THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. MR JUSTICE S.G.ENGWAU, JA.***

HON. LADY JUSTICE C.N.B.KITUMBA, JA.

HON. LADY JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO.56/03

BETWEEN

1. OBWANA SAMSON
2. OKAI JOSEPH
3. SGT ODONGO WILLIAM::::::::::::::::::::::::::::::::APPELLANTS

AND

UGANDA::RESPONDENT

[Appeal from conviction and sentence of the High Court of Uganda Mbale High Court Circuit (*Rugadya J) *dated 18th March 2003 in HCCSC No.93/02]

JUDGMENT OF THE COURT

Obwana Samson, Okai Joseph and Sgt Odongo William in this judgment referred to as the first, second and third appellant respectively (and together as the appellants) were jointly indicted for the murder of Okurut John and Vicent Agama on 3rd May 1990 at Ajepet village in Pallisa District contrary to ***sections 188*** and ***189*** of the **Penal Code Act.**

They pleaded not guilty to the indictment, on which they were tried, convicted and sentenced to death. They have appealed to this court against both conviction and sentence.

The memorandum of appeal filed on their behalf by M/S Kawenja, Othieno &Co. Advocates contains the following grounds:-

1. **The learned trial judge erred in law and in fact in convicting the appellants basing on circumstantial evidence which was not corroborated.**
2. **The learned trial judge erred in law and in fact in holding that the appellants had a common intention of killing the deceased with malice aforethought.**
3. **The learned trial judge erred in law and in fact in holding that there were no contradictions in prosecution case thereby convicting the appellants on the testimony of witnesses without credibility.**
4. **The learned trial judge erred in law and fact in holding that the lapse of time in the prosecution in the prosecution witnesses not disclosing the appellants' identities at the earliest opportunity did not constitute an afterthought to be construed in favour of the appellants.**

It was their prayer that the judgment and findings of the High Court be set aside the conviction be quashed the sentence be set aside and the appellants be acquitted.

The facts that led to the prosecution of the appellants are that on the material day, the appellants and other people who are still at large raided the homes of the deceased and abducted them. The appellants were armed with guns and were wearing military fatigue. They took the deceased away and soon thereafter, gun shots were heard.

The following day their bodies were found in the bush by the road side with bullet wounds. The matter was reported to the police who came with a doctor to examine the bodies. Dr Kirya examined the bodies and compiled reports which were admitted in evidence as PE1 and PE2 respectively.

The appellants were arrested on 14th May 2001 and their defence was alibi which was rejected by the trial judge who convicted them as charged.

When the appeal came before us for hearing, Mr Brian Othieno, learned counsel for the appellants, argued grounds one and two together, ground three separately. The third ground was abandoned.

In submitting on the first two grounds, learned counsel stated that there was no direct evidence implicating the appellants in the murder. He pointed out that the trial judge relied on circumstantial evidence of Okello Paskari (P.W.3) and Ouja Wilson (P.W.6). Commenting on the evidence that was adduced at the trial by the prosecution, learned counsel stated that the appellants were the last people to be seen in the company of the deceased; they were armed and led away the deceased. Soon thereafter gun shots were heard. The postmortem, counsel pointed out, confirmed that death was caused by gun shot wounds.

He claimed that the fact of shooting was not proved and there was no independent evidence to corroborate the evidence of P.W.3 and P.W.6.

He cited the case of ***Bumbakali Lutwama &others v Uganda SCCA No.38/89(***unreported) to support his argument that no evidence was adduced to show that the deceased died at the hands of the appellant.

The brief facts of the above case were that the appellants together with about 15 people were found at the home of the deceased at about 11.30 p.m. Some of the people had surrounded the house and were hitting it with bricks telling the deceased to get out. The door of the house was broken and the deceased was taken outside. His hands were tied with banana fibres. The appellants and others led the deceased away, allegedly taking him to the parish headquarters. The following morning the body of the deceased was found about a mile away from his home.

The appellants who were all related to each other and lived in the same village but in different homes were arrested and charged with the murder of the deceased. They all denied any involvement in the murder of the deceased. The learned trial judge rejected their denials and concluded that on the basis of circumstantial evidence adduced by the prosecution he was satisfied that they unlawfully killed the deceased. He convicted them of manslaughter. They appealed to the Supreme Court.

In allowing the appeal acquitting the appellants the court said:-

"Firstly with regard to circumstantial evidence. Assuming that the appellants were properly identified as being among the persons who took the deceased away from the house on the fateful night, the only evidence against them was that the deceased was last seen alive being led away by them allegedly to the parish headquarters for wrongs he was said to have committed against the 1st appellant or 4th appellant or on both. The deceased was tied with banana fibres when he was led away by the appellants, some of whom were allegedly armed with pangas.

Next day, the deceased was found dead with cut wounds. There was no evidence of what happened between the time the deceased was seen with the appellants and when his body was next day found the following morning at a place one mile away from his home. That was all.

There was no other evidence against the appellants. In the circumstances we are of the opinion that the evidence against them does not inevitably lead to an inference of guilt. The facts were not incompatible with the appellant's innocence and incapable of any other reasonable explanation than that of guilt".

Ms Khisa, Senior Principal State Attorney, for the respondent opposed the appeal and supported the conviction and sentence. She submitted that the evidence of P.W.3 and P.W.6 was sufficient to support the conviction of the appellants and did not need any corroboration. She further pointed out that P.W.3 narrated how the attack took place and the witness knew the appellants before the incident. As for P.W. 6 the learned Senior Principal State Attorney submitted that he narrated how he heard gun shots shortly after the appellants had taken away the deceased.

She claimed that the evidence was sufficient.

It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night such evidence should not ordinarily be acted upon to convict the accused in absence of other evidence to corroborate it.

The rationale for this is that a witness may be honest and prepared to tell the truth but he might as well be mistaken.

This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of a conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence. If after administering the necessary warning the trial judge finds that the identification of the accused was positively made without the possibility of an error or mistake, she/he can convict an accused person in absence of corroboration.

The conditions which are considered favourable for correct identification without any possibility of error have been laid down in a number of authorities such as ***Abdalla Bin Wendo v R (1953)20 EACA 166, Roria v R [1967] EA 583 Abdalla Nabulere &others v Uganda [1979] HCB 77, Moses Bogere &another v Uganda Criminal Appeal No.1/97(SC)*** (unreported) ***Moses Kasana v Uganda [1992-83] HCB 47.*** The conditions that were set out are the following:-

(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.

As for circumstantial evidence, the law regarding the same is well settled. As was elaborately pointed out in the cases of ***Simon Musoke v R [1958] EA 715; Andrea Obonyo & others v R [1962] EA 542; Mcgree v DPP [1973] CLR 232; Teper v R [1952] AC 489*** that where the evidence is circumstantial it must be such that it produces moral certainty beyond reasonable doubt that it is the accused who committed the offence with which he or she is charged. It was further pointed out that the facts proved by the prosecution must be such that there are no other co-existing circumstances which would destroy the inference of guilt. In other words, in order to support a conviction, circumstantial evidence must point irresistibly to the accused as the one who committed the offence.

We shall now examine the evidence of identification as given by the identifying witnesses - P.W.3 and P.W.6.

Okello Paskari testified that on 3rd May 1990 at about 1 a.m. he was at home sleeping and he heard voices outside. The father called him and he went outside and saw six people standing in the compound with his father. One of them Oluta Wilson was tied. He recognized Opolot who was A4 at the trial (now deceased), Odong (A3) Tukei who was not in court, Obwana (A1), Okai (A2). The witness stated that he knew these people before as they are village mates and neighbours and there was bright moonlight. The incident lasted about 20 minutes. He further stated that they threatened to kill him if he revealed their identities. They took away his father and after about one hour he heard gun shots.

The following day he reported the abduction of his father to the LC1 Chairperson of the village, Honoria Gerosomu (who did not testify).

Later during the day the body of his father and that of Agama were found in a swamp with gun shot wounds.

The evidence of Ouja Wilson was that on the day in question he was in his house sleeping when five men forced the door of his house open. The men were dressed in military uniform. They dragged him outside and tied him up with a rope. He identified his attackers as Tukei and the appellants. The third appellant, Tukei and the late Opolot were armed with guns. They asked him for his school identity card and the incident took approximately one hour.

He further stated that he was able to recognize the attackers as he moved with them to the home of Okurut.

If the evidence of these two witnesses is believed the conditions prevailing at the time of the incident must have enabled the witnesses to identify the attackers. The witnesses stated that all the appellants were known to them as they were village mates and there was a bright moon light. In the case of PW 3 he stated that the incident lasted about 20 minutes while PW6 stated that it lasted 0ne hour and he observed the attackers as he went with them to the home of late Okurut. There was close proximity between the identifying witnesses and the attackers.

The first appellant in his unsworn statement stated that on 3rd May 1990 he was in Kalaki and heard about the incident that had taken place in his village. He was on remand where he spent seven days and after his release he returned to his village Ajepet until he was arrested in 2001.

The second appellant on his part stated that he was a resident of Ajepet village but in May 1990 he was not living in the village due to insurgency. He stated that he left the village on 15/10/1989 and settled in Kigo in Kampala with his brother Nabudere. He returned to his village in 1991 and lived peacefully until he was arrested on 14/9/2001.

The third appellant also denied any involvement in the commission of the offence. He stated that at the time of the incident he was serving in the army and was stationed in Gulu. He came to his village Ajepet in 1996 and became a cultivator. He, too, was arrested on 14th May 2001.

Many questions remained unanswered especially the basis on which the police decided to arrest the appellants in 2001 for an offence they were alleged to have committed in 1990. There was no evidence of the investigating officer to explain the part he played in the case. The police visited the scene soon after the incident was reported by PW5 but no evidence of that visit was given.

We tend to agree with Sir Udo Udoma CJ (as he then was) in the case of ***Bwaneka v Uganda [1967] EA 768,*** at page 771 he said:

"Generally speaking, criminal prosecutions are matters of great concern to the state; and as such trials must be completely within the control of the police and the Director of Public Prosecutions.

It is the duty of 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."

In the case of ***Rex V Shaban Bin Donald (1940) 7 EACA 60*** the Court of Appeal for Eastern Africa said:

"We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to police by someone who is subsequently called as a witness, evidence of details of such report (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under section 157 of the Evidence Act, and sometimes as showing that what he now swears is an after thought or that he is now purporting to identify a person whom he really did not recognize at the time or an article which is not really his."

The above decision was from Tanzania and the section which the court was considering is similar to ***section 156*** of our Evidence Act (Cap 6 Laws of Uganda) which provides as follows:

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

In another case of ***Kella v Republic [1967] EA 809*** at page 813 the court said:

"The desirability for this practice would apply with special force to a case of this nature where the decision depends upon the identification of the accused person two and half years after the incident happened. The police must in their investigation have taken statements from both the principal witnesses Hallima and Jerevasio. In her evidence Hallima states that she gave the statement the following day naming the two appellants. If

this statement had been produced and she had in fact identified both appellants by name the day after the incident, this would have considerably strengthened her testimony but if this portion of her evidence was untrue then it would have the opposite effect and have made her testimony of little value."

We are of the opinion that the same reasoning is applicable to the appeal before us.

Three of the witnesses who testified namely Okello Paskari (P.W.3) Okurut Max (P.W.5) and Ouja Wilson (P.W.6) especially Okurut Max stated that he reported the matter to police although he did not state whether he named the appellants as suspects. Okello Paskari stated he reported the abduction of his late father and late uncle to the LC1 Chair person Gerosomu Honoria, who did not testify. Again he did not state whether he named the appellants as suspects. The only known statement to the police in which he named the appellants was recorded in 2001.

Okurut Wilson (P.W.4), the elder brother to P.W.3 in his testimony said:

"On 4.5.1990 I was at Aduket Gogonyo. At about 9.00 a.m. my brother Okello Paskari came weeping. He told me that in the night <u>five people stormed them(sic)home. 3of them armed, but all in military wear and took away Okurut John daddy and uncle Vicent Ogema.</u>" (Emphasis added).

As for P.W 6 while narrating the events of the previous night said:

"In the morning the relatives of Okurut Gerosomu Honoria relatives to deceased Chairman L.C.1 came to me. They were many people- they wanted to know how I had survived as I was arrested together with the deceased. I told them what had happened and led them to the direction where the gun shots were heard. Indeed we found the bodies of Agama and Okurut when he followed that direction. The bodies were still tied together when we found them."

This witness did not name the appellants as the attackers. The failure by these witnesses to name the appellants as suspects casts doubt about the statements they made to police in 2001 naming the appellants as the attackers.

The late Opolot Mugidu who was the fourth appellant told court in his unsworn statement that he was in the village at the time of the incident and he remained there until he was

arrested on 14th May 2001. He heard about the death of the deceased but it was not known who had caused the death.

The learned judge in dealing with the evidence implicating the appellant said at page 18 of the judgment:

"In the case before me, the prosecution witness PW3 Okello Paskari witnessed the abduction of his father and his uncle. When the father was led away, he remained at home till morning. He was only fifteen years old then. First thing in the morning, he rushed and informed his relative and LC1 Chairperson Gerosomu Honoria. He revealed the names of the people he saw in the night. PW5 Okurut Max told court that it was Gerosomu Honoria who informed him about the abduction of the two village mates. He could only have known this from Okello Paskari.

This Gerosomu Honoria sought out PW6 Ouja Wilson because PW3 had informed him that he was one of the people who was a victim of the attackers, and was tied up by the attackers. PW6 similarly revealed what he knew to the LC officials, who proceeded to search for the victims. When they discovered the bodies, PW5 went and reported the sordid affair to the police. PW4 told court that his young brother PW3 informed him of the events in their home. He was given details of the attackers identities and that they were neighbours and village mates." (Emphasis added).

We were unable to find any evidence to support the finding of the learned judge that the PW3 and PW6 revealed the details and identities of the attackers to the people he mentioned or anyone else. They learned judge further stated that the police did not follow up the matter because of insurgency. Again there was no evidence to support that although there was evidence of insurgency in the area at the time. Even if there was insurgency in the area, Government offices remained officially open to perform Government duties.

One police officer, No. 19151 D/CPL Orokode Joseph (PW1) gave evidence which was admitted under ***section 66*** of the **Trial on Indictments Act.** He participated in the arrest of the appellants on 14/0/2001.

We are not persuaded that insurgency prevented the police from investigating the case. The police visited the scene and took a doctor who conducted an autopsy on the bodies of the deceased. If they were able to do that then they could have gone ahead to record statements

from identifying witnesses. Such statements would have provided the necessary corroboration to the testimony of those witnesses.

What is needed in the instant appeal is 'other' evidence direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure there was no mistaken identification by PW3 and PW6. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm and a fabricated alibi etc. The facts and circumstances of this appeal are such that the lapse of time between the attack and the naming of the appellants as the attackers rendered the testimony of PW3 and PW6 suspect and make their testimony as an after thought. The learned judge tried to explain away the failure by the Director of Public Prosecutions to prosecute the appellants by stating that the witnesses especially PW 3 and PW4 were still young and could not pursue the case. It not clear to us why the learned judge was trying to justify inaction on the part of the DPP. We have already pointed out that the prosecution of criminal cases is the sole responsibility of the police and the DPP. The only reasonable inference that one can be drawn from the conduct of the DPP and the police is that the identities of the attackers were unknown. We therefore do not agree with the learned judge that the alibis put up by the appellants were fabricated.

We are of the opinion that it would be unsafe to allow the conviction of the appellants to stand. We are not satisfied that the prosecution proved its case to the required standard. The conviction of an accused person is based on the strength of the prosecution case and not the weakness of the defence

In the result we allow the appeal, quash the conviction, set aside the sentence and order for the immediate release of the appellants unless they have other lawful charges to answer.

Dated at Kampala this 13th day of March 2009.

S.G.Engwau

Justice of Appeal

C.N.B.Kitumba

Justice of Appeal

C.K.Byamugisha

Justice of Appeal