

5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA

AT MBARARA

10 **CRIMINAL APPEAL NO. 126 OF 2010**

*Appeal from the conviction and sentence of the High Court of
Uganda Holden at Mbarara by Hon. Justice Yokoramu Bamwine
on 6th July 2010.*

15 **NAMBALE WILBRODI FRED:.....APPELLANT**

VS

UGANDA:.....RESPONDENT

20 **Coram: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Byabakama Mugenyi Simon, JA
Hon. Mr. Justice Alfonse C. Owiny-Dollo, JA**

25 **JUDGMENT OF THE COURT**

This is an appeal from the conviction and sentence of the High Court of Uganda holden at Mbarara by Hon. Justice Yokoramu Bamwine J (as he then was), dated 6th July 2010, whereby the appellant was convicted of murder contrary to
30 **Sections 188 and 189 of the Penal Code Act** and sentenced to 20 years imprisonment.

Briefly, the facts as set out by the trial Judge were that, the appellant and the deceased were immediate neighbours.
35 The two had a dispute over a common path. The dispute was heard and determined by the Local Council of the area. On the 9th of May 2004 at about 3:00am the deceased was

attacked at his home by an axe wielding assailant who inflicted grave injuries on his head. The deceased's children
40 who were at the scene informed the police that they had identified the appellant as the assailant as he fled from the scene. The deceased was rushed to hospital where he died the following day. The appellant was subsequently arrested, tried, convicted and sentenced to 20 years imprisonment,
45 hence this appeal.

The appeal is premised on the following grounds:

1. ***That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and materials on record thus reaching a wrong decision.***
- 50 2. ***That the learned trial Judge erred in law and fact when he relied on the evidence of PW1 and PW4 that they had properly identified the appellant whereas there were no favourable factors/conditions for identification thus reaching a wrong decision.***
- 55 3. ***That the learned trial Judge erred in law and fact when he sentenced the appellant to a harsh and excessive sentence of 20 years imprisonment thus causing a miscarriage of Justice.***

At the hearing of this appeal, the appellant was represented
60 by Mr. Agaba Jadison on state brief while Ms. Tumuheise Rose, Principal State Attorney, appeared for the respondent.

Counsel for the appellant argued grounds 1 and 2 together. He submitted that the learned trial Judge erred in law and fact when he came to the finding that the appellant had
65 been positively identified, yet the conditions at the scene at the time did not favour correct and unmistakable identification of the assailant.

Counsel attacked the evidence of PW1 and PW4 as un-
70 reliable, arguing that their claim of having properly identified the appellant by his height as he ran away ahead of them from the scene, cast strong doubts on the correctness of the identification.

75 On the issue of the dispute between the deceased and the appellant over a path, counsel argued that there was evidence that showed the matter was resolved a year before the death of the deceased. There was therefore no motive on the part of the appellant to kill the deceased.

80 On the whole, he contended, the prosecution evidence was insufficient to link the appellant to the commission of the offence. Counsel prayed Court to quash the conviction and have the sentence set aside. Counsel abandoned ground 3 on sentence.

85 Counsel for the respondent opposed the appeal. She submitted that the identification of PW1 and PW4 was free from the possibility of error given that the appellant was

identified with the help of moonlight as he fled from the
90 scene. She contended that there was also circumstantial
evidence pertaining to the dispute over a path and the
disappearance of the appellant from the village for over a
year. Counsel argued that, considering that the appellant
was well known to PW1 and PW4, they could not have been
95 mistaken in their identification even though they identified
him by his height only as they pursued him outside the house.

Counsel prayed Court to uphold the conviction and confirm
the sentence.

100 We have carefully considered the submissions of both counsel
and the evidence on record. This is a first appeal and as such
this Court is required under **Rule 30(1) of the Rules of this Court**
to re-appraise the evidence and make its inferences on issues
of law and fact:- See also **Pandya Vs R [1957] E.A 336; Bogere**
105 **Moses and another Vs Uganda, Criminal Appeal No. 1 of 1997**
(SC); Kifamunte Vs Uganda, Criminal Appeal No. 10 of 1997
(SC).

We shall, in accordance with the above authorities, proceed
to re-appraise the evidence and to make our own inferences
110 on both issues of law and fact.

From the evidence on record, the deceased was attacked
inside his bedroom at night. There was no light and both PW1
and PW4 stated they did not identify the assailant inside the
house. Both testified that they identified him with the help of

115 moonlight as he ran away while they pursued him outside. Further that, he was dressed in a pair of black trousers and was without a shirt. PW1 testified that at some point the distance between her and the appellant was five meters. PW4 for his part testified that he managed to get within a
120 distance of about three metres from the assailant. Both witnesses were categorical that they identified him by his height. PW6 testified that she was able to identify the appellant inside the house when he flashed a torch at her face.

125 By any standards, the circumstances described by PW1, PW4, and PW6 were not quite conducive for correct identification of the assailant. There is therefore need for us to evaluate the evidence cautiously and satisfy ourselves that mistaken
130 identification is ruled out. In so doing the Court must consider the evidence as a whole, namely the evidence if any, of factors favouring correct identification together with those rendering it difficult. Where the conditions favouring correct identification were difficult, there is need to look for other
135 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. See **Roria Vs Republic [1967] E.A 583; George William Kayesubula Vs Uganda, criminal Appeal No. 16 of 1977 (SCU); Abdalla Nabulere and another Vs Uganda [1979] HCB 77 and Moses Kasana Vs Uganda [1992-93] HCB 47.**
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145 PW6 testified that she was able to identify the appellant when he flashed a torchlight into her face while she was inside the house. She disclosed this to Bahemuka (DW2) that very night. The testimony of DW2 on this point is as follows;

150 ***“My wife and I proceeded to the scene. We found there 2 daughters of the victim and the victim himself. We asked them whether they had seen the attacker. They said they did not see them.”***

PW6 further testified that the appellant was putting on white gumboots. This was at variance with the testimony of PW4 who stated;

155 ***“He was putting on police shoes. We all knew him to own police shoes.”***

PW7, the police officer, testified that when he visited the scene, PW4 informed him the appellant was putting on white gumboots.

160 PW4 in his examination in chief testified that he identified the appellant by his height as he ran away from the scene. In his cross-examination he stated:

165 ***“I recognised him. I saw his face. He went out first. I ran after him, went ahead of him and tried to grab him but he outpaced me.”***

PW1 stated twice in cross-examination that she notified DW2 and his wife when they came to the scene that she had identified the assailant as the appellant. DW2 in this regard
170 testified that:

“Kyogabirwe (PW1) is the one who told me that she had not seen the attacker.....she told me she did not see the person who killed the father”.

Her statement to the police appeared to suggest she
175 identified the appellant inside the house. However, in the said statement she did not state that she pursued the appellant and identified him outside the house. Further, PW1 denied her statement was read back to her, yet PW7 stated he did so.

The first information (exh D3) given to the Police by Muhangi
180 (PW5) was to the effect that the deceased had been attacked by an unknown person.

PW5, son to the deceased, was not at the scene at the time of the attack. His evidence was to the effect that he had been informed by Muwhezi (PW4), PW1 and others that the
185 deceased was attacked by the appellant. In his statement to the police, he stated that the assailant was unknown. PW1, PW4, and PW6 who testified that they had positively identified the appellant as the assailant did not reveal his identity to their relative (PW5) so that he informs the police.

190 The law is that grave discrepancies and contradictions in the prosecution case, unless satisfactorily explained, would usually

but not necessarily result in the evidence of the witness(es) being rejected. Minor discrepancies would not usually have that effect unless the trial Court thinks that they point to deliberate untruthfulness. Minor discrepancies should be ignored if they do not affect the main substance of the prosecution's case. Discrepancies in the testimony of many witnesses on material points have to be carefully weighed in arriving at the truth. But minor differences should be ignored, as they are often a test of truth. Several people giving their versions of events seen by them are naturally liable to disagree on immaterial points. The Court should consider the broad spectrum of the case when weighing evidence. Discrepancies and contradictions in the testimony of witnesses on material points should not be overlooked as they seriously affect the value of their evidence: See **Alfred Tajar Vs Uganda, EACA, Criminal Appeal No. 167 of 1969.**

We find that the contradictions and inconsistencies in the instant case were not minor, for they related to identification which is the root of the case. The discrepancies were not only on immaterial facts but also touched on the core issue as to whether or not the conditions at the scene at the time were favourable for correct and unmistakable identification.

We find that the contradictions as set out above went to the root of the case as they affected the credibility of the witnesses thereby rendering their evidence unreliable. The trial

Judge erred when he found that there were no material inconsistencies and or contradictions in the prosecution case.

220 In addition to the direct evidence, the trial Judge also relied on circumstantial evidence in convicting the appellant. The circumstantial evidence revolved on the dispute over the footpath and the conduct of the appellant immediately after the death of the deceased. The appellant is said to have run
225 away from the village where he stayed and was only arrested a year later.

In this regard, the evidence of PW3 was to the effect that the appellant threatened to kill the deceased as a result of the disputed path. When pressed during cross-examination, he
230 revealed that the LCs directed the appellant to create another path which he did. He added however that, this did not end the matter. In his defence, the appellant acknowledged the dispute had existed but stated it was resolved when he opened another path. This was
235 corroborated by DW3 who stated the dispute between the two had been resolved by the Local Council Court one year prior to the death of the deceased.

PW1 testified that the deceased had a land dispute with DW2 as well. Another dispute was with Kosia, son to the deceased,
240 over a certificate of title, which subsisted at the time of his death.

It is trite that before drawing an inference of the accused's guilt from circumstantial evidence, Court must be sure that there is no other co-existing circumstances which would
245 weaken or destroy the inference of guilt. The inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of guilt. **Teper Vs R [1952] A.C 489; Simon Musoke Vs R [1958] EA 715.**

250 We find that in view of the evidence that the deceased had a grudge with two other different people, it is probable that the deceased could have been killed by persons other than the appellant. The co-existing circumstance would therefore
255 weaken or destroy the inference of guilt on the part of the appellant. At least the facts are capable of explanation upon another reasonable hypothesis.

The appellant denied having run away from the village, in his testimony. He was supported by DW2, DW3, and DW4 (his wife). The evidence of the said witnesses revealed that the
260 appellant remained in the village and no evidence was brought in rebuttal.

Upon our evaluation of the circumstantial evidence, we have found it incapable of irresistibly pointing to the guilt of the appellant.

265 Grounds 1 and 2 succeed accordingly.

We therefore allow this appeal, quash the conviction, and set aside the sentence. The appellant is hereby set free unless he is being held on other lawful charges.

270 We so order.

DATED AT MBARARA THIS ^{6th}.....DAY OF DECEMBER 2016.

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HON. JUSTICE KENNETH KAKURU,
JUSTICE OF APPEAL

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HON. JUSTICE BYABAKAMA MUGENYI SIMON,
JUSTICE OF APPEAL

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HON. JUSTICE ALFONSE C. OWINY-DOLLO
JUSTICE OF APPEAL

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