THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.120 OF 1999

CORAM: HON. JUSTICE G.M. OKELLO, JA.
HON. JUSTICE A.E. MPAGI-BAHIGEINE, JA.
HON. JUSTICE A. TWINOMUJUNI, JA.

MUSISI JACKSON :: APPELLANT

VERSUS

UGANDA::RESPONDENT

[Appeal from conviction and sentence of the High Court at Kampala (Katutsi J) dated 26.10.99 in Criminal Session Case No.245/1998].

JUDGEMENT OF THE COURT

The appellant, Jackson Musisi, was indicted for murder contrary to sections 183 and 184 of the Penal Code. He was convicted and sentenced to death by the High Court at Kampala on 21.10. 99. He appealed to this court against the conviction.

Briefly the facts are that the appellant and the deceased Christine Namayanja were neighbors, living about 1/2 km apart. The two, however, had an uneasy relationship. The appellant nursed a grudge against the deceased whom he suspected of having caused the death of a relative through witchcraft.

On the fateful day at around 5.30 p.m. the appellant was seen in the bush about 1/4 a Km from the deceased's home, by one Emanuel Kakumba, PW6, who was trapping animals with some other people in the bush. There was no path where they were. The appellant never greeted nor talked to them. He was moving in the direction of the deceased's home. He was putting on a

green shirt, a pair of black trousers and the locally made tyre-sandals (lugabire). He had a panga in his hands.

At around 7.30 p.m., as the deceased emerged from the goats' hut to collect grass for the fire, she was assaulted by the appellant who severed her head slicing it into pieces. The appellant was identified by the two grand children of the deceased, Derrick Bazanye, aged 7, PW2 and Ntabadde Olivia aged 12, PW3 who promptly ran to the main house to report to their mother, Namutebi Scovia, PW4, describing the appellant's clothing to her.

An alarm was raised and answered by the villagers including the appellant. A report was made to the police who visited the scene promptly. The appellant was arrested from the deceased's home, where he was with other mourners keeping the vigil. He was putting on different clothes.

On searching his house, a green blood-stained shirt, a pair of black trousers and one sandal were recovered. Footmarks were traced from the deceased's home and ending at the home of the appellant.

The appellant was indicted for murder. At the trial he denied the offence contending that he was at his home when he heard the news of the murder.

This was rejected by the learned trial judge who convicted him as charged. Hence this appeal.

There are two grounds of appeal:

"1. The learned trial judge erred both in fact and law when he held that the appellant was identified as the assailant.

2. That the learned trial judge wrongly construed the circumstantial evidence thus coming to an erroneous conclusion that there was corroboration of the evidence of identification."

Regarding the first ground, Mr. Sam Serwanga for the appellant argued that there was not sufficient evidence to identify the appellant as the assailant. He pointed out that it was wrong to connect the appellant with the offence just because he had been seen in the vicinity in the bush a few hours earlier and he happened to be taking the direction of the deceased's home. He argued that the attack took place at night when the circumstances favouring a correct identification were lacking. There was no indication as to the strength of the light from the fire in the goats' hut and

there were coffee bushes surrounding the goats' hut which obstructed visibility. Mr. Serwanga contended that both the identifying witnesses Derrick Bazanye (PW2) and Olivia Ntabadde (PW3) both being of tender age did not testify on oath and therefore their evidence required corroboration which was lacking. Commenting on the exhibits which were never tendered in court but relied on by the learned judge, Mr. Serwanga submitted that this course was erroneous. There was no sufficient evidence to point to the appellant as the culprit. He was not identified.

Mr. Vincent Okwanga, Senior State Attorney assisted by Ms. Sikola Nafuna, State Attorney, supported the conviction. He submitted that the appellant was properly identified. The conditions favoured a correct identification. The appellant was very well known as a relative and village-mate living within a half kilometer from the deceased's home. The attack took place at around 7.30 p.m., which was early evening. It was still light and this visibility was augmented by the fire in the goats' hut. The hut had no mud or wattle walls. It was only supported by the poles. Furthermore, the surrounding coffee shrubs were young. Mr. Okwanga contended that the witnesses identified the appellant's clothing and the one sandal which were taken as exhibits, but which could not be produced in court due to reasons which were satisfactorily explained away by the State. The Police Officer who handed them to the exhibits storekeeper could not be traced. The one who had received them in had left the police force and joined the army. He could not be secured to attend court with minimum delay.
He prayed for dismissal of the appeal.

The learned trial judge observed:

> **"Both children say they were able to see the accused by 20 the assistance of the fire that was burning inside the goats' hut. The goats' hut itself had open walls. One could see through it from any corner. Accused admits that it was not a dark night. The children were seeing their grandmother the deceased as she went to collect grass for the fire. They had their attention focused on to her. In the circumstances I am satisfied that the conditions were favourable for a correct identification."**

It is trite that whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, there is need for such identification evidence to be subjected to a close scrutiny before basing a

conviction on it. The reason being that a mistaken witness can be a convincing one and a number of witnesses can all be mistaken. The following have been held to be material factors for the court to consider when determining the quality of the identification whether the appellant was previously known to the witnesses or were perfect strangers; the length of the encounter; the distance between them and the state of light. - **R v Turnbull (1977) QB. 224; Abdala Nabulere and Another vs. Uganda (1979) HCB. 77.**

We are satisfied that the learned trial judge after properly directing himself that the evidence of PW2 and PW3, both children of tender years, required corroboration and that such corroboration could be found in circumstantial evidence proceeded to scrutinize their evidence along the above guidelines. We agree that the circumstances of identification as outlined by Mr. Okwanga as accepted by the learned trial judge favoured a correct identification without any doubt and the quality of their evidence was good. We should also add that the villagers living in villages where there is no electricity to supply strong lighting get accustomed to seeing things in the light shed by ordinary fires. In this case the time was dusk but was illuminated by a fire in the goats' hut. These people's eyesight gets conditioned to and becomes accustomed to such situations. Their powers of seeing were therefore not diminished by the circumstances that the incident was only illuminated by a small fire or that there were coffee shrubs around. This ground of appeal fails.

As regards ground two that the learned trial judge misconstrued the circumstantial evidence thus coming to an erroneous conclusion, Mr. Serwanga submitted that there were some aspects of the evidence which if properly construed would have led to an inference of innocence and not that of guilt. He singled out the medical evidence where Serunyigo Bunny, PW5, who carried out the postmortem and Scovia Namutebi, PW4, the deceased's daughter testified that the tongue was missing from the body. He submitted that if the circumstances were as testified to by PW2 and PW3 then the appellant would not have had the time or the opportunity to remove the tongue and run off with it.

We think that in view of the circumstances of this offence, whether the tongue was found in the body or not is immaterial. It does not alter the offence of murder as the medical evidence revealed:

"The neck was completely cut off leaving just a piece of muscle connecting to the body. The whole head was chopped by a sharp instrument."(Sic)

The tongue might have been chopped up too. Alternatively if the 20 killer had wanted to take the tongue for some sinister rituals, he still had the opportunity to do so for Derrick Bazanye PW2, said:

"When she fell down Olivia passed through a hole in the goats' hut and ran away. I followed her later. I told Senga what I had seen."

It is thus clear there was time for the killer to remain alone but as pointed out above we consider the point to be very minor and irrelevant. The learned judge rightly ignored it.

The other aspect of the evidence pointed out by Mr. Serwanga as having been misconstrued by the learned judge was the foot track allegedly left by the killer to the house of the appellant. Mr. Serwanga argued that the learned judge should not have relied on this piece of evidence. He contended that after the alarm had been raised and answered, a lot of people were milling around between the scene of crime and the appellant's house. It would not have been possible to distinguish their footprints. He submitted that the appellant was involved in constructing a shed for mourners which was the normal thing to do. This is where the Police arrested him.

Mr. Okwanga pointed out that there was sufficient evidence before the learned judge to corroborate the evidence of the two main witnesses Derrick Bazanye, PW2 and Olivia Ntabadde, PW3. The appellant had been seen in the bush where there was no path. He had a panga in his hands. Christopher Sekito, PW1, who was with others trapping animals in the bush told the court that the appellant behaved strangely in that he neither greeted nor talked to them as he made his way through the bush in the direction of the deceased's home. He recognized the green shirt and black trousers and the lugabire sandals the appellant was putting on. Bazanye, PW2 and Ntabadde, PW3 testified to this attire. Kakumba Emmanuel, PW6, parish chief of Kyonga village & the LCs and LDUs later recovered a blood stained green shirt, black trousers and one sandal (lugabire) from his house. These were taken by the police, though not exhibited in court as pointed out above. The footsteps from the deceased home stopped at the appellant's home. They did not return to the deceased home as Mr. Serwanga wanted to contend. The appellant must have returned after removing the sandals. He was careful to avoid making any identical return

footmarks, naturally to avoid detection. This evidence of foot-marks together with the rest of the evidence inevitably point to the appellant's identity.

We are therefore satisfied that the learned judge properly scrutinized the evidence. This ground also fails.

The appeal is accordingly dismissed.

The conviction by the trial court is upheld.

Dated at Kampala this 22nd day of May 2001

G.M. OKELLO
JUSTICE OF APPEAL

A.E. MPAGI-BAHIGEINE
JUSTICE OF APPEAL

A.TWINOMUJUNI
JUSTICE OF APPEAL