

UGANDA / JUDGMENT

Muchumi alias kalule v Uganda (Criminal Appeal 3 of 1993) [1994] UGSC 22 (9 November 1994)

[1994] UGSC 22

COURT

Supreme Court of Uganda

BEFORE

Mayindo, DCJ, Odoki, JSC, Oder, JSC

CASE / FILE NUMBER

Criminal Appeal 3 of 1993

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AT MENO \$J. S. C.\$) MANYINDO, D. C. J., ODOKI, AND ODER, (CORAM: CRIMINAL
APPEAL NO. \$3/1993\$

BETWEEN

: APPELLANT. JOHN MUCHUMI ALIAS KALULE

VERSUS

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: UGANDA

> (Appeal from a conviction and sentence by the High Court at Mbarara, (Kireju, J.) dated
17/3/1993 in High Court Criminal Session Case No. 1/1990).

JUDGMENT OF THE COURT:

The Appellant, John Muchumi, alias Kalule, was convicted of robbery, contrary to Sections 272 & 273(2) of the Penal Code Act and sentenced to death. He has appealed against the conviction.

The prosecution case was that during the night of 2nd June, 1984 in Natita village, Masaka District, the complainant Prospare Nakyeyune (P. W.1), her husband, Joseph Ssozi, and their children were attacked by a gang of armed robbers in their house. The Complainant and Joseph sustained injuries from which the latter died three days later. The robbers also stole some money and articles of household property during the incident.

It was alleged that light from a tadoba and another lamp enabled the robbery victims to see their assailants amongst whom they recognised Appellant as one of them. The Appellant was well known to the Complainant's family before the incident.

The robbery was immediately reported to the police at Kahungu, leading to the Appellant's arrest on 9th July, 1984, following which he was charged with the offence. On such facts the Appellant ought also to have been charged with the murder of Joseph, but he was not. The prosecution gave no explanation for the omission.

The Appellant denied participation in the robbery and put

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forward a defence of alibi. In his testimony on oath, he said that he was a Murundi, but was born and grew up in the village where the Complainant lived; but in 1977 moved away to Kihinya Trading Centre in a nother area. He claimed that he was at his home during the flight the robbery occurred. This defence was rejected by the learned trial Judge as untrue case. The learned Judge found that the Appellant was properly identified at the scene of crime and convicted him as indicted.

Three grounds of appeal are set out in the memorandum, of which Mr. Akampurira, learned Counsel for the Appellant, argued the first two together. The third ground, concerning the learned Judge's finding on the defence of alibi, was abandoned.

The first two grounds are to the effect that the learned trial Judge erred to have held that the Appellant was properly identified, and to have convicted him on the prosecution evidence which was riddled with contradictions. The learned Counsel submitted that conditions were not favourable for correct identification of the Appellants by the witnesses concerned. For instance, Propare's evidence at first was that when the intruders numbering five, entered the house a tadoba and a hurricane lamp were alight in her bed-room and that of her husband respectively. The door of both rooms were also open; but in cross-examination, she admitted to have told the police in a previous statement that she heard her husband strike a match to light a lamp. This meant that no lamp was a-light when the assailants struck. Secondly it is not clear where the Complainant saw the Appellant, because it appears that he was not one of those who entered her bed-room. In this connection, Pasikaria Nagguja (PW2) said that the Appellant was one of those who entered her father's (Joseph's) bed-room. Further, according to Prosepare's evidence the intruders removed the tadoba from her room and put it on ^a cupboard in ^a small room. There is no indication of where she was when this was being done.

Most of the criticisms which the learned Counsel made of the Complainant's evidence were not put to her in cross-examination. Moreover, with respect, we are unable to accept the learned Counsel's submissions about the conditions of recognition having been difficult in this case. Firstly because, the Appellant was well known to the Complainant and her daughter, Pasikaria P. W.2). Secondly, Pasikaria (P. W.2) saw what happened from a vantage position, in the ceiling

where she had climbed to hide when the intruders struck. A hurricane lamp which was alight in her father's bed-room enabled her to see what was going on. Thirdly, the incident lasted about thirty minutes, according to Prospera the Complainant (P. W.1), which was ample time for her to observe the robbers and what they were doing. In this regard, Pasikaria, (P. W.2) said this in her evidence:

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"After seeing that they had entered. I climbed in the ceiling trying to go in the bed-room We used to go up and end up in my father's bed-room We used to climb in the ceiling before the incident. We used to keep there things. I did not go to my father's bed-room because they had already entered my father's bed-room and were beating him. I feared. I remained in the ceiling while seeing them. They did not see me they did not bother to look up because I was stationary. I saw Muchumi he was holding a gun which he gave to his friend and beat him with a panga and later used an iron bar which made him to fall down. When he fell down Muchumi struck him again on the side of the head, he was unconscious. Muchumi picked the blanket and they went out. In the bed-room of my father two people entered, others entered other rooms but I did not see them but I was hearing them. Those who entered my father's bed-room, I knew Muchumi only. I did not know where my mother Prospera Kyeyune was. There was a hurricane lamp in my father's bed-room. Muchumi was dressed in a red T shirt. I observed them for quite a long period but I cannot estimate the time. Those who first came we informed them Muchumi with others are the ones who killed my father. We informed Lukananso^{!!}

This was corroborated in certain Material particulars by the Complainant's evidence, in which she said:

"After covering my children who were still young, I heard the banging of the behind door. I then asked who was banging the door. Because we had not locked the door it opened then I saw people in the small room. At first they entered about five people. The door at my husband's bed-room was opened with a lamp in my room. In my room it was a tadoba, in my husband's bed-room it was a hurricane lamp. I saw them with panga and sticks and some were holding iron bars. I was removed from my bed-room and I was ordered

to sit in the small room. They started beating me with a panga, which cut me. They were demanding money. Those who entered with his friend who had a gun and panga, the accused had iron bar and panga".

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The learned trial Judge accepted the evidence of these two eye witnesses. Applying the decision in the case of Abdalla Nabulere vs. Uganda (1979) H. C. B. 77, she found that the evidence had established that favourable conditions existed for proper identification of the Appellant at the scene. We agree with that finding.

Regarding what he referred to as contradictions in the prosecution evidence, the learned Counsel mentioned some parts of the Complainant's evidence which suggested that she did not know the intruders who entered the house and that she only heard that Monday was arrested because the children had seen him at the scene. In apparent contrast, Pasikaria's evidence was that the Appellant, armed with a gun, was a member of the gang, and that his name was mentioned as such to those who first arrived at the scene in answer to an alarm and the police. The learned Counsel also attacked the evidence of Pasikaria on the ground that she was only about 14 years at the time of the incident.

What the learned Counsel referred to as contradictions do not in our view appear to be so on a closer scrutiny of the evidence. First because the person called Monday to whom the Complainant referred was the Appellant's brother. Pasikaria, in fact, made no mention of Monday in her testimony. Further although the Complainant did say that she did not know those who entered the house, she appears to have said so only with regard to the first group which entered; for in the sentences following that part of her evidence, she said:

"Later the Accused entered with his friend who had a gun and panga, the Accused had an iron bar and a panga. I did not know the Accused's friend. The second group did not go to my husband's room, they went to mine. My husband gave them money

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From this evidence, it appears that the Appellant was in the second group. This tallies with Pasikaria's evidence that the Appellant was one of the two intruders who entered her father's bed-room and assaulted him.

At the trial the attention of the learned judge was drawn to what have been referred to before us as contradictions. She considered them and came to the conclusion that they were minor, indicating that the prosecution witnesses did not tell deliberate lies to the Court. The learned Judge said this:

"I have considered these inconsistencies and I have found that they are minor in nature and do not prejudice the Accused All the other discrepancies pointed by Counsel for the Accused I have found that they were minor and did not prejudice the Accused in any way. I believe the testimony of the prosecution witnesses. I am convinced that none of them tried to tell a deliberate lie to the Court.

We agree with that conclusion.

Regarding the age of Pasikaria (F, U, 2) she was 23 years when she testified, and, therefore, not a child of tender years. She was about 15 years at the time of the incident. So, no corroboration of her evidence was necessary. The issue of whether a witness is a child of tender years arises at the time of trial, not when the incident happened. See *Kibageny arap Kolil vs. R* (1959) E. A. 92, and *Tomasi Omukono and Another vs. Uganda*, Crim. App. No. 4/1977 (U. C. A.) unreported.

In the circumstances, we think that grounds one and two of the appeal must fail.

Another piece of evidence which, in our opinion, strengthened the prosecution case, but on which the trial learned \$J\$. Je did not apparently rely, is that the blanket which was stolen from the bed-room of the Complainant's husband was recovered from the Appellant's home shortly after the robbery. This was strong circumstantial evidence against the Appellant.

The Appellant was named soon after the incident as having been one of the robbers. As has been stated in other cases this

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Court attaches great importance to such evidence of first report, showing consistency of the witnesses concerned.

For these reasons, we think that the Appellant was properly convicted.

In the result the appeal must fail. It is accordingly dismissed.

Dated at Mengo day of..... 1⁹³*

S. T. Manyindo, Deputy Chief Justice.

B. J. Odoki, Justice of the Supreme Court.

A. O. Oder, Justice of the Supreme Court.

I CERTIFY THAT THIS IS ^A TRUE

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A. L. KYEYUNE,

AG. ASST. REGISTRAR. V11/1992+-

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