THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT GULU

Coram: **Hon Justice Mukasa-Kikonyogo, DCJ**
Hon Justice S.B.K. Kavuma, JA
Hon Justice A.S. Nshimye, JA

CRIMINAL APPEAL N0. 19/2004

ARISING FROM CONVICTION AND SENTENCE OF THE HIGH COURT OF UGANDA AT LIRA ON 6/2/2004 C.S.C N0. 89/2003 PRESIDED OVER BY HON JUSTICE I.D.E MAITUM

ONGUNE KASULE GEOFFREY ::::::::::::::::::::::::::::::::APPELLANT

VS

UGANDA:: RESPONDENT

JUDGMENT OF THE COURT

The appellant Ongune Kasule Geoffrey appealed against both conviction and sentence of death contrary to section 183 & 184 of the Penal Code Act (now sections 188 & 189) of the Penal Code Act.

The following are the brief facts:

During the evening of 26/8/2001 at Angwalo village in Lira District, Awio David (deceased) and his wife Acola Elizabeth (P.W.3) were drinking in the home of Ogwal Opit. The deceased left his wife still drinking and went away. Later the wife also left

for home. On the way, she found her husband dead by the road side. She raised an alarm which was answered. She was arrested as the first suspect and taken to Lira police. Later she was released, when a better suspect came to light.

There was an allegation that the appellant had a land dispute with the deceased. When he went to Lira police to inquire about his arrested brothers, he was also arrested and charged with the murder of the deceased. His defence of alibi was rejected, hence, this appeal. He appealed on two grounds namely:-

1. ***That the learned trial judge erred in law and fact when she failed to evaluate the whole evidence heard at the trial and basing her judgment on the prosecution case and there by occasioning a miscarriage of justice.***

2. ***That the learned trial judge erred in law and fact when she convicted the appellant on a charge of murder basing on doubtful and insufficient circumstantial evidence thereby occasioning a miscarriage of justice.***

Mr. Atiang Otim appeared for the appellant on state brief while M/s Nabaasa Caroline a Principal State Attorney appeared for the State/Respondent.

Counsel for the appellant submitted that P.W.4 told Court that he proceeded to the scene on 28/8/2001 and recorded statements from L.C.I chairperson and also obtained a letter allegedly authored by the appellant indicating disaffection with the deceased. Another piece of evidence was that of P.W.2 who excused himself that he had a running stomach. Court said that he would be cross examined later, but was not. His evidence was not subjected to cross examination leaving it hanging.

Counsel pointed out that the wife of the deceased (P.W.3) who was the 1st suspect did not see or know the person who killed her husband. She was drinking with her husband at Ogwal Opit's home and wondered why the appellant was arrested.

Counsel criticised the judge for relying on the evidence of P.W.4 Ochen Patrick L.C.I vice chairman because his evidence was not corroborated. Obira Patrick a Local Administrations Police officer summoned by the judge under section 80 of the Trial on Indictment Act did not remember people who were to be arrested in accordance

with a letter from C.I D Lira instructing him to arrest. The letter did not mention the name of the appellant.

P.W.6 Okulo Sipriano is the one who arrested P.W.3, the widow. He does not say when Patrick Ochan came to him. He is the one who was going to buy the land but the deceased did not sell the land. The land was not sold, which would have been a condition precedent to killing. P.W.7 a clan chief, received the unsigned letter on 25.8.2001 (exbt P.2) relied on, but he did not know who brought the letter. He did not know who killed the deceased.

P.W.2 a detective sergeant, did not mention the name of the clan chief from whom he got the letter. The appellant said he was in Loro in Apac as early as 23/8/2001. The evidence of the appellant prompted the trial judge under section 80 of the Trial on indictment Act to order production of the investigating officer and arresting officer to enable Court to come to a just decision. P.W.8 was produced, but he did not provide help to the learned trial judge. Then the judge proceeded with evidence of P.W.2 which was not tested by cross-examination.

Counsel cited to us the case of **Musoke S. V R** [**1958] EA 715**. Had the learned trial judge properly evaluated the evidence, she should not have come to the decisions she came to.

On insufficiency of evidence, he referred us to the evidence P.W.2 which in his view was unreliable. Section 80 of the Trial on indictment Act, was not complied with. There was no charge and caution statement to verify the alibi of the appellant. The learned trial judge misdirected the assessors while summing up to discard the evidence of D.W.2 the wife of the appellant who was in Court listening. The evidence of an numinous letter whose source was unknown was very un satisfactory.

Finally, counsel submitted that the standard of proof of beyond reasonable doubt was not achieved. The prosecution failed to prove participation of the appellant. He prayed that we allow the appeal and set the appellant free .

In reply M/s Caroline Nabaasa supported the conviction and sentence. In her view, the judge rightly evaluated the evidence and came to a right decision. The contention of counsel regarding evidence of P.W.2 on the statement from a man called Dyege was corroborated by P.W.4 Ocen Patrick who said that;

> ***"he wanted me to lend him 5000/= to go to Lira. He spent the night at my home".***

M/s Nabaasa submitted that the judge rightly evaluated the evidence of the defence. Counsel for the appellant in the High Court conceded that the 1st three ingredients had been proved. She analysed evidence of P.W.4 and P.W.7 the clan leader. Counsel stated that unchallenged evidence leads to the inference that it is the truth because it was not challenged. On the evaluation of prosecution and defence evidence, evidence of P.W. 4, 5, and 6 was relied on. There is no where in the judgment that the judge relied on the evidence of P.W.2. She argued that absence of cross examination of P.W.2 did not prejudice the appellant in any way.

Counsel argued further that, the absence of the investigating and arresting officers did not in away affect the evidence adduced by the prosecution after destroying appellant's alibi. P.W.3 explained on page 7 of the record that she was the first person to find the deceased. She was detained until the evidence of assault by the appellant came to light. Counsel conceded that there was a contradiction between the evidence of P.W.3 and P.W.5 as to who first found the body, but it was not material and did not go to root of the case.

She argued that corroboration leading to participation by the appellant is found from his lies. The appellant denied his statement. He denied that he studied up to P.4. Lies of the appellant render corroboration to the prosecution case.

On the submission by counsel for the appellant that police arrested other people, counsel Nabaasa replied that investigations are not limited. The police arrested those named in the letter, and others to help police zero on the right person. She prayed that ground one be disallowed.

On ground 2 on insufficiency of evidence, she submitted that there was sufficient evidence. Counsel explained that no charge and caution statement was produced because there was none.

The summoning up to assessor on page 38 clearly pointed out the evidence on both sides. There was no misdirection. She prayed that ground two too be disallowed and the whole be dismissed.

In reply, counsel for the appellant submitted that, the learned trial judge relied on the evidence of P.W.2 which is the foundation of all prosecution evidence.

Mr. Dyege did not testify. There is no where mentioned that P.W. 4 is the same person as Dyege. Where there was confusion, it ought to be resolved in favour of the appellant. It was wrong for the judge to have disregarded evidence of the wife. She said, he did not own a bicycle. How could he try to pledge a bicycle he did not have.

To him the investigating officer should have been called to throw light on how the appellant was arrested. There were mass arrests including the wife of the appellant. The case was not proved beyond reasonable doubt.

Finally, counsel stated it was a good practice that a charge and caution statement be recorded to verify alibi of an accused person. The burden of proof lay on the prosecution to disprove and destroy the alibi.

He prayed that the conviction be quashed and sentence be set aside.

Alternatively, and in the event we decided to uphold the conviction, he prayed that the sentence of the appellant be varied from death to prison sentence in light of the recent Supreme Court decision of **Attorney General V Kigula & others**.

In mitigation he submitted that his client:-

1. ***Was a first offender.***
2. ***Was 48 years.***

3. ***He has a wife.***
4. ***He has no children.***
5. ***He was on remand 2 years and 1month before conviction and has been in custody for 6 years after conviction.***

M/s Caroline Nabasa on mitigation prayed that if we must interfere with the sentence, we ought to consider the post-mortem report which showed that the neck of the deceased was broken. There were wounds on the side of the neck. The weapon was a big club. His brother is already dead. The sentence should therefore relate to the gravity of the attack.

Evaluation

We have considered submission of both counsel and read the record and authorities referred to us. We are also alive to our duty as a first appellate court to re-examine the evidence and give it such fresh scrutiny so as to come to our conclusion whether to support conviction or not. This is a case where there was no eye witness. It all depended on circumstantial evidence.

The principles governing reliance on circumstantial evidence to convict an accused person are well settled. There are several authorities on this subject but the case of **Simon Musoke V R [1958] 715** cited to us by counsel for the appellant is seldom quoted

Justices in Simon Musoke case stated:

> ***" The learned judge did not expressly direct himself that in a case depending exclusively upon circumstantial evidence, we must find before deciding upon conviction that inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

The best evidence we see the prosecution produced was that of P.W.4 Ocen Patrick a vice chairperson LC.I. He told court that the appellant went to him in the night of 26.8.2001. He requested him to lend him shs 5000/= so that, he can escape to Lira.

This was because, he suspected he had killed the deceased whom he hit with a club on the head.

The other evidence which was nearly similar to that was of P.W.4 was of a police D/Sgt Akena P.W.2. He testified that he recorded a statement from one Dyege who told him that the appellant went to him during the night of the murder and sought to exchange his bicycle for 5000/=. He wanted to ran away after assaulting the deceased. Dyege was not called by the prosecution to testify, which rendered P.W.2's evidence to the extent of what Dyege told him, hearsay and therefore inadmissible.

The defence of the appellant was that on 23/8/2001 he had gone to visit his niece at Loro.

The appellant's defence seems to have been corroborated by P.W.7 Opio Jildo the clan leader of Ogara. He stated that he received an unanimous letter on 25/8/2001 in which names of 5 people including that of the appellant were mentioned as threatening to kill the deceased. The following day, the deceased was killed. When he convened a meeting after the murder, the appellant was not at his home and did not know his whereabouts. But he learnt that he had gone to his niece in Loro

The other evidence that tends to corroborate the defence is the conduct of the appellant. In his sworn statement, he told Court that when he came back from Loro, he learnt that his brothers had been arrested. He went to the Police to find out the reason. There, he was arrested and detained. The self reporting to Lira Police by the appellant was corroborated by P.W.8 Obira Patrick a Local Administration police, who said that when he reached the police with some people he had arrested, he found that the appellant had reported himself to the police. We do not find the conduct of the appellant in that respect to be conduct of a guilty person.

The wife of the appellant, D.W.2 told Court that on 23.8.2001 her husband left home and told her he had gone to Loro. On 26/8/2001 she heard that some one had died on the roadside. She went and found out that it was Awio David. Her evidence was nevertheless discarded by the learned trial judge who directed the assessor also to do the same. We are at loss to understand what prompted her to make such an order. The

record does not show whether it is the State Attorney who complained that she had all the time been sitting in Court or it was an observation of the learned trial judge herself. Be it as it was, either way, we are unable to appreciate why the witness was allowed to testify and go through the burden of cross examination without pointing out that she had been sitting in Court.

With all respect to the trial judge, the record does not bear out her observation. We think she was in error in disregarding her evidence which we have decided to consider in our evaluation of evidence

Further in his sworn statement, the appellant told court that, he told police in his charge and caution statement that he had gone to Loro. The charge and caution statement was however not tendered in evidence by the prosecution.

We now appreciate why counsel for the appellant was persistently attacking the prosecution for not producing the charge and caution statement. To him, it would have shown that the Police was put on very early notice to verify his client's alibi that he was in Loro on the material day, but did not bother to.

From the above evidence, we have evaluated, we agree with counsel for the appellant that the prosecution failed to place the appellant squarely at the scene of crime. It also failed to destroy his alibi. See **Matete Sam V Uganda SCCR Appeal N0. 53/2001, Ssekitoleko Vs Uganda [1967] EA 53, Uganda Vs Sebyala [1967]EA 204.**

We have found it hard to believe the evidence of P.W.4 Ocen Patrick, a whole vice chairperson of a village who allegedly facilitated a suspected murderer to escape by accommodating him until 5:00am when he left. He did not to report to anybody including his chairman and neighbours. It was later in the day, when he reported to (P.W.6) the Parish chief on his return to deliver Elizabeth Acola the widow of he deceased, at Gombolola headquarters as the 1st suspect of the murder.

We have looked at P.W.4's evidence with suspect. Although we did not have the advantage of watching his demeanour, as the trial Court did, we think he was not a responsible and truthful person.

We uphold submission of counsel for the appellant that the learned trial judge erred in convicting the appellant on scanty circumstantial evidence adduced by prosecution. It far fell short of the standard of proof required in cases of this nature based on circumstantial evidence.

The appeal is therefore allowed. The conviction of murder is quashed and sentence of death set aside. Unless the appellant is held on some other lawful order, we order that he be released forthwith.

Dated at Gulu this 28th day of June 2010.

L.E.M MUKASA KIKONYOGO
DEPUTY CHIEF JUSTICE

HON S. B.K KAVUMA
JUSTICE OF APPEAL

A.S. NSHIMYE
JUSTICE OF APPEAL