THE REPUBLIC OF UGANDA

IN THE COURT OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE S. G. ENGWAU, JA
HON. JUSTICE C. K. BYAMUGISHA, JA

CRIMINAL APPEAL NO. 101 OF 1999

MUZAHURA PROFILIO ……APPELLANT

VERSUS

UGANDA……... RESPONDENT

(Appeal arising from the conviction and sentence of the high Court of Uganda at Fort-Portal (Bamwine J.) dated 14.9.1999 in Criminal Session case No.27 of 1999)

JUDGEMENT OF THE COURT

During the night of the l1th June 1997 at Mujunju Trading Centre in Kabarole District the house of Musinguzi Kabagambe, hereinafter to be referred to as the 2nd deceased was attacked by a gang of about six men. They forced the 2nd deceased to open the door for them. On gaining entry into the house, the assailants tied up the 2nd deceased and his wife, P.W. 1, Lydia Kate Tumuramye with a rope. The assailants first demanded for Shs. 40 million but reduced it to Shs.400,000/= when the two victims failed to produce it. They also did not have Shs.400,000/= so the 2nd deceased told them to go to his shop and take any goods they wanted.

The assailants were armed with a torch, sticks, a knife and a gun. The 2nd deceased and P.W. 1 were told to lie face down whilst the assailants were ransacking the shop. It appears the appellant stayed behind to guard the two victims.

At that time the 2nd deceased's child aged about 2 years fell underneath its parents' bed. The appellant who was armed with a powerful torch picked the child and handed it to P.W. 1. It was at that time that P.W.1 recognised the appellant, whose girlfriend was her friend and their

neighbour. She was able to recognise him as one of the assailants with the aid of the powerful torch light he was flashing in the room.

The appellant also demanded money from P.W. 1 and told her that he was going to kill her husband, the 2nd deceased for spreading rumours that on his visits to the village, he was carrying a gun. Before the incident, the appellant, from time to time used to visit the village to see his girlfriend.

The assailants stayed in the house for about 1 1/2-2 hours. After ransacking the 2nd deceased's shop, they untied him and took him along with them, apparently to Magezi's home, where both of them were subsequently killed.

After the gang had taken her husband away P.W. 1, Lydia Kate Tumuramye, who was very frightened took refuge into the neighbour's house who was the appellant's girlfriend. She informed her of the attack but did not mention the name of the appellant as one of the attackers. She spent the whole night with her.

The next morning P.W. 1 learnt of the death of Magezi, 1st deceased, who had been killed and burnt in his house. Later she received information of the death of her husband, Musinguzi, who had also been murdered. The matter was reported to Mujungu Police Post. The appellant was arrested sometime later and charged with two counts of murder. He was subsequently prosecuted.

In his defence the appellant denied the charges and set up a plea of alibi. In his unsworn statement he told court that at the time of the commission of the offences he had moved from Mujungu Trading Centre to Bushenyi. He was evicted from his land by his brother at Nyamigaro near Mujunju - Trading Centre. He, however, admitted that his girlfriend was a neighbour of the 2nd deceased. Although he knew the 2nd deceased, he did not know how he died. He said that he was arrested in Bushenyi by the Military Police who suspected him to be a rebel. He was later handed to the Police at Bushenyi who preferred murder charges against him.

The trial court rejected his alibi and accepted the prosecution case. The appellant was acquitted on count 1 and convicted of the murder of Musinguzi on count 2. He was sentenced to death, hence, this appeal which is based on the following three grounds:

1. That the learned trial judge erred in law and fact when he convicted the appellant of murder basing such conviction on the evidence of a single identifying witness under conditions that were not good for proper identification.

2. That the learned trial judge erred both in fact and in law when he wrongly rejected the appellant's alibi and thereby came to a wrong conclusion.

3. That the learned trial judge erred in fact and in **law when he failed to evaluate evidence as a whole.**

Mr. E. Ddamulira Muguluma, counsel representing the appellant, prayed this court to allow the appeal, quash the conviction and set aside the death sentence.

Mr. Muguluma argued the three grounds of the appeal separately in that order so did Mrs. Annette Kalungi Mutabingwa, counsel for the respondent. We shall also adopt the same approach and order in our evaluation of the evidence on record.

On the first ground counsel for the appellant submitted that the learned trial judge should not have relied on P.W. l's evidence without corroboration to convict the appellant. As far as he was concerned the conditions did not favour correct identification. He argued that P.W. 1, who was with her deceased husband when the gang attacked them, must have been terrified by such a loud bang on the door and a gang of about six men. She could not have correctly identified the appellant or any other assailants. The only light in the room was that of the torch said to have been flashed by the appellant.

On the other hand counsel for the state, Mrs. Annette Kalungi Mutabingwa, submitted that the conditions in this case favoured correct identification. P.W. 1 knew the appellant. She was very close to him for a long time of about 2 hours, the assailants spent in the house. She was assisted by the bright torch light to identify the appellant. The appellant picked up her child who had fallen underneath the bed and handed it to her.

Further Mr. Muguluma pointed out that there were irreconcilable contradictions in P.W. 1's evidence, the sole identifying witness which warranted some corroborative evidence. For example P.W. 1, said that she did not see the assailant who picked up the child. Later she changed and said it was the appellant who picked it and handed it to her. She also testified that the appellant picked the child with one arm and carried the torch in the other yet he had a knife. Counsel wondered how the appellant could have carried the three at the same time. We agree with those observations. With respect, in the circumstances of this case, the contradictions complained of by counsel for the appellant cannot be treated as minor especially in view of the finding of the learned trial judge when he stated in his judgment as follows:

"Clearly, the whole issue hinges on the question of identification by a single witness, admittedly under difficult conditions"

Further we agree that the learned trial judge correctly stated the position of the law applicable in cases of this nature when he stated in his judgment as follows:

"In deciding whether or not a witness was able to recognise the accused person who claims to have seen him, at the scene of the crime, court is usually guided by certain factors. These include whether or not the accused was a stranger to the witness, the distance between the accused and the witness, the time taken by the witness to observe the accused and the source of light"

The learned trial judge relied on the case of **Nabulele and others vs. Uganda (1979) HCB 77.** The other decided cases where guidelines to the correct approach to evidence of identification especially in those based entirely on a sole identifying witness include **Sulemani Katusabe vs. Uganda Cr. Appeal No.7 of (1991)** (unreported) **Roria vs. Republic (1967) EA. 583 Abdulla Bin Wendo and Another Vs. R. (1953) 20 EACA 166. Moses Kasana vs. Uganda Cr. App. No. 12 of (1981) unreported.** In the case of **George William Kalyesubula vs. Uganda Criminal Appeal No. 16 of (1977)** (unreported) the court observed that:

"Although a fact can be proved by the testimony of a single identifying witness, this does not lessen the need for testing with the greatest care the evidence of such a witness respecting identification when the conditions favouring correct identification are difficult.

In such circumstances what is needed is other evidence pointing to the guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error"

In the instant appeal, in agreement with learned counsel for the appellant, we are unhappy about the conditions in which P.W. 1 claims to have identified the appellant. Whilst we agree with the learned trial judge that the appellant and P.W. 1, were not strangers and in fact neighbours it was strange that P.W. 1 took refuge into the appellant's girl friend's house if she had correctly identified him as one of the assailants!!

Secondly it might be understandable for P.W. 1 not to have mentioned the name of the assailant to his girlfriend, but the reason for not mentioning it to the LC Chairman P.W.2, Busingye Christopher, is hard to find. It was not until one day after that he mentioned the appellant's name. As submitted by Mr. Muguluma the possibility that it was an afterthought could not be ruled out, especially as there was some grudge between her deceased husband and the appellant.

With regard to the complaint in the Second ground we are satisfied that the learned trial judge was alive to the principles governing the plea of alibi as indicated in his judgment when he stated that:-

"It is trite law that where the accused puts forward an alibi in answer to the charge, he does not assume the burden proving it. The duty is on the prosecution to weaken it or destroy it by producing evidence that puts the accused at the scene of crime"

He relied on the cases of **Uganda vs. Dusman Sabuni 1981 HCB I and Bogere Moses and others vs. Uganda Cr. Appeal No. 1 of 1997**

We agree with counsel for the appellant that the learned trial judge did not sufficiently consider the defence of alibi raised by the appellant. It appears he came to the conclusion that the recognition of the appellant was not mistaken basing himself only on the prosecution evidence given by P.W. I. He did not consider the defence side as required by the law. This failure, in our view, contravened a fundamental decision of great importance laid down in the case of **Okethi Okale and Another vs. Republic (1965) E. A. 555 and Bogere and others** (supra). It is settled law that before a decision is made, the evidence must be looked at as a whole. In practical terms

the defence must be considered and weighed with the prosecution case before a decision of fact is made leading to the conviction of the accused. If this is not done it is futile for the accused to make a defence for whatever he says, evidence and the record as a whole to ascertain whether any miscarriage of justice has taken place.

In the instant appeal as it was rightly submitted by Mr. Muguluma it was not shown that the appellant had been seen in the area on the day of the incident. The prosecution did not adduce any evidence to rebut his claim that he was arrested by the Military Police in Bushenyi in connection with some other charges. Neither was there other evidence than that of P.W. 1 to put the appellant at the scene of crime at the material time. See **Nsubuga vs. Uganda Cr. App. No. 16 of (1988)** (unreported) Considering the evidence on record as a whole we find that the alibi put up by the appellant was not disproved or destroyed.

We agree the learned trial judge properly directed himself and the assessors on the burden of proof and on the possible danger of basing a conviction on the evidence of a single identifying witness but we think that in the circumstances of this case it would be unsafe to found a conviction on the evidence of P.W.1 without any corroboration. See **Roria vs. R (1967) E.A. 583 (supra)**

On the third ground where it was complained that the learned that judge did not properly evaluate the evidence we think that he tried, but he should not have relied on the testimony of P.W.1 to convict the appellant. Considering the conditions in which she made the identification mistaken identity could not be ruled out.

In the result we allow the appeal, quash the conviction and set aside the death sentence. The appellant should be released forthwith unless he is held on some other lawful charges.

Dated at Kampala this 6th day of February 2003

L. E. M. MUKASA-KIKONYOGO, DCJ
DEPUTY CHIEF JUSTICE

HON. JUSTICE S. G. ENGWAU, JA
JUSTICE OF APPEAL

HON. JUSTICE C. K. BYAMUGISHA, JA
JUSTICE OF APPEAL