

UGANDA / JUDGMENT

Kitosi & Another v Uganda (Criminal Appeal 14 of 2014) [2025] UGSC 10 (21 February 2025) [2025] UGSC 10

COURT

Supreme Court of Uganda

CASE / FILE NUMBER

Criminal Appeal 14 of 2014

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 14 OF 2014

(CORAM: OWINY-DOLLO, CJ; MWONDHA; TUHAISE; MUSOKE; MUSOTA, JJ. S. C)

BETWEEN

1. KITOSI ABU

2. NAMUNYANA ELIZABETH EXAMPLE 11:1:..... VERSUS

UGANDA :.....

(Appeal from the decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.154 of 2010, decided by Remmy Kasule, Eldad Mwangusya, JA and *Prof. L. E Tibatemwa, JJA dated 18th June 2014).*

JUDGMENT OF THE COURT

Introduction

This is a second appeal. Kitosi Abu and Namunyana Elizabeth herein referred to as the 1st and 2nd appellants respectively, appeal against the decision of the Court of Appeal wherein the learned Justices of Appeal dismissed their appeal and confirmed their respective convictions of murder and sentences of 35 years' imprisonment imposed by the High Court in Criminal Session Case No. 0029 of 2010.

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Background.

The Appellants were jointly indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the two and others still at large, on the 10th day of June, 2008 at Bugembe, Katwe Zone, in Jinja District, murdered Lugolobi Paul. The Appellants were convicted as indicted and sentenced to a term of imprisonment of 35 years each. They appealed to the Court of Appeal against the conviction and sentence.

The facts giving rise to this appeal as accepted by the learned Appellate Justices, are that the deceased, Lugolobi Paul, who worked at Bugembe Taxi Stage, Jinja District, was suspected to have stolen a side mirror from one of the vehicles that had been parked in a parking yard at Bugembe. He was chased and assaulted by a mob of people who, according to Christina Alitwala Harriet (PW2) and Nassa-li Monica (PW3) included the two Appellants.

According to the testimony of both PW2 and PW3 on which the prosecution heavily relied, the two witnesses were sleeping in the same house when they heard someone crying for help saying that he was being killed when he had committed no crime. PW2 went out of the house first followed by PW3. On reaching outside they found out that the person crying for help was the deceased who was known to them. The witnesses identified the two Appellants and one Mabonga among the mob that was assaulting the deceased. Mabonga was not

indicted because he fled from his home and could not be traced. The deceased was seated and leaning on a chair while being assaulted. He died from where he was assaulted and the body was tied with ropes and dragged to a nearby beauty salon belonging to one Sande and then to Silver Sand where it was abandoned. It was later picked by police and taken away for post mortem examination which was performed by Dr. Joseph Kakande (PW1).

The post mortem report revealed that the body had cut wounds on the scalp and the cause of death and reason for the same was haemorrhage due to assault.

The 1st Appellant was arrested from his place of work while the 2nd Appellant was arrested from her home. She was found in a grass thatched hut where she used to rear ducks. According to PW4, she was found hiding in a corner in the hut.

The 1st Appellant gave his defence on affirmation. He stated that he was arrested on 10/06 2008 at 7:30 p.m. as he went to Bugembe East Market where he worked as a guard. He denied that he was a neighbor to PW2 who lived in Katwe Zone while he lived in Budumbuli East. He denied knowledge of his co-accused and denied having participated in the killing of the deceased whom he knew as ^a minibus driver.

The second Appellant gave her testimony on oath. She denied having participated in the assault of the deceased and knew nothing about the incident. She also denied having been found in the hut where she used to rear her ducks and keep her beans. Her testimony was that she was arranging her things in the hut which served as her store. She stated that at the time the deceased was killed she was in her house sleeping. She also denied having heard any alarm on the night the deceased was killed and of the two witnesses who testified against her she knew only Monica Nassa, li, PW3.

The trial Judge came to the conclusion that the prosecution had proved beyond reasonable doubt that both Appellants had participated in the killing of the deceased. She convicted each one of them for the offence of murder and sentenced each of them to a term of imprisonment of 35 years' imprisonment hence the Appeal to the Court of Appeal on the following grounds;

- 1. THAT the learned trial Judge erred in law and fact when she convicted the Appellants on the basis of unsatisfactory identification evidence.
- 2. THAT the learned trial Judge erred in law and fact when she relied on uncorroborated circumstantial evidence to convict the Appellants.
- 3. THAT the learned trial Judge erred in law and fact when she failed to adequately evaluate all the material evidence adduced at trial and hence reached erroneous decision which resulted into a serious miscarriage of justice.

The Court of Appeal dismissed the Appeal and found that there was credible and reliable evidence to support the conviction of both Appellants and confirmed the conviction and sentence. The Appellants thus filed the second Appeal to this court. The sole ground of this Appeal is as follows: -

***The learned Justices of Appeal erred in law when they failed to adequately re-evaluate all the material evidence adduced at the trial and upheld an erroneous conviction and sentence resulting into a miscarriage of justice'**

The Appellants prayed that their Appeal be allowed, the judgment of the Court of Appeal set aside, the conviction quashed, sentence set aside and get released.

Representation.

Both appellants were represented by Mr. David Keeya on State brief while the respondent was represented by Ms. Ainebyona Happiness, a Chief State Attorney. Both parties had earlier filed their submissions, which they adopted, this being a reconstituted panel.

Appellants' Submissions

Counsel for the appellants submitted that the learned Justices of Appeal erred in law when they confirmed the Appellants' respective convictions on the basis of unsatisfactory identification evidence. Counsel pointed out that the conditions under which the Appellants were identified were unfavorable for correct identification. Counsel argued that there is no evidence on record proving the length of time under which the Appellants were under observation by the identifying witnesses. He added that since the crime was committed at night by a mob, the intensity of the light should have been also

proved by the respondent which in this case was not. Counsel relied on *Bogere Moses & Anor Vs. Uganda*, SCCA No. 1 of 1997.

Counsel further submitted that PW3 stated that she saw a third person but could not recognize the person and according to counsel, failure to recognize this person was due to the unfavourable conditions for correct identification. Counsel therefore faulted the learned Justices of Appeal for relying on the evidence of PW2 as a single identification witness without caution. He relied on *Abudala Nabulere & Anor Vs. Uganda*, SCCA No. 9 of 1978 and *Ilazar, rula Henry Vs. Uganda*, SCCA No. 17 of 2015.

Further, counsel argued that the apparel put on by both Appellants as described by PW2 were not produced in court thus leaving doubt as to whether the witness correctly identified the Appellants. He added that PW2's evidence as a single witness in respect of the 1st Appellant, Kitosi Abu, should have been corroborated as well as the identification evidence against the 2nd, 1st Appellant since it was under similar circumstances that could have led to mistaken identity.

Counsel submitted that the learned Justices of Appeal failed to reevaluate the evidence on record and ignored the Appellants' defense of alibi. Counsel alluded to the fact that the Appellants had pleaded the defense of alibi when they stated that at the time of the crime, they were not at the scene but the alibi was not considered by the trial Court. Counsel argued that despite the learned Justices' observation at Appeal that the trial court had not considered the Appellants' defense of alibi, they failed in their duty to re-evaluate the

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evidence on record in that regard. He thus faulted both lower courts for not evaluating the evidence on record as a whole as was stated in *Bogere Moses & Anor Vs. Uganda*, (supra).

It was further submitted for the 1st Appellant that the evidence in regard to his participation had major contradictions. Counsel pointed out that PW3 stated that she did not recognize the third person at the scene and did not see him beat the deceased either, which evidence was contradictory to PW2's evidence who stated that she saw the 1st Appellant beat the deceased with a stick. He contended that such contradictions that are major weakened the respondent's case and should have been ruled in favour of the 1st appellant. Counsel therefore prayed Court to find merit in the Appellants' grounds of Appeal and allow the Appeal, quash their respective convictions, set aside their respective sentences and release the appellants.

Respondents' Submissions.

Counsel for the respondent opposed the Appeal and supported the findings of the learned Justices of Appeal.

Counsel associated himself with the cases of Abudala Nabulere & Anor Vs. Uganda, (supra) and Bogere Moses & Anor Vs. Uganda, (supra) and submitted that the learned Justices of Appeal considered the issue of identification at length. Counsel contended that the learned Justices considered the duration under which the Appellants were under observation by the witnesses and also the intensity of light under which they were positively identified.

Further, that the learned Justices observed that the Appellants and the witnesses (PW2 and PW3) were not strangers and that they were familiar faces irrespective of whether or not they used to interact. He thus supported the learned Justices' decision that the conditions were favourable for correct identification and that the identification was free from error.

He however, argued that the case of Ilazarlrza Henry Vs. Uganda, (supra) is distinguishable from the instant case because the source of light in that case was moonlight while in the instant case the source was an electric bulb that was on top of the crime scene.

On the issue of failure to exhibit the apparel and other items, counsel submitted that the witnesses had properly described the apparel and this should be enough for court to rely on without the exhibits.

In regard to the defense of alibi, counsel argued that the identification evidence adduced at trial and as re-evaluated by the learned Justices of Appeal, placed the Appellants at the scene of crime and therefore discredited the Appellants' defense of alibi.

Counsel argued that the contradictions pointed out by counsel for the Appellants are minor and do not go to the root of the case and thus should be ignored. Counsel asked Court to find no merit in this Appeal and dismiss it.

Submissions for the appellants in rejoinder.

In rejoinder, counsel submitted that the learned Justices of Appeal failed to caution themselves when they relied on the evidence of a

single identifying witness in respect of the 1st Appellant. Further that the prosecution evidence on identification was insufficient and thus needed to be corroborated by exhibiting the apparel which was not done by the prosecution during trial. Counsel reiterated his earlier submissions and prayer.

Consideration of the appeal by court.

This is a second appeal and this court is mindful of its duty as a second Appellate Court, to decide whether the first Appellate Court failed in its duty to re-evaluate the evidence presented before the trial Court to reach its own conclusion. Consequently, this Court can only interfere with the conclusions of the Court of Appeal if it appears that in consideration of the Appeal as the first Appellate court, the Court of Appeal failed to re-evaluate the evidence as a whole. See *Rwabugande Moses versus Uganda*, Supreme Court Criminal Appeal No.25 of 2014.

The duty of a second Appellate court is intertwined with the duty of a first Appellate Court although the two are different. The Supreme Court has distinguished clearly the duties cast on each Court in the case of *Kifamunte Henry v. Uganda* Criminal Appeal No. 10 of 1997 thus;

"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to re-evaluate the evidence of the case and to reconsider the materials before

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the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact finding on credibility of witness which the appellate Court has not seen. See *Pondga o. R* [1957] EA 336, *Okeno u. Republic* [1972] EA 32 and *Chq.rles Bltulre a. Uganda Supreme Court* Criminal Appeal No. 23 of 1985 at page 5.

Furthermore, even where a trial Court has erred, the Appellate Court will interfere where the error has occasioned a miscarriage of justice: It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first Appellate Court save in Constitutional cases. On second Appeal, it is sufficient to decide whether the first Appellate Court on approaching its task, applied or failed to apply such principles. See *P. R. Pandya v. R* (supra), *I(airu v. Uganda* 1978 HCB 123.

Therefore, the duty of a second Appellate Court is to examine whether the principles which a first Appellate Court should have applied were

properly applied and if it did not, for it to proceed and apply the said principles.

The appellants' contention is that the learned Justices of Appeal failed to re-evaluate the evidence on record particularly, the identification evidence and the defense of alibi.

The case of *Moses Bogere and Another Vs Uganda Supreme Court Criminal Appeal No 1 of 1997* this Court, faced with a similar situation regarding identification of the assailants, came up with factors which are considered pertinent in cases where the issue of visual identification is addressed. These include: -

- 1. Whether there were factors or circumstances which at the material time rendered identification of the attackers difficult, notwithstanding that there were those which could facilitate identification;
- 2. Whether the absence of evidence of arrest and or police investigation had any or no adverse effect on the cogency of the prosecution case;
- 3. Whether the appellants' defenses of alibi were given due consideration.

In respect to the first element, the Supreme Court gave the following guidelines: -

"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. The starting point is that a Court ought to satisfy itself from the evidence whether the conditions under which identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The Court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole, namely the evidence if any, of factors favoring correct identification together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to the rest of the evidence. (see *Suleman Katusabe Vs Uganda SC Cr. App. No. 7 of 1991* (unreported))"

The Supreme Court cited with approval the following passage from the case of *Abudala Nabulere & Another Vs Uganda, Supreme Court Cr. App. No. 1978 reported in (1979) I;ICB 77* that has been followed in numerous other cases: -

"[I]f the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defense disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that

there is a possibility that a mistaken witness can be a convincing one, and even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger....

trIf the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately weighs itself of the special need for caution'

At trial, the learned trial Judge found as follows: -

(I have carefully considered the evidence adduced by all parties and I have read the written submissions by counsel. I hold that the circumstances in this case favoured the correct identification of DW1 and DW2 by the key prosecution witnesses as herein discussed. With the aid of a security light, it is possible for one to see another person at a distance of 2-3 meters. I, therefore, differ from Mr. Kiyemba's contention that it was impossible for PW1 and

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PW1 to correctly identify DW1 and DW2. The evidence of PW2 and PW3 was corroborated by PW4. PW4 testified that at the time they went to arrest DW2, they found her hiding in a garage (store) under a cupboard. This coupled with the circumstantial evidence herein included to such as the fact that when PW4 and others went to the parking yard where DW2's husband works, he could not be traced at home. DW2 was not there though they could see light in the house.

As they continued searching, they heard a noise from the garage used as a store and upon forcing the door open, they found DW2 squatting under the iron sheets. There was also other corroborating evidence that the deceased's body was discovered when both hands were tied. Besides the dead body, were two side mirrors of a vehicle and a big stone. trThen this is considered with PW2's evidence that after DW1 and DW2 had killed the deceased, they tied him with a rope and dragged him to silver sands bar. This conduct viewed together with the accused persons' defence is not consistent with that of innocent persons.

PW2 was a very confident lady who gave clear testimony and she impressed me as being truthful. PW3 was not as intelligent as PW2 but was not telling any deliberate lies. The inconsistencies between their two testimonies were minor and I have decided to ignore them since they do not affect the criminal aspects of the case. PW2 testified that

she recognized the deceased as Paul and that he was being hit by Elizabeth with an iron bar whilst Abu hit Paul's chest with fists, whilst Paul who was seated in the chair bleeding, bent down, Abu hit him with sticks. PW2 testifies that she saw Mr. and Mrs. Mabonga (DW2 and her husband) and Abu assaulting the deceased.

PW2 explained to court that as much as she was visiting PW3, she had visited the place before and had known DW2 for about a year. On previous occasions, when her sister PW3 shifted to Bugembe, PW2 would stay for a week. Additionally, PW2 one time spent a month helping the sister since she had no maid. PW2 stated that she knew Mr. Mabonga since her school days and told court that he used to work in the park yard. PW2 also knew Abu for the month she spent with PW3. I have no doubt that there was no mistaken identity of the assailants."

On Appeal, while considering the identification evidence, the learned Justices of Appeal held as follows: -

"The evidence of PW2 and PW3 was to the effect that the time of assault was at 3:00 a.m when an alarm interrupted their sleep. PW2 woke up first when she heard the alarm. When she went outside she saw a mob assaulting the deceased. He was being chased as he was being assaulted. He then sat on a chair from where the assault continued. After the assault the assailants tied the body of the

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deceased and dragged it to two places as already described in this judgment. From the narration of PW2 and PW3 it is clear that although no definite duration was assigned by the witnesses the events took enough time as to enable the witness to observe not only the acts of the assailants but also their identity. In other words, it was not a fleeting glance and depending on other factors the duration would not be an issue.

The second condition is that there was light provided by a security light which was at the scene. This means that the assault was not in darkness. The position of security light was above the chair where the deceased sat as he was being assaulted. The fact that the witnesses did not describe the intensity of the light is not significant because from the available light they were able to see what was going on. The type of light and the witnesses' evidence that it was sufficient to enable them observe the events as they described them is enough for court to establish that although an incident took place during night there was light that enabled them to make a positive identification.

On the issue as to whether or not the witnesses knew the appellants before the incident, counsel for the appellants submitted that there was no evidence of any interaction between the witnesses and the appellants and therefore there was no basis for a finding that they knew them. The

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1st appellant denied having been a neighbor to Ptr12 because he lived in Budhumbuli East while she lived in Katwe Zone and he did not know her. The 2nd appellant stated that she knew only PW3. PW2 stated that she knew both appellants and described how each one of them was dressed. The apparel was not produced during the trial as exhibits but even without production of the apparel court can determine whether a witness knew a person before or not. PW2 was also able to describe the weapon each of the appellants was carrying. She testified that the 1st appellant was used to guard motor vehicles which as a fact admitted by the 1st appellant in his evidence to the trial court.

From the evidence of the two witnesses the two appellants were not strangers. They were familiar faces to the witnesses FW2 and PSI3 irrespective of whether or not they used to interact.

The distance between the witnesses and the scene of the assault was described to be two to three meters. As already indicated Ptr12 was able to talk to the assailants to restrain them from beating the deceased. The observation of PIII2 was thus at a close range.

In consideration of the factors that favoured correct identification as described above together with the factors that did not favour correct identification like the time of the night and the fact that the assault was by a mob, this

court finds that the fact that the area was lit by a security light, the witnesses knew the appellants before, and had sufficient time to observe them, that the identification of each of the appellants by PW2 and Ptr13 was free from error and we dismiss ground 1 of the appeal.'

We have carefully read and analyzed the above quoted findings of both the trial Court and the Appellate Court. Court observed that the events took enough time that enabled the witnesses to observe the acts of the assailants as well as their identity. Secondly, that the intensity of light was not significant because from the available light the witnesses were able to see what was going on. Thirdly, that the witnesses and the Appellants were not strangers and lastly that the witnesses were able to identify the assailants within the distance of two to three meters. In our view, the 1st Appellate Court properly reevaluated the evidence of identification on record. We therefore find that the learned Justices of Appeal fulfilled their duty as the first Appellate Court to re-evaluate the evidence afresh and we find no reason to interfere with the decision.

Further, we find the evidence of PW2 in relation to the 1st Appellant sufficient. Court can rely and convict on the evidence of a single identifying witness if it finds the evidence credible and free from error. See the case of Abudala Nabulere, (supra). The learned Justices of Appeal broadly considered all the factors needed for correct identification before confirming the appellants' conviction. We do not find any misdirection and we are unable to fault them.

In regard to the defense of *alibi*, we find that the evidence on record placed the Appellants at the scene of crime.

In the result, this Appeal is dismissed. We uphold the Appellants' convictions and the sentences imposed. The \$1^{\text{st}}\$ and \$2^{\text{nd}}\$ Appellants should continue serving their sentences.

Dated this.... 21st day of February

ALFONSE CHIGAMOY OWINY-DOLLO CHIEF JUSTICE

Muneralle.

FAITH MWONDHA JUSTICE OF THE SUPREME COURT

PERCY NIGHT TUHAISE JUSTICE OF THE SUPREME COURT

ELIZABETH MUSOKE JUSTICE OF THE SUPREME COURT

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STEPHEN MUSOTA JUSTICE OF THE SUPREME COUR

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