

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CORAM: ARACH-AMOKO, MWONDHA, MUGAMBA, BUTEERA,
CHIBITA JJSC
CRIMINAL APPEAL NO.007 OF 2019

1. KIDEGA JOSEPH
2. OKOT JUSTINO.....APPELLANTS

VERSUS

UGANDA.....RESPONDENT

(Appeal arising from the decision of the Court of Appeal at Arua before Kakuru, Muhanguzi and Madrama JJA on the 24th day of January 2019 in Criminal Appeal in Criminal Appeal No.007 of 2016)

JUDGMENT OF COURT

This is a second appeal arising from the decision of the Court of Appeal which upheld the appellants' conviction for the offence of murder contrary to sections 188 & 189 of the Penal Code Act, Cap 120.

Background:

The appellants and others still at large were indicted with the offence of Murder contrary to sections 188 & 189 of the Penal Code Act, Cap 120. The particulars of the offence were that Kidega Joseph and Okot Justino, on 24th December, 2010, at Apaa village, Labala Parish, Paboo Sub-county, Amuru District murdered Okello Denis Tito.

At the trial, the prosecution called four witnesses (PW1, PW2, PW3 & PW4). PW1 was a medical doctor who testified that the cause of death was head injury due to blunt force trauma.

PW2 was a brother to the deceased. He testified that the 1st appellant's hut was set on fire by a one Arop Geoffrey. The arson led to the death of some members of the 1st appellant's family. Consequently, the appellants set out to attack the brothers of the arsonist. He testified that the appellants accordingly went and caught the deceased whom they beat to death. He stated that the 1st appellant had a knife and an axe and that he used the axe to assault the deceased. PW2 further testified that he was able to see the appellants kill the deceased because of the light from the burning hut, the moon light and the fact that he was at a distance of about 10 meters away from the scene of crime. He added that the appellants were also known to him.

PW3 testified that he was the deceased's cousin. He testified that after the murder incident, he found the 1st appellant with a one Obilo. He stated that when the 1st appellant saw him, he said; "You are one of the people we are looking for." He testified that he was then shot in the thigh with an arrow and stabbed on the right side with a knife by Obilo. He stated that the 1st appellant kicked him and hit him on the right side with an axe and that he became unconscious. The scars from the stabbings were confirmed by the assessors.

PW4 testified that he was the deceased's cousin and that on the fateful night; he was woken up by the sound of footsteps of many people running towards his house. He testified that as he fled, he saw the 1st appellant together with other people. He stated that the 1st appellant had an axe and a bow and arrow. He added that he recognized the 1st appellant because of the moonlight and the 1st appellant's voice when he tried to ask him to stop. He testified that after finding refuge, he was informed that the appellants had killed the deceased.

The appellants denied any involvement in the murder of the deceased and set up an alibi. The 1st appellant (DW1) informed court that on the fateful night, he was in Coro village and not Akaa. The 2nd appellant (DW2) testified that at the material time, he was struggling to save people from the burning hut and that he was not involved in the killing of the deceased. DW3 was a police officer

attached to Amuru CPS who confirmed a statement he had recorded from a one Okot Atanasio. The statement implicated the appellants in the murder of the deceased.

Upon evaluation of this evidence, the High Court found the appellants guilty for the offence of murder. They were sentenced to 36 years and 4 months' imprisonment in respect of the 1st appellant and 39 years and 1-month imprisonment in respect of the second appellant. The appellants appealed to the Court of Appeal which confirmed the conviction and varied the sentence to 27 years' imprisonment in respect of the 1st appellant and 25 years' imprisonment in respect of the 2nd appellant.

The appellants were dissatisfied with the decision of the Court of Appeal. Hence filed this appeal on only one ground which reads as follows:-

That the learned Justices of Appeal erred in Law by failing to adequately re-evaluate all material evidence relating to the uncorroborated evidence of PW2.

Representation:

The appellants were represented by Counsel Awero Sarah on state brief while the respondent was represented by Ms. Nabisenke Vicky, Assistant Director of Public Prosecutions.

Submissions:

The appellants' counsel submitted that the Court of Appeal failed in its duty to adequately re-evaluate the evidence relating to the uncorroborated evidence of PW2 surrounding identification. Counsel argued that the conditions under which identification was made were difficult and thus there is a possibility of mistaken identity. She argued that PW2's sight was blurred by the smoke from the burning hut and the many people at the scene of crime. Counsel relied on the decision of this Court in **Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 01 of 1997**, where it was stated that court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult and to warn itself of the

possibility of mistaken identity. That court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a sentence, unless it is satisfied that mistaken identity is ruled out. In so doing, the court must consider the evidence as a whole, namely the evidence if any of the factors favoring correct identification together with those rendering it difficult.

Counsel argued that the contradictions in the prosecution's evidence should be resolved in favor of the appellants. Counsel pointed out these contradictions and they all related to the witness' exact location when the crime was being committed. Counsel added that it was unclear whether at the time of commission of the crime, PW2 was hiding in his neighbor's building or in the bush or among the people in the houses in the camp or at the scene of crime.

Counsel submitted further that the learned Justices of the Court of Appeal did not consider the grudges that existed between the two families that could have led one family to plan to imprison the head of another family in revenge.

She invited court to consider the 1st appellant's evidence at pages 59 and 60 of the High Court proceedings where he stated that he had served the community since 1986 and that he was a member of the village Health team. Counsel wondered why the 1st appellant was arrested 11 months and the 2nd appellant 5 years after the crime was committed and yet they were both resident in the village. She was emphatic that the appellants participated in the burial but not in the killing of the deceased.

Counsel submitted that the Court of Appeal failed in its duty to re-evaluate the evidence relating to the uncorroborated evidence of PW2 regarding the circumstances surrounding the identification of the appellants.

She prayed that this Court reverses the decision of the High Court and that of the Court of Appeal and acquits the appellants.

The respondent's counsel submitted that the Court of Appeal properly and exhaustively re-evaluated the evidence before it and came to the right conclusion of upholding the conviction of the appellants.

Counsel argued that the Court of Appeal was alive to the fact that PW2 was a single identifying witness in circumstances that were difficult for proper identification but that nevertheless, they found that the appellants were correctly identified.

Counsel further submitted that there was a concurrent finding on the fact that the circumstances of identification of the appellants were favorable for proper and correct identification by a single witness. Counsel relied on a decision of this Court in **Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014**, where it was stated that this Court can only interfere with the concurrent finding if it is satisfied that the two courts were grossly wrong and or applied the wrong principles of the law.


Counsel supported the finding of the Court of Appeal that since the conditions under which PW2 identified the appellants favored correct and proper identification, there was no need for corroboration as that evidence alone was cogent and safe to sustain the conviction of both appellants.

Without prejudice, counsel submitted that PW2's evidence was corroborated by the evidence of PW4. She stated that PW2's identification was further corroborated by his narration of how the deceased was killed which was confirmed by the admitted evidence of PW1- Dr. Madrama who examined the deceased's body and recorded his findings on P Exhibit 1. The findings indicated that the deceased had sustained multiple fractures of the skull and that his occipital bones were broken with several fragments. The cause of death was determined as head injury following blunt force trauma. She submitted that PW2's testimony was further corroborated by PW3 who testified that the deceased had been stabbed and that his head had been totally smashed. She added that the 2nd appellant also corroborated PW2's testimony when he stated that the deceased's body was found in a bush with marks of beating and a smashed head. The evidence also confirmed the existence of a burning house that could produce light capable of being seen from afar.

Counsel contended that the existence of a grudge as asserted by the appellant is not borne out of evidence on record. Counsel referred

this court to the testimony of PW2, PW3 & PW4 who were categorical that they had no grudge against the appellants. Counsel submitted that on the contrary, the evidence adduced at the trial court showed that the appellants were motivated by the murder of A1-Kidega's family to attack the deceased and any of the relatives of Arop, the arsonist. Counsel relied on the authorities of **Kato Kyambadde and anor Vs Uganda, Supreme Court Criminal Appeal No.0030 of 2014** and **Godfrey Tinkamanyire and anor Vs Uganda Criminal Appeal No. 5 of 1998** where it was observed that while motive was irrelevant in a criminal prosecution, it was always useful since a person in his normal faculties would not commit a crime without a reason or motive.

Counsel argued further that the contradictions in the prosecution's evidence were minor and inconsequential and did not point to deliberate untruthfulness in as far as the circumstances surrounding the identification of the appellants as participants in the murder of the deceased are concerned. Counsel relied on the case of **Kato Kyambadde and anor Vs Uganda (Supra)**.

Counsel invited this court to uphold the trial court and Court of Appeal's findings that the prosecution destroyed the appellants' alibi when the appellants were squarely put at the scene of crime. Counsel relied on the authority of **Baluku Samuel & another Vs Uganda, Supreme Court Criminal Appeal No. 21 of 2014** where this court found that where the prosecution adduces evidence showing that the appellants were properly identified and squarely put at the scene of crime, then their defence of alibi cannot stand. 

Counsel prayed that this court upholds the conviction of the appellants and accordingly dismiss the appeal.

Consideration of Court:

This is a second appeal and the duty of this Court as a second appellate court is to determine whether the first appellate court properly re-evaluated the evidence before the trial court by subjecting it to fresh scrutiny before coming to its own independent conclusion. (**See Kifamunte Henry Vs Uganda, SCCA No. 10 of**

1997, Ntambala Fred Vs Uganda, Supreme Court Criminal Appeal No. 34 of 2015)

The appellants' counsel argument was that the Court of Appeal did not properly re-evaluate the evidence regarding the circumstances surrounding identification of the appellants by a single identifying witness-PW2. It was contended that the evidence was full of contradictions and that it was not corroborated and as such, it ought not to have been relied upon by the Court.

The law in regard to identification by a single witness has long been settled in a host of cases. In the case of **Abdala Nabulere & Another Vs Uganda_Cr. App. No. 9 of 1978. (1979) HCB 77**, the Court held as follows.

There is no particular magic in having two or more witnesses testifying to the identity of the accused in similar circumstances. What is important is the quality of the identification. If the quality of the identification is not good, a number of witnesses will not cure the danger of mistaken identity, hence the requirement to look for 'other evidence.

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 to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All the 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.....

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need of caution. (emphasis added)

Bearing the above principles in mind, we shall now determine whether the conditions favored correct identification of the appellants in the instant case. In resolving this issue, the Court of Appeal held as follows:

“In the instant case, PW2 testified to have recognized the appellants who were 10 meters away with the aid of moonlight and light emitting from the burning hut. We consider the distance of 10 meters to be close enough for proper identification of the appellants who were well known to the witness. The appellants were not strangers, they were residing in the same village and the witness knew A1 as a peasant farmer and A11 as a Local Council 1 Chairman. We find that the presence of moonlight coupled with light from a burning hut were favorable factors which aided positive identification of the appellants as the assailants at the scene of the crime. We find that the conditions under which the appellants were identified favored correct identification.”

We are unable therefore, to fault the Court of Appeal finding on the proper and correct identification of the appellants. **In Beingana Kanoni Willy Vs Uganda, S.C Criminal Appeal No. 26 of 2009**, this Court referring to **Abdallah Bin Wendo Vs R (1953) 20 EACA 166** laid down conditions considered favorable for correct identification. The conditions are:

- i) Whether the accused was known to the identifying witness at the time of the offence.
- (ii) The Length of time the witness took to identify the accused.
- (iii) The distance from which the witness identified the accused.
- (iv) The source of light that was available at the material time.

PW2- the single identifying witness testified as follows:

“I know the two accused persons. Okot Justino is the LC 1 Chairman, Apaa village. Kidega is just a farmer...There was moonlight and burning house emitted some light. I was distanced 10m away from them as they moved with Tito Okello (the deceased) to the burning house... They started beating the deceased at the home of AII (Okot Justino) and took him to a nearby bush and I could see.”

In view of the above unchallenged testimony of PW2 in material particular, we come to the conclusion that the conditions favoured correct and proper identification of the appellants. The appellants were known to the witness, there was moon light and the burning hut emitted light. The distance of 10 metres is small and favourable for correct identification. The argument by appellant’s counsel that the witness’ identification was blurred by the smoke is to say the least ridiculous and we reject it. In **Bogere Moses Vs Uganda, S.C Criminal Appeal No. 1 of 1997**, this Court referred with approval to the decision in **Moses Kasana Vs Uganda C.A Criminal Appeal No. 12 of 1981**; where it was held that there is need to look for other supporting evidence if the conditions favoring identification are difficult. In this case, we have found that the conditions favored correct identification and that even without looking for supporting evidence, the evidence of identification is sufficient. ✍


The appellants’ counsel also argued that the inconsistencies and contradictions ought to be resolved in favour of the appellants. We agree with the Court of Appeal that the appellants were correctly identified by PW2 and the defence of alibi was adequately destroyed. The inconsistencies were minor and do not point to deliberate untruthfulness by the witness.


We have studied the evidence further and we accept the respondent’s counsel submissions that the appellants were motivated by the murder of A1-Kidega’s family to attack the deceased and the relatives of Arop, the arsonist. The suggestion by the appellants’ counsel that there was a grudge between the family of the deceased and the convicts is not borne out of evidence on record and we accordingly reject it.


In the result, the appeal has no merit and it is dismissed. The appellants shall continue to serve the sentence imposed by the Court of Appeal and as confirmed by this Court.


Dated at Kampala this 28th day of August 2020.


ARACH AMOKO,
Justice of the Supreme Court


MWONDHA,
Justice of the Supreme Court


MUGAMBA,
Justice of the Supreme Court


BUTEERA,
Justice of the Supreme Court


CHIBITA,
Justice of the Supreme Court