THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 63/98

CORAM: HON. MR. JUSTICE C.M. KTO, JA

HON. LADY JUSTICE A.E.MPAGI-BAHIGEINE,JA

HON. MR. JUSTICE J.P. BERKO, JA

1.MUSHIKOMA WATETE)

2. KAKALA MUKHWANA) ……APPELLANTS

3. FRANCIS MUKHWANA)

4.LAWRENCE NATSEBA)

VERSUS

UGANDA…… RESPONDENT

(Appeal from the judgment and decision of the Hiçh Court of Uganda Holden at ale delivered on the 6th day of November 1998 by the Hon. Judge Augustus Kania in Criminal Session Case No. 283 of 1997)

JUDGMENT OF THE COURT:

The four appellants were tried and convicted on 6/11/98 on an indictment which charged them with the offence of murder and sentenced to death.

The brief facts are that sometime in December 1995 the elders of Bumusho Parish convened a meeting at which it was decided to deal with those who practise witchcraft in the area. The names of suspected witches and wizards were compiled. It was also resolved at the meeting to select young men who would kill the suspected witches and wizards. The appellants attended the meeting. On the 6/12/95 the deceased was arrested around 4p.m. by a mob armed with pangas, clubs and sticks on an allegation that her brother had kept with her his bag containing instruments of witchcraft. They took her to Bushiko sub-county headquarters whilst beinq

assaulted with pangas and clubs. All appellants were among the mob. From Bushika sub-county the deceased was taken to Bududa. Or the way to Bududa the second appellant was alleged to have cut the deceased on the side of the head with a panga whilst the third and forth appellants assaulted her with clubs and stones At Bududa Trading Centre one Waringa Wakoko cut the deceased on the head and she collapsed. She was picked up and dumped at the Bududa Police Post where she died. The mob fled when the police approached them. It took sometime before the appellants were arrested and charged.

At the trial, all the appellants gave unsworn statements. The first appellant, Natseba Lawrence, said that he was arrested from his home on the 3/2/97 at 3.00 a.m. He denied having participated in the murder of the deceased. He stated hat he did not stay in Kikhohcvillage most of the time as he was re/ident at Mbale. The second appellant, Nakhokho Peter alias Mushikoma Watete, said that he was arrested on 17/2/96 on an allegation that he had gone to the home of one Sam Nambaale and threatened to kill him. While that case was pending he was charged with other offences which were alleged to have been committed in 1995. He said he was surprised of being accused of an offence committed in 1995 and yet he was at home all those years. The third appellant, Kakala Mukhwana Fred, stated that he travelled from his home in Bumasisho village on the 12/10/96 and came to Mbale to visit his sister - in - law. He was arrested by the police at the car park where he had gone to look for transport to return to his village. He denied the offence.

The fourth appellant, Francis Mukhwana, stated that he took his sick wife to Bududa Hospital where she was admitted on the 6/12/95 and whilst he was busy looking for what the hospital had asked him to bring he met RC officials and one Sam Nambaale and a boy called Mutege who had been arrested and tied up with a rope. He was told that the boy was found with another person whom they suspected had a gun.

They had saved the boy and were taking him to the police. He went to his home and found that many homes were being searched. He went back to the hospital until the searches were over. He

was arrested on the 22/8/97. He denied the charge.

The appellants called three police officers in support of their defence. D/AIP Ogwang Johnson produced in evidence the first and second information that were recorded by the Police. The first information was given by one Khankha Joseph on 7/12/95 and was to the effect that his sister-in-law Kibone Mary had been killed by a mob of unknown people. The second information was given by Sam Nambaale and was to the effect that his sister Kibone Christine had been killed by Lawrence Matsebu and George Waringa. and others. D/AIP Owori Charles and D/AIP Elibu, all of CPS in Mbale were called to put in evidence the charge and caution statements of the appellants. We shall revert to the significance of their evidence later in the judgment.

The learned trial judge accepted the prosecution case, rejected the defence and convicted the appellants.

The grounds of the appeal are that:

(1) the Honourable trial judge erred in law and fact when he failed to carefully evaluate the evidence of the single identifying witness and thus held that the appellants had been properly identified,

(2) the Honourable trial judge erred in law and fact when he held that the appellants were guilty without properly evaluating the evidence of alibi set up by the appellants,

(3) the Honourable trial judge erred in law and fact when he held that the deceased had died of cut wounds whereas there was no evidence to that effect, and

(4) the trial judge failed to resolve the grave inconsistenies in the prosecution case.

At the hearing, ground four was abandoned, and quite rightly so, as learned counsel for the appellants was unable to point out any inconsistencies in the prosecution's case. The evidence was straight and co-ordinated. Though grounds one and two were argued separately, they can conveniently be considered together as they dealt with the issue of identification.

According to appellants' counsel, Ms. Diana Musoke, evidence of identification of the appellants depended on the evidence of a single identifying witness. In counsel's view PW 2, the Parish Chief, to whom the mob brought the deceased, never mentioned the names of the appellants as being among those who brought the deceased. It was only PW 3 who said that the appellants were among the mob who came and grabbed the deceased. In her view since the mob consisted of over fifty people, it was impossible for PW 3 to identify who did what and as the witness was able to give a detailed account of
what each appellant did, her evidence was suspect. For that reason the judge ought not to have accepted her evidence. Counsel also attacked the learned trial judge for not considering the alibi set up by each of the appellant.

We do not accept the arguments of appellants' Counsel that the appellants were identified by one single identifying witness. The evidence of PW 2 shows that the deceased was brought to him at the sub-county headquarters at 5p.m. The deceased was being held about 8 metres away from where he was and he could see how she was being held. He then continued:

> ***"A4 was holding the left hand, A3 the right hand, A4 had a club while A3 had a panga, A2 had a club so* had *A5. A4 was beating the deceased with the panga all over the body. He was using the flat side of the panga. I saw A2 assault the deceased with the club in the back and buttocks. A2 had a club and assaulted the deceased in the back and legs. A5 first pushed the deceased down."***

The above evidence was elicited from PW 2 in cross examination. It is therefore not correct to say that PW 2 did not mention the names of the appellants as part of the mob that assaulted the deceased on the 6/12/95.

The second identifying witness was EW 3. Her evidence was that she was sewing with her mother, the deceased, on the 6/12/95 at Kikholo Trading Centre when many people armed with sticks, pangas, and stones came and surrounded her. Her mother got frightened and when she was trying to flee the people grabbed her. Among those who grabbed her mother were Waninga Wakoko, Natseba Lawrence (A2), Mushikoma Watete (A3), Mukhwana Kalala (A4), Mukwana Tomasi, Mutsaka Wandyembe, Menne Matete, Buhama Watwekere and others. She said she followed them for some distance when they started to assault her mother. The first person to hit the deceased was Waninja Wakoko.
Lawrence Matsebu hit her back with a panga, Mushikoma Watete hit her buttocks with a club, Mukhwana Makala hit her chest with a stone whilst Mukhwana Tomasi hit on the head. She said that A2, A3, A4 and A5 were her cousins. That was not challenged by the appellants.

According to this witness the incident started at the Trading Centre at about 4p.m. They reached the sub-county headquarters around 5p.m. The deceased was finally dumped at Bududa Police Post at about 8p.m. The appellants therefore had been under observation for about four hours.

The learned trial judge, after referring to the prosecution evidence on identification, correctly directed his mind on law on evidence of identification and guidelines for insuring that conditions existed for correct identification. He referred, in particular, to the cases of ***Abdalla bin Wendo and Another v R (1953) 20 EACA, 166 Roria v Republic (1967) EA 583,*** and ***Abdalla*** **Nabulere** ***and others v Uganda, Criminal Appeal No. 12 of 1981.*** To these may be added ***Patrick Isimbwa and Another v Uganda Cr. Appi. No. 13 of 1991 (SCU) unreported*** and ***Uganda v George Wilson Simbwa Cr. App. No. 37 of 1995 (SCU) unreported.***

Briefly, the law is that although identification of an accused person can be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such a witness regarding identification, especiaLly when conditions favouring correct identification are difficult. Circumstances to be taken into account include the presence and nature of light; whether the accused person is known to the witness before the incident or not; the length of time and opportunity the witness had to see the accused and the distance between them. Where conditions are unfavourable for correct identification, what is needed is other evidence pointing to guilt from which it can be reasonably concluded that the evidence of identification can safely be accepted as free from possibility of error. The true test is not whether the evidence of such a witness is reliable. A witness may be truthful and his evidence apparently reliable and yet there is still the risk of an honest mistake particularly in identification. The true test is whether the evidence can be accepted as free from possibility of error.

The position of the law, where the case against the accused person depends wholly or substantially on correctness of identification of one or more witnesses, can be found in the case of Abadala Nabulere (Supra) . In that case the former Court of Appeal of Uganda put it this way:

> "***Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of an accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting accused in reliance of the correct identification or identifications. The reason for the special caution is that there is possibility that a mistaken witness can b a convincing one, that even anumber of such witnesses can all be mistaken. The judge should then examine clearly the circumstance the identification came to be made, particularly the length of time, 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 mistaken identity is reduced, but the poorer the quality the greater the danger".***

In the instant case there were two identifying witnesses. The first one was PW 2, Davis Warnanial. As we have already seen from his evidence, he knew all the appellants very well. He

was formerly their Parish Chief and he knew the village of each of the appellant. He saw all the appellants at the meeting convened by the elders at which it was resolved to deal with people in the area who practice witchcraft. He saw the deceased and her assailants at about 5p.m. when she was brought to Bushika sub-county headquarters where she was assaulted with clubs and pangas. He said that the assailants were only 8 metres away from him. He described in detail the part each appellant played in the whole sordid episode.

PW 2's evidence was not challened by putting to him in cross-examination that he did not see what he said he saw, and that he did not know the appellants before the incident.

The second identifying witness was PW 3. As we have already noted from her evidence, she was with the deceased when she was grabbed at 4p.m. She followed the mob from that time until 8p.m. when the deceased was finally dumped at the police post. She said the appellants were her cousins. She therefore had an opportunity to observe the appellants from 4p.m. to 8p.m., a period :of four hours. A greater part: of the period was broad day light.

PW 3 was similarly not challenged in cross-examination that she did not witness what she said she witnessed, and that the appellants were not related to her.

The learned trial judge, after reviewing the evidence of PW 2 and PW 3 and testing it against the safeguards laid down in the decided cases, found that the conditions for correct identification existed. He therefore found that the appellants were correctly identified by PW 2 and PW 3 as being part of the mob which arrested, assaulted and caused the unlawful death of the deceased.

There is no doubt that the learned trial judge properly directed himself as to the law applicable to evidence of identification by one or more witnesses.

On the evidence of PW 2 and PW 3 we are satisfied that conditions for correct identification of the appellants by PW 2 and PW 3 existed, as such ruled out any mistaken identification of the appellants by them. In the circumstances, our view is that ground one of the appeal must fail. This, we think, also disposes of ground 2 in so far as the first, second and third appellants are concerned. The reason being that they did not set up an alibi as a defence. Learned counsel for the appellants was therefore wrong in criticising the learned trial judge for not considering the alibi set up by the first, second and third appellants.

It was the fourth appellant who put up a defence of alibi, but we agree that the evidence of PW 2 and PW 3 puts him at the scene of the crime. His alibi therefore must collapse: See ***Siraji Sajjabi v Uganda Cr. App. No. 31 of 1989.***

A common argument put up on behalf of all the appellants by Mr. Owori, who represented them at the trial, was that they could not. have p.articipated in the murder as they were arrested long after the incident even though they claimed to have been at Bushika all the time. The explanation given by the appellants' own witness, D/AIP Ebilu, was that the suspects in connection with this case could not be arrested immediately because they had either been arrested in connection with other offences or they could not be found. This explanation was accepted by the learned trial judge, and quite rightly so, as there is evidence that a lot of killings of suspected witches and wizards took place in the area at that time and that some of the appellants were arrested in connection with some of those killings.

Ground two also fails.

Ground three challenged the conclusion of the medical evidence that the cause of death was due to internal brain haemorrhage in view of the admission by the doctor, in cross examination, that the post mortem examination was not thorough as he did not have facilities to carry out internal examination. The evidence of PW 3 shows that the deceased was cut on the heed at Bududa Trading Centre and she collapsed.. Se died not long after that.

PW 4 found cut wounds on the head and bruises on the arms. The doctor found that the bone in the head was broken and therefore the possibility of blood going into it cannot be ruled out. In our view the conclusion of the doctor that the deceased died of internal brain haemorrhage is supported by evidence on record. A part from the medical evidence, the evidence of the eye witness shows that the deceased died at the hands of the appellants. We therefore do not see any merit in ground three, which must fail.

In the event the appeal is dismissed.

Dated at Kampala this 9th day of November 1999.

C.M.Kato

Justice of Appeal.

A.E.Mpagi-Bahigeine

Justice of Appeal

J.P.Berko

Justice of Appeal.