

The Republic of Uganda

In the Supreme Court of Uganda

At Mengo

(Coram: A.H.O. Oder., - J.W. N. Tsekooko., – A. N. Karokora -
J.N. Mulenga., and L.E.M. Mukasa-Kikonyogo, JJSC).

Criminal Appeal No. 42/1999

B E T W E E N

ABDALLA WASSWA APPELLANT

AND

UGANDA RESPONDENT.

Judgment of the Court.

This is a second appeal by Abdalla Wasswa hereinafter to be called the appellant against the dismissal of his appeal by the Court of Appeal on 21st May 1999.

The brief facts of the case are that Nakalembe Feeza, hereinafter to be called the deceased was the appellant's wife. At the time of her death on 4/11/95 they had been married for over 10 years. They had six children. Their matrimonial home was situated at Nakawala Kasambya in Mubende District. The appellant had business premises at Lwegula trading Centre part of which was occupied by tenants. On 2/11/95, following a misunderstanding the deceased left the matrimonial home. She went to live with her mother,

Maliyana Katalina Mbabazi, P.W.2 at Lwegula Trading Centre in Mubende District, close to the appellant's second home.

On 4/11/95 between 5 a.m. – 6.00 a.m. the deceased was sleeping in her mother's house when someone knocked at the window of the bed room where she and her brother, Ssentenge Mohamad, P.W.1, were sleeping. On being asked who was knocking the caller identified himself as her husband. The deceased went outside to meet him. After a short while, Ssentenge, P.W.1, and Maliyana, P.W.2, who had remained in the house heard the deceased crying out that she had been killed by her husband. Both of them came out and made an alarm which was answered by the neighbours including Naluddodo, P.W.3. The deceased was found lying down near her mother's house, dead. She had sustained a single stab wound in the chest.

The appellant had left his home early that morning saying to Naluddodo that he was taking cattle to Nabingola Market with Kakembo, Naluddodo's husband. However, he returned alone at about 6 a.m. and collected a panga and knife from Naluddodo's house. When the deceased's body was found, the appellant was nowhere to be seen. He disappeared from his home and area that morning.

At about 4 p.m. on the same day the appellant was traced and arrested at Butenga village in Masaka District, about 40 miles from the scene of the murder. He was found hiding under grass away from the road. He was subsequently charged with murder. His defence was an alibi. He told court that in the night before the deceased's death he was at home with his sister and children. On 4/11/95 he left his house with his friend Ssendegeya, at

6.a.m. and went to Masaka District to buy a motorcycle. He did not know of the death of the deceased that morning. He claimed that he and Ssendegeya were arrested apparently for riding an unregistered motorcycle. He denied having murdered the deceased.

The learned trial judge rejected his defence of alibi and believed the evidence of the prosecution witnesses. She found the appellant guilty as charged and sentenced him to death on 23/11/98. His appeal to the Court of Appeal was dismissed. The appellant appealed to this court.

The memorandum of Appeal sets out two grounds of Appeal namely that:-

- see memo*
1. The learned ^{appellate judges} justices of appeal erred in law and in fact when they confirmed the conviction of the appellant on the basis of unsatisfactory and inconclusive circumstantial evidence.
 2. The learned ^{appellate judges} justices of Appeal erred in law and fact by failing to consider the appellant's defence of alibi.

On the first ground, Mr. Kiggundu Mugerwa, counsel for the Appellant contended that the circumstantial evidence on which the trial judge based her judgment, and on which the Court of Appeal confirmed it, was unsatisfactory and inconclusive. He submitted that the evidence of Sentege, P.W.1, Maliyana Katalina Mbabazi, P.W.2, and Naluddodo, P.W.3, was not visual but audio. Sentege and Maliyana did not see the appellant stabbing the deceased to death nor did Naluddodo see the appellant when he collected the panga and knife from her house. They all claimed to have recognized him by his voice only. Mr. Kiggundu Mugerwa further argued that in the

absence of visual identification at the material time, there should have been other evidence to corroborate the circumstantial evidence of Sentege, P.W.1, and Maliyana Katalina Mbabazi, P.W.2. As far as he was concerned Naluddo's evidence could not be taken as corroboration either, because she did not see him, too. The prosecution case was further weakened by the failure to produce those weapons (panga and knife) as exhibits. There was no effort made whatsoever to trace them and no explanation was given for the omission which, counsel submitted, should go in favour of the appellant.

Counsel further argued that the failure by the prosecution to call Kakembo, weakened the prosecution circumstantial evidence. Mr. Kiggundu Mugerwa contended that the evidence of Kakembo would have corroborated that of his wife, PW3, because it would have put the appellant at the scene. With regard to timing, counsel argued that it could not have taken the appellant such a short time to move from Naluddodo's house to the scene of crime. He could not have taken one minute to cover a distance of 50 metres.

Further, Mr. Kiggundu Mugerwa submitted that the conduct of the appellant could not be taken as corroboration because it was capable of explanation upon other reasonable hypothesis than that of guilt. Counsel relied on Simon Musoke - VR - 1958 EA 715, and Teper V R(1952)2 ALL E.R 447; 1952 A.C. 480. As far as he was concerned the prosecution evidence was incomplete and without any corroboration. He submitted that the Court of Appeal erred in confirming the trial judge's finding that the dying declaration was corroborated by the evidence of Maliyana and Sentege.

In reply, Mr. Elubu, Senior State Attorney, supported both the conviction and death sentence. He asked this court to dismiss the appellant's appeal. With regard to the first ground of appeal, Mr. Elubu pointed out that the Court of Appeal was mindful of the fact that the prosecution case depended entirely on circumstantial evidence and rightly upheld the judgment of the learned trial judge. He argued that the circumstantial evidence relied on namely; the dying declaration, the conduct of the appellant, the collection of the panga and knife from Naludoddo's house was strong enough to support the prosecution case. He explained that the appellant was sufficiently armed to carry out the murder. The appellant's voice was well known to Maliyana and Ssentege, having been married to the deceased for over 10 years. Mr. Elubu further contended that there was sufficient time for interaction between the deceased and the appellant from the ^{time of the} calling of the deceased and the murder. The question of mistaken identity was ruled out. It was Mr. Elubu's submission that the identification of the appellant by the deceased was positive visual identification. The deceased in her dying declaration, could not have been referring to another man but her husband, the appellant.

We are of the view that the learned Justices of Appeal properly considered the evidence on record before they confirmed the findings of the learned trial judge on ^{the issue of circumstantial evidence} ~~that issue~~. Clearly the prosecution case was based on strong and conclusive circumstantial evidence consisting of several pieces of evidence. Firstly there was the dying declaration of the deceased where she named the appellant as her assailant. Looking at the circumstances surrounding that dying declaration we agree that the deceased could not have been mistaken about the identity of her attacker. She had ample time to recognize the

appellant because, as submitted by Mr. Elubu, she had time to interact with him for her mother, P.W.2 testified inter alia that:-

“Then she went out. She spent there a while then she said, ‘mother my husband has killed me’.”

Secondly there was the testimony of Ssentege and Maliyana which in agreement with both courts we find corroborates the dying declaration. As for the different words which Ssentege and Maliyana said the deceased used to describe her assailant both courts considered them carefully, explained them and reconciled them. We are in agreement with them (the two courts) that in the circumstances of this case the terms “my man” and “my husband” could be used interchangeably. The deceased would not have been referring to another person other than the appellant.

Mr. Kiggundu-Mugerwa raised a point not argued in the Court of Appeal to the effect that the contents of Ssentege’s police statement differed from his testimony in court. In the circumstances of this case and in view of the importance of Sentege’s evidence, it is necessary to reproduce the relevant portion of Sentege’s statement to the Police. It reads in part that:

“She stayed with us and was sleeping in one room. On Saturday the 4th day of November 1995 at about 06.00 hours, someone came and knocked at the window of the room in which we were sleeping with the late Nakalembe. Nakalembe asked who was knocking and the voice outside replied, that “I am Waswa”. My late sister opened and went outside after a short time I also went outside for a short call. But as I was just stepping outside I heard

my sister cry that "Waswa has killed me". There and then I looked in the direction from where the voice came from and I saw Waswa pulling out a knife from my late sister's back and run away while he was in a brown towel. The late also moved about three steps and fell down and died. I made an alarm, my mother **MBABAZI MARIAM** also joined and we made an alarm, which attracted many people, among whom were our neighbours Naluddodo, Moses and others."

The learned trial judge did not rely on that part of the evidence of Sentege relating to visual identification of the appellant. However, in our view the rest of the contents of Sentege's statement to the police are substantially the same as the oral testimony which he gave in court. In these circumstances it can be said that by virtue of section 155 of the Evidence Act, that police statement corroborates the testimony of Sentege. The contradictions such as there were are minor and do not affect the substance of his testimony. In rejecting Sentege's evidence of visual identification the learned trial judge did not take into consideration the advice of the Assessors to the effect that in the area where the murder took place, during November of each year by 6.00 a.m. there is enough light to enable a person to identify another. That may explain why Sentege said there was moonlight and he identified the appellant. However, since the judge disregarded this evidence we shall not refer to it any further.

Thirdly, there was the evidence of Naluddodo, PW3, from whom the appellant collected the weapons at 6.00 a.m. She, too, knew the appellant very well. He had been trading in cattle with her husband for some time. The time factor and estimation of the distance between Naludoddo's home

and the scene of crime complained of by counsel for the appellant, was satisfactorily explained by the learned Justices of Appeal in their judgment. We share their view that:-

“These rural witnesses sometimes lack precision in the estimation of time or distance. What matters in this case is that all the witnesses agreed that the events took place when it was almost dawn, as the judge correctly observed”.

It is possible as suggested by Mr. Kiggundu Mugerwa, that if the weapons collected from Naluddodo's house by the appellant were produced and exhibited into court that evidence could have given more support to the prosecution case. However, that would also depend on a number of factors one of which would be whether exhibits were stained with the deceased's blood. We are unable to accept Mr. Kiggundu Mugerwa's contention that the prosecution evidence was inconclusive.

Fourthly, we think that the conduct of the appellant manifested guilty mind. We do not accept counsel's submission that the appellant's conduct was not sufficiently explained and so did not amount to corroboration. We think that both PC Enyagulata Emmanuel, P.W.4 and P.C. Baryanga Alfred, P.W.5, the Police officers who arrested the appellant, and whose evidence the courts below accepted, clearly explained the conduct of the appellant.. He could not be traced at his home or in the area immediately after the murder. He was, instead, found at Butenga village in Masaka District, which was 40 miles away from the scene of crime. He was hiding under some grass and away from the road. Hiding was incompatible with the

innocence of the appellant and a clear indication of guilty knowledge on his part.

We agree that if, again as submitted by counsel for the appellant, Kakembo, PW3's husband, had been called as a witness it would have probably assisted the court. However, as the evidence stands on record it is sufficient to destroy the appellant's alibi and to implicate him with the murder. Failure to call Kakembo was not fatal to the prosecution case.

Lack of positive visual identification did not render the prosecution case incomplete as it was argued by Counsel for the appellant. The circumstantial evidence was subjected to proper evaluation and scrutiny by the learned Justices of Appeal. The first ground must fail.

x On the second ground of Appeal it was the contention of Mr. Kiggundu Mugerwa that the learned Justices of Appeal did not consider the appellant's evidence of alibi. His evidence which was corroborated by that of his sister, Hawa Nagawa, D.W.2, that he travelled with one Ssendegeya on his motorcycle to Masaka to purchase a motor cycle was ignored by both the High Court and Court of Appeal. Counsel argued that the reason given by the learned trial judge for rejecting Nagawa's evidence was a trivial one.

In reply Mr. Elubu submitted that the fact that the appellant was placed at the scene of crime destroyed his alibi. There were inconsistencies in the defence evidence, which pointed at deliberate untruthfulness on the part of the appellant. He argued that the learned trial judge rightly rejected the

evidence of Nagawa, D.W.2 because she had the opportunity to observe her demeanour.

ⓧ did she say so

In the light of the evidence before court the criticism that the Court of Appeal did not consider the plea of alibi is not justified. As rightly submitted by Mr. Elubu, in view of the strong prosecution circumstantial evidence putting the appellant at the scene of crime at the material time, his subsequent conduct and the lies told by him and his sister, Nagawa, his plea of alibi must be false. In rejecting the evidence of Nagawa, D.W.2, the learned trial judge did not solely base herself on the lie she told about having custody of the deceased's baby but looked at the evidence of the appellant, other witnesses and considered it as a whole. Besides she had the opportunity to observe her demeanour, she was therefore, justified to disbelieve Nagawa's story.

↓ did she say so

According to the appellant's evidence in chief and that of his sister Nagawa, he left his home with Ssendegeya at 6.00 a.m. to go to Masaka. However, in cross examination the appellant said that he set off from the matrimonial home with Ssendegeya at 10.30 a.m. and had not heard of the death of the deceased. The undisputed evidence of Ssentege and Nagawa was that Sentege went to the appellant's home (not in the Trading Centre), to inform his sister, Nagawa, D.W.2 and the children of the deceased's murder at 7 a.m. but the appellant was not there. Those lies taken together with the strong circumstantial evidence leave no doubt in our minds that his alibi is false. The learned Justices of Appeal rightly rejected his alibi. See Supreme Court Criminal Appeal No.12 of 1981 Moses Kasana Vs. Uganda (unreported). The second ground of the appeal must fail too.

The decision of the Court of Appeal to confirm both the conviction of the appellant and the sentence of death passed on him by the High Court cannot be faulted. There is no merit in this appeal. It is dismissed.

Dated at Mengo... 12th... this day... 2000.

Signed
A.H.O. Oder
Justice of the Supreme Court

J.W Tsekooko
J.W Tsekooko
Justice of the Supreme Court

Signed
A. Karokora
Justice of the Supreme court

Signed
J.N. Mulenga
Justice of the Supreme Court

Signed
L.E.M. Mukasa-Kikonyogo
Justice of the Supreme Court.