she did not report it to the Police. PW2 had no knowledge of what transpired on the day the offences were committed.

[11] Learned counsel attacked the evidence of PW3 who testified that they visited the scene of crime and found 2 bodies. Where did the third body come from? PW3 testified that from the information gathered at scene the appellant was suspected to have committed these offences. This was mere speculation as none of those people had witnessed the incident. There was no mention of the names of Ekaju or Olupot in the testimony of PW1. She argued further that there was no evidence to show that the bullets that killed the deceased came from the gun allegedly recovered from a garden near the appellant's house. No evidence was led to show that the garden belonged to the appellant. It was mere speculation to claim that these items recovered belonged to the appellant.

[12] Ms Luchivya referred to Mulindwa James v Uganda Criminal Appeal No. 23 of 2014 (unreported) on guidance in regard to suspicion not amounting to sufficient evidence to convict an accused.

[13] Ms Luchivya further submitted that the testimony of PW4 should be treated with caution. She claims to have seen the appellant with a gun. It is not known when this took place. It could have been a concocted story.

[14] Ms Luchivya contended that the prosecution case was riddled with inconsistencies and ought not to have been believed. She attacked the testimony of PW4 and PW6 which was inconsistent in regard to the recovery of exhibits. The dates of receipt of the exhibits were contradictory. The purportedly recovered items were recovered in the absence of the appellant. She referred to Twehangane Alfred v Uganda C A Criminal Appeal No. 139 of 2001, (unreported) to explain the law with regard to treatment of inconsistent evidence. PW4 had a grudge with the appellant.

[15] The appellant raised an alibi in his defence which had not been discredited. Had the learned trial Judge properly evaluated the evidence on record she would have acquitted the appellant.

[16] In relation to ground 2 counsel for the appellant submitted that this court should consider reducing the sentence imposed upon the appellant.

[17] Mr Sam Oola for the respondent submitted that the evidence of a single identifying witness in this case, PW1, was sufficient evidence to support a conviction of the appellant for commission of the offences charged. PW1 knew the appellant and used a torch at the time of the attack to identify the assailant as appellant and another 2 persons who were masked that he was unable to identify. He referred to the case of Uganda v George Wilson Simbwa SCCA No. 37 of 1995, (unreported) whose facts are similar to the facts in this appeal in which the Supreme Court held that the single identifying witnesses' testimony was sufficient to found a conviction as the accused had been known to the appellant and the witness had used a torch to identify the respondent.

[18] Mr Oola further submitted that the prosecution was not obliged to prove motive. Neither was it obliged to produce the killer weapon. It is immaterial whether or not the gun recovered by PW3 was the killer weapon used in the commission of the offences herein. And that this court should not speculate on why the appellant was not wearing a mask as the rest of the assailants.

[19] Mr Oola contended that there was the evidence of PW6 who was directed by the appellant to a place where he recovered an identity card and a voter card in the names of Ekaju Justine, the deceased in count 1. The body of Ekaju had been found at the scene of crime. Mr Ekaju would have been in possession of his identification documents. Secondly how did the appellant know where these documents and articles were other than the inference that the appellant had taken those documents from Ekaju after killing him.

[20] Mr Oola further argued that there was no contradictions and inconsistencies in the evidence for the prosecution. Where those existed they were minor and ought to be ignored. The trial court had rightly found the appellant guilty as charged.

[21] In relation to ground 2 Mr Oola submitted that the aggregate sentence of 52 years was an appropriate sentence for 2 murders. The appeal against both conviction and sentence should fail.

Analysis

[22] As a first appellate court, it is our duty to 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. We shall proceed to do so bearing the above principles in mind.

Ground 1

[23] The case for the prosecution was that PW1 and his brother, Ochom Emmanuel, now deceased on the morning of 2nd July 2011 were walking from their village to go to the lake at about 5.30am when PW1 met 3 assailants one of whom he identified as the appellant when he flashed his torch on his face. He did not identify the other 2 assailants who apparently went to confront his brother. PW1 testified that the appellant shot him in the stomach with a gun and his intestines were exposed. He held them back with his hand. The appellant pushed him to the ground and then went to join his 2 colleagues. PW1 hid in the nearby garden and heard a shot. And soon after he heard a motor cycle approaching and then another shot. He presumed that his brother had been shot. Some people came to the scene and took the witness for treatment.

[24] PW2 was a wife to appellant no. 1 and Ojange Gabriel was her brother in law. At the time of the incident she was separated from the appellant and dowry had not been returned. In May 2011 Ojange visited them and he slept in the kitchen. Getting to the kitchen about midnight he saw a gun. He asked Ojange about the gun but he did not respond.

[25] PW3 was Detective Police Constable James Ogwal who at the material time was stationed at Soroti Police Barracks. On the instructions of AIP Elolu the witness and a colleague visited a murder scene at Omagara village in Serere District. On reaching the scene they found 2 dead bodies, one lying next to a motor cycle and another next to a bicycle. They interviewed some people at the scene as a result of which they appear to have arrested the appellant and came with him to Soroti Police

Station. He also visited the appellant's home at Agirigoi Omagara village and recovered an SMG rifle with no butt, 5 loaded magazines, 2 voters' cards, one belonging to deceased Ekaju Justine and another to Olupot, army uniform and 4 mobile phones. These items were buried in a big pot in a garden 50 metres from the appellant's home. PW3 handed these items to the storeman to be exhibited.

[26] PW4 was Atim Betty, the wife of the appellant though dowry had not been paid. In March 2011 she lived with the appellant for about 6 months. She admitted to having a grudge with the appellant on account of the fact that the appellant beat her. Prior to the incidents in relation to this case, probably 3 months earlier she had seen the appellant with a gun at their home. He was dismantling it. He also had what looked like army and police uniforms. On that day Ojange did not visit them but thereafter he often visited and they would go out at night and the appellant would return in the morning. On the 1st July of 2011, the appellant did not spend the night at home. He returned early in the morning at about 6.00am on the 2nd July 2011. He asked for water to bathe. He was dressed in a light blue shirt with brownish trousers that had blood on them.

[27] After the appellant bathed someone came at home and informed the appellant of people who had died and they went to the scene. Some police officers came home that morning and interviewed PW4. She described the gun to them. They searched the house and found Shs.240,000.00. Police told her to pick her clothes and she accompanies them to the Police station. Thereafter she saw the appellant being brought by another group of police officers home and they searched the house, recovering, a weighing scale, a mobile phone, and a short stick.

[28] PW5 was Detective Corporal Odong Francis, who at the material time was stationed at Soroti Police Station. On the 6th July 2011 while he was at CPS, Soroti, 2 officers of the Rapid Response Unit came with 2 suspects and exhibits. He exhibited the exhibits in the register. He received a stick grenade, Offensive rifle, 166 rounds of ammunition, 5 magazines, a baton, 2 head masks, army boots, weighing scale, arms cap pair of army uniform, police zebra belt, police cap, 4 nokia phones and 5 phone batteries, a black jacket, grey trousers, light blue shirt, 2 voters' cards for Ekaju and Olupot in a big clay pot with a hole. The following day on 7th July Det. Sgt. Mbulaite signed for these exhibits and took them to Rapid Response Unit Kireka.

[29] PW5 identified the baton, 240,000.00 cash, 4 nokia phones, weighing scale in court and tendered the same as prosecution exhibits, 3, 4, 5, 6 and 7 together with an exhibit slip. The rest of exhibits were with the Rapid Response Unit at Kireka.

[30] PW6 was Detective Constable Okolis John Otekan who testified that he arrested the appellant and Ojange Gabriel on 2nd July 2011. At the time he was attached to the Rapid Response Unit at Kireka and they were looking for guns. He was the second in command. He got a call from the Regional CID Officer who directed him to a crime scene at Omagara village in Soroti District. On arrival at the scene they found 2 bodies with bullet wounds. The police divided up in 2 teams and the witness's team went to the appellant's house and conducted a search. They found an electric extension cable, a pair of wet trousers, ordinary a wet jacket, a bicycle with fresh soil, a torch and panga. The appellant's wife was arrested too and taken together with the appellant who had been arrested at the scene of crime, and taken to Serere place station, where they left the appellant's wife, PW4.

[31] PW6 proceeded to Soroti police station where they interrogated the appellant. At about 4.00pm on the same day late AIP Ayenu called the witness. She was with the appellant and the appellant gave them directions to where to find a gun. They proceed as per directions and dug up the ground, and found a pot, that contained a short machine gun with no number, 5 magazines, 1 weighing scale, 1 police baton, 4 nokia phones, identity cards, voters card of one of the deceased Ekaju, a police belt and beret, police shirt, one plain army uniform, 26 loose bullets, one stick grenade, one tortoise grenade, a pair of army boots and 2 masks. The witness carried the pot to CPS Soroti.

[32] PW6 identified 4 nokia phones, weighing scale, baton, and cash 240,000.00. He tendered in an exhibit slip from Soroti CPS which was marked P Exhibit 9. He did not know where the other items recovered were. The gun and grenades were taken to ballistic experts in Kampala.

[33] The case for the appellant was that on that day he never moved from home and that his wife, PW4, lied to say he only came back in the morning of 2nd July 2011. He was at home in the morning of 2nd July 2011 when his neighbour, Odongo Michael, came home and told him that his 2 brothers had been shot on their way to the lake shore. One died but another survived. Appellant advised him to take his brother to hospital. He directed the appellant to the scene of crime. The appellant proceeded to the scene of crime and on his way he met police and army

vehicles. He was put in one of the vehicles and taken to his home. They demanded for a gun and he told them he had none.

[34] At his home police and army carried out a search and got Shs.240,000.00, 4 phones, and a bicycle. He was taken together with his wife to Serere Police station and then to Soroti Police station. He was interrogated by the Army officers and in particular Cap. Omagora. He told them he had no gun. He never talked to Ayena or PW5. He did not give them directions, oral or in writing, to the gun. He denied that PW4 ever saw him with a gun and that she had a problem with him.

[35] Appellant further testified in cross examination that he knew PW1 who was a brother to Ochom. Ochom was a village mate to the appellant but not PW1 who was from a different village. He stated that PW1 lied to court. He did not know Opolis John. PW5 beat him.

Judgment of the Trial Court

[36] The learned trial Judge summed up to assessors and the assessors in turn advised her to convict the appellant and his co accused for 2 offences. The learned trial Judge, after reviewing the evidence in the case and in agreement with the assessors opinion convicted the appellant with his co accused as charged and sentenced them to 26 years on each count to be served consecutively.

[37] The learned trial judge accepted the evidence of a single identifying witness and in addition the testimony of PW3, PW4, PW5 and PW6 in its entirety, concluding that it was circumstantial evidence that leads to only one inference and that is that the appellant, in possession of a gun, shot at PW1, (who survived) and the 2 deceased persons in the early morning of 2nd July 2011.

Exhibit Evidence for the Prosecution

[38] The learned trial Judge directed the assessors with regard to exhibit evidence in the following words,

> 'With regard to exhibits not tendered in court, you need to be satisfied that they were sufficiently described by the witnesses and there is a chain of custody of the same. Once you are satisfied with the description, you can make reference to them in your decision.'

[39] In the Judgment of the trial court this subject was dealt with in the following words,

> 'According to PW5 Odong, the storeman, he received a rifle, magazines and voters card for deceased Ekaju from Rapid Response police on 6.7. 2011 but these items along with grenade were taken to Rapid Response police in Kireka by Det. Mbulaite for the accused persons to be tried by the Court Martial as was the practice those days. What is crucial is that these items were described by the different witnesses who handled them from recovery to the storage to the movement out of the police station.
>
> .....
>
> In the instant case, PW4 Cpl. Odong the storeman who received the rifle, magazines and voter's card for Ekaju testified the items were taken by Det. Mbulaite to Rapid Response Unit in Kireka. I am therefore satisfied that the chain of custody of the items is well established.'

[40] PW5, Odong Francis, who stated that he was the exhibit store man, testified that he received exhibits that included a rifle, ammunition, voters' cards for Ekaju and Olupot in a big clay pot on 6th July 2011 from Officers attached to the Rapid Response Unit. Those exhibits were signed for and taken by Det. Sgt. Mbulaite to Rapid Response Unit, Kireka. He does not testify as to how he came to receive some of them back and what happened to those he did not receive and were not tendered in court. Det. Sgt. Mbulaite did not testify yet he was the last person on the evidence on record to hold these exhibits. From 7th July 2011 to the time of the trial these exhibits are not accounted for.

[41] There is on the record of trial P Exhibit 8. It appears to be an exhibit slip. It is signed by D/AIP Kedi and not PW5. Exhibits tendered by PW5 on the record are stated to be Nos 3, 4, 5, 6 and 7. There is no record as to how P8 was tendered in evidence.

[42] The exhibits, P3, P4, P5, P6 and P7, produced by the prosecution do not connect the appellant in any way to the offences charged. So apart from the fact they were wrongly admitted into evidence their evidential value in connecting the appellant to the offences charged is of nil value.

[43] PW6 tendered in evidence exhibit slip PE9. It was issued by Soroti Police Station. The officer that signed to acknowledge receipt and checking of the said items is D/AIP Kedi. It is not PW6 who, in fact

stated that he handed over these exhibits to Soroti Police Station. This receipt is dated 6th July 2011. PW6 was, in our view, incompetent to produce this receipt in court as an exhibit. It should have been produced by the author of it or his successor in office.

[44] Neither Det. Sgt. Mbulaite, nor the exhibit store man for Kireka Rapid Response Unit to which Det. Sgt. Mbulaite was to deliver the exhibits testified in this case. There was obviously a break in the chain of evidence with regard to the movement of exhibits in this case, both of the exhibits produced in court, and those not produced in court.

[45] PW3 and PW6 stated the exhibits recovered from the garden, recorded in P E9, were recovered on the 2nd July 2011. PW6 stated that he recovered these items after talking to the appellant at Soroti Police station. However, the storeman, PW5, who testified to have received them, and then passed them onto Det. Sgt. Mbulaite on 7th July 2011, stated that he received them on the 6th July 2011. There is no explanation where these exhibits were from 2nd July 2011 up to 6th July 2011 when they were delivered to Soroti Police station. This unexplained 4-day delay in depositing the said exhibits to Soroti Police Station renders suspect the story behind their recovery including source of the said exhibits.

[46] We are of the view that the exhibits that were admitted in evidence were wrongly admitted, as the officer who had last custody of the same or the store man at Kireka Rapid Response unit should have produced them in court. All other witnesses could only identify them as the objects that they had handled at whatever stage of the investigation of the case, while establishing a chain of movement from recovery to production in court.

[47] It was an error for the learned trial judge to direct the assessors that they could consider the items that had not been produced in evidence in their consideration of the evidence in this case such as the rifle and ammunition. This was clearly a misdirection. The prosecution having claimed to have recovered a rifle in the circumstances it claimed and then failed to produce it in court, or offer a satisfactory explanation as to its whereabouts, may lead to an inference that no rifle was discovered or if it was, and it was sent for examination, the results of the examination may not have supported the case for the prosecution. Those items not exhibited were not evidence and not only the assessors but the court should not have had any regard to the same.

[48] Even for the exhibits produced in court P3, 4, 5, 6 and 7 were not produced by the right witness and no explanation was provided as to why D/AIP Kedi who received and checked the exhibits, and signed the exhibit receipts P8 and P9, did not produce them. PW5 did not sign the exhibit slips, P8 and P9.

[49] In our view it was entirely wrong for the court to have any regard to the exhibits P3, 4, 5, 6 and 7, 8 and 9 in light of the gaps in the chain of movement and other gaps set out above. Likewise, it was wrong for the court to take into account items claimed to have been recovered for the unexplained failure to produce them in court.

[50] Particular emphasis was placed on the voters' card for Ekaju, one of the deceased, for having been found allegedly, in a pot that the appellant directed PW6 to in the appellant's village not far from his home. The appellant denied that he gave directions to PW6 to that effect. There was no evidence adduced to the effect that the late Ekaju, on the fateful night, was travelling with that document and that it was stolen that night. No member of Ekaju's family was called to testify in this matter in relation to the movement of Ekaju that early morning.

[51] Notwithstanding the foregoing this voter's card belonging to Ekaju Justine was not tendered in evidence and no reasonable explanation was presented as to why this was so. The last we hear of it is that it was taken to the Rapid Response Unit, Kireka by Det. Sgt. Mbulaite. As it was not produced and no reasonable explanation was provided for its non-production in court, it is doubtful, it was ever recovered as claimed. Reference to it cannot serve any useful, let alone, connect the appellant to the murder of Ekaju Justine or Ochom Emmanuel.

[52] Similarly, the rifle or firearms and ammunition allegedly recovered from near the appellant's home, on information allegedly supplied by the appellant, was not produced in evidence. No plausible explanation was offered as to why this was not done. No connection was established between the offences in question and the said firearms allegedly recovered. The appellant denied talking to PW6 at all or telling him about the whereabouts of any firearm. Did the rifle actually exist? We shall never know. The prosecution failed to produce it. Was the rifle the murder weapon? We shall never know.

[53] It is imperative, in our view, where the prosecution recovers exhibits that will be used as evidence in a case for the record of movement of such exhibits from the moment they are recovered up to the moment

they are produced as evidence at the trial to be accounted for. This is what is often referred to either as a chain of evidence or chain of custody. The purpose of doing so is twofold. Firstly, it lays down a proper foundation that connects the evidence to the accused, or to a place and or object that is relevant to the case. Secondly it ensures that what the object is claimed to be is what it is. The chain of custody ensures that there has been no tampering with the exhibit save where that is done for purpose of scientific analysis or examination, prior to the production of the exhibit at the trial. Where there is a gap in the chain of custody one cannot exclude the possibility of tampering and or substitution. It follows that where there is a gap in the chain of custody such exhibit ought not to be accepted in evidence and if it is accepted its probative value would be nil.

[54] In Uganda v Christopher Musisi [1977] HCB 298, a High Court of Uganda decision, the accused was indicted of murder. The only evidence before the court was that the accused was a porter employed by the deceased and he was found on the night of the deceased's death some distance away with a lot of items which had been stolen or removed from the deceased's home. The policeman who received the said recovered exhibits never testified. Allen, J., (as he then was), *inter alia* held, that there was a gap in the chain of evidence linking the exhibits in the case as there was no evidence of any policeman who received those particular exhibits taken from the accused. There was no evidence that the exhibits in court were the same as the exhibits taken from the accused. The accused was acquitted of the charge of murder.

[55] This point was discussed in Kyomukama Fred v Uganda [2016] UGCA 55. The appellant was indicted and convicted of the offence of rape. On appeal this court reviewed the evidence at the trial and found that there were gaps in the chain of custody of the exhibits removed from the appellant that were taken for testing at the Government Analytical Laboratory. The court observed, allowing the appeal, that:

> 'There is no evidence on how exactly the clothes were recovered from the appellant, who received them, who marked them and how they ended up at the government analytical laboratory. ..... The appellant's defence, coupled with the broken chain of exhibits should have been resolved in the appellant's favour.'

[56] In Malumbo v Director of Public Prosecutions [2010] E A 280 the Court of Appeal of Tanzania set aside a conviction that was based on exhibit evidence that had gaps in the chain of evidence. The court stated in part,

> 'We wish to add that it is important to ensure that exhibits are handled carefully. Needless to say, exhibits are vital evidence. So, their preservation, loss or tampering will depend on how they are handled.'

[57] The above case law provides ample authority for our decision on this point.

[58] The exhibits allegedly gathered from the appellant's garden could have presented a treasure trove for forensic investigative purposes. Given the claim that they were kept in a pot underground properly covered, presumably on the morning of 2nd July 2011, and recovered less than 12 hours later, a forensic examination of them, for either finger prints or specimens that could reveal material for DNA examination. Such material would have been able to establish a link with the persons who hid the same or had previously handled them and if they were somewhat involved in the commission of the offences in question.

[59] PW6 mentioned that scene of crime officers visited the scene of the crime where the bodies of the deceased persons were found. No scene of crime officer testified in this case. We have no idea if any evidence was gathered at the scene or not. It could have been possible to search for the bullets discharged and spent cartridges given that shots appeared to have been fired at close range and from post mortem reports of the deceased persons the bullets exited from the bodies. Discovery of such items would have aided in the investigation especially in determining from which gun they had been fired from. This is particularly important as it was alleged that a possible murder weapon had been recovered.

Other Circumstantial Evidence

[60] We are left basically with only the evidence of the single identifying witness, PW1 and PW4, who admitted to have had a grudge with the appellant. In court PW4 testified that on the night leading to 2nd July 2011 the appellant did not return home until about 6.00am. She did not know where he had been. The appellant contests this version and asserts that it is a lie. He slept at home that night until morning and did not move anywhere that night. PW6 claimed that PW4 had told him that the appellant had moved out of the home that morning at about 4.00am. This is in contradiction to PW4's testimony that the appellant did not spend the whole night at home and returned only in the morning.

[61] The creditworthiness of PW4 is called in question on the basis of the testimony of PW6. In addition, given that she admitted to having a grudge against the appellant, it is unsafe to treat her testimony as reliable or creditworthy for it is possible that she is not telling the truth.

Evidence of a Single Identifying Witness

[62] We are left only with the testimony of PW1, the single identifying witness, who testified that he flashed a torch when he was stopped and identified the appellant who was known to him. The appellant accepts that they were known to each other but claims that PW1 is lying as he was at home that night.

[63] The leading authority on the evidence of this nature is Abudalla 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.

[64] Mr Oola pointed out that the circumstances surrounding the identification of the appellant were favourable for correct identification in light of the fact that PW1, who knew the appellant prior to this incident, flashed a torch and recognised the appellant, when the appellant stopped him. Mr Oola referred us to the case of Uganda v George William Simbwa, SCCA No. 37 of 1995, (unreported) in which the Supreme Court found the single identifying witness, in some circumstances somewhat similar to the current one, was found to have correctly identified the accused and that such identification was sufficient to found a conviction. The Supreme Court reversed a finding

by the High Court which had concluded that the circumstances were unfavourable and had acquitted the accused.

[65] We have read Uganda v George William Simbwa (supra). The facts of that case are somewhat different from the facts of this case though both incidents occurred at night. In Uganda v Simbwa (supra) there was the evidence of a dying declaration in addition to the single identifying witness. The deceased and the single identifying witness were father and son. They were guarding their banana plantation from thieves that would steal their bananas at night. PW1 had a touch. They saw a person enter the banana garden with a panga and a spear. He cut a banana stem. The identifying witness put on the torch and flashed at the thief. The deceased rushed to confront him and the thief hit the deceased with a spear and pulled it out and ran away. The identifying witness made an alarm and people rushed to scene. The identifying witness told the people who answered the alarm that it was the respondent that had speared his father and run away. The deceased also told the people who answered the alarm that it was the respondent that had struck him with a spear as he confronted him as he was stealing his bananas.

[66] In the case at hand PW1 was stopped suddenly and told to stop. This is when he shone his torch onto the face of the person telling him to stop. He recognised him as the appellant as they lived on the same village. He was shot by this person in the stomach and his intestines were coming out. He held them and ran into the bush. He had seen 2 other assailants he could not identify as they had masks. Those were struggling with his brother Ochom. The person who shot him walked back to them. He then heard a shot and presumed that his brother must have been shot. Shortly afterwards he heard a motor cycle and another shot. He was rescued and taken to hospital. The incident happened at about 5.30am, while it was dark.

[67] It is not known how long this incident took. It was dark. PW1 had a torch which he switched on when he was suddenly stopped. It is not clear how long the light was on and he observed the assailant before he was shot. It appears the incident happened suddenly and events moved rapidly from one to the other. It is possible PW1 recognised correctly the assailant in light of the torch light and the fact that appellant was previously known to him.

[68] On the other hand, there must be some unease about the possibility of mistaken identification. This offence occurred in the dark save for the torch light. It is unclear at what speed the events unfolded. It would

appear to us the circumstances were somewhat difficult for correct identification to be made. It is not known for how long PW1 observed the assailant. The distance between the 2 is not known but probably it was fairly close as the assailant pushed PW1 to the ground after he shot him. It is not clear how long the torch continued shining.

[69] The prosecution did not call any evidence that showed the persons who came to the scene and took PW1 to hospital and the first report PW1 may have made to them about the incident, including whether or not he had recognised the assailants. This would have helped to remove the unease with regard to a possible mistaken identification.

[70] PW1 in his testimony showed a scar on his body that was caused by the shot fired by the assailant at his abdomen. He did not show that there was an exit point for the bullet. It was thus probable or at least possible that the bullet remained in his body and when he was taken to hospital for treatment it would have been recovered. If recovered it would have been possible for forensic analysis to determine if it was fired from the same gun as the gun that was allegedly recovered. However, there was no mention if any bullet was recovered from his body.

[71] In our view what is required in the instant case is other evidence that points to the participation of the appellant in the commission of the offences charged. Unfortunately, we find no such evidence, direct or circumstantial.

[72] We are unable to agree with the learned trial Judge that there was sufficient evidence to found a conviction against the appellant on both offences charged. We would allow ground 1 of the appeal. We find it unnecessary to consider ground 2 of the appeal.

Decision

[73] This appeal is allowed. The conviction of the appellant is quashed. The sentence is set aside. We order the release of the appellant unless he is being held on some other lawful charge.

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

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Mutangula Kibeedi
Justice of Appeal