THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NUMBER 147 OF 2010

(Arising from the judgment of the High Court of Uganda at Fort Portal in Criminal Session Case No. 53 of 2006 dated 19th July 2010 delivered by the Honorable Justice Akiiki-Kizza, J)

1. MWESIGE TADEO
2. MWESIGE JAMES } ========== APPELLANTS
3. KWEBIIHA JAMES

VERSUS

UGANDA ========== RESPONDENT

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA
HON. MR. JUSTICE PAUL K. MUGAMBA, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA

JUDGMENT

This is a first appeal against both conviction and sentence. The appellants were indicted on two counts, Count one of murder c/s 285 and 286(2) of the Penal Code Act and Count two of robbery c/s 188 and 189 of the Penal Code Act. The High Court of Uganda at Fort Portal convicted the trio on both counts. The Court sentenced each of them to 25 years imprisonment with the sentences to run concurrently.

The brief facts of this appeal according to the prosecution case are that on the 2nd day of August 2005, at Ntezi II village, Kahangi Parish, Hakibale Sub-county, Kabarole District the appellants invaded the home of Rwaheru Paul (hereinafter referred to as "the deceased") at around 1:00 am in the night and strangled him to death. The appellants then proceeded to rob Keloy Bonabana, wife to the

deceased of cash worth Ushs. 20 million, a radio and a wrist watch. Immediately before the robbery they cut the deceased's wife on the head with a deadly weapon, to wit a panga. Having been tried, convicted and sentenced to 25 years on each count of robbery and murder, and being dissatisfied with both conviction and sentence of the High Court of Uganda , the appellants lodged this appeal.

In their memorandum of appeal dated 8th April 2016, the appellants raised the following grounds:

1. **That the Learned Trial Judge erred in law and fact when he held that the convicts were properly identified.**

2. **That the Learned Trial Judge erred in law and fact when he sentenced each of the accused persons to twenty five years imprisonment.**

Legal Representation

Learned counsel Mr. Denis Odota, on state brief from Justice Centres Uganda, 2nd Floor, Mengo Chief Magistrates Court, Mengo appeared for the appellants.

Senior State Attorney Muwanguya Jonathan represented the State.

Role of the 1st Appellate Court

This is a first appeal and this Court is charged with the legal duty of

reappraising the evidence and drawing inferences of fact as provided for under ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules Directions SI 13-10)***. The rule states that:

"...(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

*(a) **reappraise the evidence and draw inferences of fact**; and*

(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner..." (Emphasis added)

This Court also has the duty to caution itself that it has not seen the witnesses who testified firsthand. On the basis of its evaluation, this Court must decide whether to support the decision of the High Court or not, as illustrated in **Pandya v R [1957] E.A 336** and **Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No 10 of 1997.**

Ground one:

Case for the Appellants: On identification

Mr. Odota, counsel for the appellants cited the law governing identification by referring to the case of **Roria vs Republic [1967] E.A 583** which was relied upon with approval in the Supreme Court case

of **Frank Ndahebe vs Uganda, SC Criminal Appeal No. 2 of 1993** and is to the effect that in a case resting entirely on identification, the Court has a duty to satisfy itself that in the circumstances of the case it is safe to act on such evidence, which must be free from mistake or error on the part of the identifying witness or witnesses.

Counsel contended that PW1, Keloy Bonabana the single identifying witness in this case could not have properly identified the attackers because of the difficult conditions existing during commission of the offences. He submitted that the incident happened at night and the only source of light was a "*tadooba*" and 2 torches which were inside the house hence making it hard to properly identify the attackers outside. Counsel argued that when PW 1 moved out of the house to respond to the deceased's call for help, he was left with only one source of light which was a *"tadooba"* since the torches remained inside and were probably unlit. He pointed out that PW1 was hit and cut on the head by A3 Mwesige Tadeo and that with blood flowing on her face, it made it more difficult for her to see the faces of the other attackers. Counsel also argued that PW1 did not have enough time to properly identify A1 Mwesige James and A2 Kwebiiha James given that she was away from them looking for money around the house. He further argued that since A3 was

holding a torch in front of her, it is possible she did not properly identify him also.

Mr. Odota further submitted that the trial Judge had no basis for finding that the appellants had fled the village and thus it could not be considered as corroborative evidence of the single identifying witness. He submitted that the items (wrist watch and radio) claimed to have been got from the appellants were suspect since prosecution did not adduce any evidence as to how they were recovered. This is because the investigating officer did not testify at the trial. In those circumstances, he prayed that this ground be allowed.

Case for the Respondent

Mr. Muwaganya, counsel for the Respondent opposed this ground of appeal arguing that the court can safely base a conviction on identification by a single witness provided it is convinced that the identification was proper. He submitted that there is no mandatory requirement for corroboration provided the Court warns itself of the dangers of relying on such evidence to convict, which caution the trial Judge duly correctly adhered to and administered to the assessors as well.

Counsel further submitted that the trial Judge properly appraised the

evidence of PW1, the single identifying witness, and came to the right conclusion. He pointed out that PW1 had known the appellants since they were born and described each of them in detail.

Counsel also submitted that there was clear evidence about the presence of light from the *"tadooba"* and two torches, that the event took a long period of time, and that the appellants kept interacting with PW1 as they searched for money in the house. He therefore supported the trial Judge's findings that the witness was truthful, composed and consistent in spite of the fact that she was 70 years old.

Counsel prayed that the trial Judge's findings that the conditions for identification were favorable be upheld and this ground dismissed. He also prayed that the conviction of the appellants be upheld.

Resolution by Court

We have considered the submissions of both learned counsel for the appellant and respondent. We have also ably addressed our mind to the authorities presented.

Suffice it to say, that this is an appeal hinged solely on the evidence of a single identifying witness. The evidence on record shows that (PW1) Keloy Bonabana, wife of the deceased, was the only witness

who identified the appellants. She was also the only witness produced to support the prosecution case.

It is not in contention that the ingredients of the offences of robbery and murder were proved by the prosecution save for the participation of the appellants. Regarding the issue of identification, the principles are well settled in the case of **Abdulla Nabulere & Ors v Uganda, Criminal Appeal No. 9 of 1978.** The case lays down the factors which go to the quality of identification. This Court is enjoined to closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of identification evidence. If the quality is good then the danger of mistaken identity is reduced. The poorer the quality of these factors, the greater is the danger of mistaken identity.

A perusal of the record reveals that the trial Judge was alive to the principles set out in that authority and others we shall consider later in this judgment. He held that:

"...It is the evidence on the record that, there was only one identifying witness in the person of PW1 at the scene. I warned

the assessors, as I warn myself of her evidence being free of error on her part. Hence we have to look for other evidence to corroborate her story. See the case of ASIMA SIMON vs UGANDA UCA Cr. Appl. 107/2003)

Secondly as the attack and identification by PW1 was at night, I also warned the assessors , as I warn myself of the danger of a possibility of a mistaken identity. Hence the Court has to consider the following.

a) *Whether the witness knew the accused persons before the incident*
b) *Whether there was some light at the scene*
c) *The distance between the victim and the accused persons at the scene*
d) *The time taken by the witness while witnessing what was going on at the scene. (See ABDULLA NABULERE & ORS v UGANDA [1979] HCB 77)"*

Counsel for the appellants submitted that the disorientation of PW1 resulting from her husband being strangled, the bleeding cut on her head and the limited source of light, which was a *"tadooba"* in the house, greatly affected her ability to correctly identify the attackers. We disagree. Taking the case of ***Abdulla Nabulere & Ors*** *(supra)* as a checklist, we find that the strength of PW1's identification is drawn

from the fact that she knew the appellants as her neighbors prior to the attack. She was able to identify them by name save for A3 whom she knew by virtue of his blood relation to A2. At page 7 of the record of appeal, PW1 testified that:

> *"...I know all the accused persons. A1 is Mwesige, A2 is Kwebiha. I did not know the names of A3 but he is A2's uncle. A1 is from our same village. He is born in Ntezi village. That is where I used to stay and that is where I was attacked from. I had known them since their birth. They are neighbors all of them now before court..."*

She further testified that:

> *"...On 2/8/2005, at 1 am, I had been in bed sleeping with my husband Paulo Rwaheeru (deceased), I was awakened by the deceased calling me, while the accused were strangling him. My husband was awakened by cows which had gone out of the kraal and he went out to find what had happened, then he met accused in the doorway, they got hold of his throat and fell inside the house..."*

It is our finding that the light from the *"tadooba"* and two torches used inside the house provided sufficient light at the scene. In her evidence PW1 stated clearly that the appellants took the two torches from a table in the bedroom and switched them on; which provided

adequate light in the house. It appears that the deceased was strangled by the door way inside the house. The lighting available, in our view, facilitated PW1 in identifying A1 and A2 executing this heinous act. Although it appears that PW1 watched her husband being strangled for a brief moment before suffering a blow to her head, the fact that she had known the appellants for a long time aided her quick and proper identification of the attackers. The entire ordeal lasted an hour which in our opinion was ample time for a correct identification.

We also find that A1 was further identified when he turned the deceased's head upside down and made PW1 to sit next to the deceased's lifeless body. A2's participation seems to have been limited to strangling the deceased. A3 however moved around the house with PW1 looking for money and when he was directed to where the Ushs 20 million had been hidden on the roof, he climbed on top of a cupboard to retrieve the money. Without a doubt, we find that of all the attackers, PW1 had the closest and longest interaction with A3.

It is our considered opinion that the evidence on record was sufficient to convict the appellants. The evidence of PW1, a single

identifying witness in our evaluation is reliable. We agree with the trial Judge when he found that:

"...I have carefully considered all the evidence before me and have critically analysed the demeanours of both PW1 and those of the accused person. I find PW1 an impressive lady who struck me as a truthful person. On the other hand, the accused persons struck me as liars and unreliable. PW1 gave her evidence in a calm and candid manner. She remained consistent and was largely well composed despite her advanced age. She answered all the questions put to her in a forthcoming manner..."

Unlike this Court, the learned trial Judge had the advantage of seeing those witnesses testify. We have no reason to doubt his findings that PW1 was a truthful witness.

It is noted that subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favoring identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge can reasonably conclude that the evidence of identification, although based on the testimony of a single witness,

can safely be accepted as free from the possibility of error **(see: Abdullah bin Wendo & Anor v R [1953] EACA 166).**

On the issue of a single identifying witness, the law is that court can convict on such evidence after warning itself and the assessors of the special need for caution before convicting on reliance on the correctness of the identification. The reason for special need for caution is that there is a possibility that the witness might have been mistaken.

Counsel for the appellant stressed the need for corroboration in instances such as these, involving a single identifying witness. The trial Judge held that the evidence of the appellants fleeing from the scene and being arrested in Kampala was corroborative of PW1's testimony. Looking at PW1's testimony, she was simply informed of the events that ensued after the appellants left the scene and the circumstances of their arrest. Prosecution did not produce in Court the arresting or investigating officer to elaborate upon these facts. In our view, this failure weakened the chain of evidence.

This Court and the Supreme Court have in numerous decided cases made it clear that it is necessary and always desirable for the state to

call investigating and arresting officers to testify and explain their roles in the criminal cases they handled. The Supreme Court emphatically stated this position in **Okwanga Anthony vs Uganda SCCA 20/2000 [2000] KALR 24** as follows:

> *"...The effect of failure by the prosecution to call police investigating and arresting officers to give relevant evidence at a trial was considered by this Court in Bogere Moses and Another vs Uganda Criminal Appeal No. 1/97 (SCU) (unreported) in which the court referred with approval to what Sir Udo Udoma, CJ said in Rwaneka vs Uganda (1967) EA 768 at 771:*
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> *'Generally speaking, criminal prosecutions are matters of great concern to the State; and such trial must be completely within the control of the police and the Director of Public prosecutions. It is the duty of the prosecutors to make certain that police officers, who had investigated and charged an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals.'*

This Court also followed its own earlier decision in Alfred Buwembo vs Uganda, criminal Appeal No. 28/94 (SCU)(unreported), in which

it said:

> *'While it is desirable that the evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition, to prove the charges.'*

We agree with the court's view in Rwaneka vs Uganda (supra) and in Alfred Bumbo & Ors vs Uganda (supra)..."

In the instant case, we find that it would have been proper to call the arresting and investigating officers to testify particularly to the circumstances in which the deceased's wrist watch and radio cassette were recovered. These items were only produced in court for identification. It is unclear whether these items were found in the possession of the appellants. However, the absence of police evidence is not fatal to the appellants' conviction as there is other evidence by PW1 to support the conviction.

Counsel for the appellant relied on the case of **Roria vs Republic**

[1967] E.A 583 where it was held that while it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so. Counsel also relied on the Supreme Court case of **Frank Ndahebe vs Uganda, SC Criminal Appeal No. 2 of 1993** where the appellant's conviction and sentence were quashed on the basis that in the circumstances of that case, it was unsafe to convict. We find that case distinguishable from the present. In that case, the single identifying witness did not disclose the names of the attackers to the people who answered the alarm and the authorities. Secondly, she identified the appellant by another name 'Rugude' and none of the witnesses knew him by that name. Thirdly, there was only torch light which was being flashed by the attackers and the only witness, a young girl of 14 years, was being threatened and assaulted. These circumstances do not align with those in the case before us.

The lack of corroboration notwithstanding, courts can convict an accused person on the evidence of a single identifying witness provided that the necessary caution and warning is given regarding the dangers of relying upon such evidence. We have already found that the trial Judge rightly administered the caution to himself as well as the assessors.

This ground accordingly fails.

Ground two: On sentence

Case for the Appellant

Counsel for the appellants submitted that the sentence of 25 years imposed by the trial Judge on the appellants was harsh and excessive considering that the appellants were first offenders. He argued that the sentence of 25 years was even higher than that of life imprisonment which according to Section 47(6) of the Prisons Act, Cap. 304 is deemed to be 20 years. He prayed that the sentence be reduced.

Case for the Respondent/State

Mr. Muwaganya, counsel for the State opposed this ground on sentence. He submitted that it was trite law that an appellate Court cannot interfere with sentence of the trial Court except where it is illegal, manifestly excessive or where it would lead to a miscarriage of justice. He further submitted that the maximum penalty on both counts is death and so the trial Judge was lenient by sentencing the appellants to 25 years imprisonment. Regarding the meaning of life imprisonment, counsel submitted that the case of **Tigo Stephen vs Uganda SC Criminal Appeal No. 8 of 2009** interpreted it to mean

the natural life of the person. Counsel prayed that this ground be disallowed and the sentence be confirmed.

Resolution by Court

We have considered the principles upon which this Court can interfere with the sentence of the trial judge. These principles were set out by the Supreme Court in **Kyalimpa Edward vs Uganda, Criminal Appeal No. 10 of 1995**. The Supreme Court referred to the case of **R vs De Haviland (1983) 5 Cr. App. R(s) 109** and held as follows:

> ***"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a Judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs R (1954) 21 EACA 270 and R v Mohamedali Jamal (1948) 15 EACA 126."***

Counsel for the respondent submitted that the offences for which the appellants were convicted attract the maximum sentence of death and therefore the sentence of 25 years imprisonment on each count was lenient. Although counsel for the appellant contended that the

sentence exceeded life imprisonment, we find that in a number of cases of this nature sentences of even 30 years have been passed and upheld by the courts. We are of the view that each case must be considered on its merits.

We find no reason to disturb the trial Judge's sentence. We therefore uphold the sentence of 25 years on each count. Though the appellant did not raise the issue of remand period as a ground of appeal, we are satisfied that the trial Judge took into account the remand period. This ground also fails.

In the final result, this appeal is dismissed. We uphold the conviction of the appellants for the offences of murder and robbery. We further uphold the sentence of 25 years imprisonment imposed by the trial Court on each count to run concurrently.

We so Order.

Dated at Kampala, this .....5th..... day of .....December..... 2017.

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HON. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

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HON. JUSTICE PAUL K. MUGAMBA

Justice of Appeal

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HON. JUSTICE CATHERINE BAMUGEMEREIRE

Justice of Appeal