THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. JUSTICE C.K.BYAMUGISHA, JA.***

HON. JUSTICE S.B.K.KAVUMA, JA.

HON. JUSTICE A.S.NSHIMYE, JA.

CRIMINAL APPEAL NO.127/08

BETWEEN

1. BIRYOMUMAISHO MILTON
2. ASIIMWE ALEX::APPELLANTS

AND

UGANDA::RESPONDENT

[Appeal from the judgment of the High Court of Uganda sitting at Bushenyi (*Gidudu J) *dated 20th October 2008 in Bus-00-CR-A-0082/06]

JUDGMENT OF THE COURT

This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction.

Biryomumaisho Milton and Asiimwe Alex in this judgment referred to as the first and second appellant respectively (and together as the appellants) were jointly indicted on two counts for aggravated robbery contrary to ***sections 285*** and ***286(2)*** of the **Penal Code Act** and murder contrary to ***sections 187*** and ***188*** of the same Act.

It was alleged in the particulars of the first count that the two appellants on 30th August 2004 at Kazinda Trading Centre in Bushenyi District robbed Muganzi Ronald of his numberless motorcycle and immediately before or immediately after the said robbery used a deadly

weapon to wit a knife on the said Muganzi Ronald. In the second count it was alleged that on the same day at Katenga 11 village the appellants murdered Muganzi Ronald.

The facts material to this appeal are that the deceased was a *boda boda* operator at Kazinda Trading Centre. On the day in question at about 9 p.m, he was approached by one Nabaasa Didas now deceased and a brother of the first appellant. He requested him to take him to Katenga village on his motor cycle and the fare was agreed at Ug Shs 3,000/=. The deceased accepted. When they reached a place called Katungu they were joined by the first appellant and they continued on their journey until they reached Igambiro Forest where they were joined by the second appellant. The trio forced the deceased off his motor cycle and a struggle ensued which resulted on the deceased being seriously injured.

The next day, one Kagumire Philip (PW2), the LC 1 Chairman of Katenga Village, received information that there was a trail of blood heading to the forest. He went to the scene and followed the trial of blood into the forest until he came across blood stained clothes. He immediately went to Igambiro Police Post and reported the matter. The witness, together with PC Mulekye (PW4) and other people visited the scene and found the deceased seated in water and was bleeding and had a swollen face. He was unconscious. He was taken to Ishaka Hospital for treatment which in turn referred him to Mbarara Hospital where he died on 4/09/04. While still at the hospital he revealed the identity of his attackers to his sister, Zipola Birungi (PW5). The body of the deceased was examined by Dr Sendi Bwogi (PW1) who compiled a post mortem report (exhibit P1). The cause of death was neurogenic shock due to injuries inflicted with a blunt hard object.

After the incident a police officer D/C Twinomugisha (PW6) visited the homes of the appellants but they were not traced.

On 4/10/04 the first appellant was arrested from his shop by DC Twinomugisha in the company of other police officers. The second appellant was arrested on 9th April 2005 from his garden. They were charged.

At the trial they gave sworn statements in which they put up a defence of alibi which was rejected by the trial judge who convicted them as charged and sentenced them to death-hence this appeal.

The memorandum of appeal contains five grounds.

1. **The learned judge erred in law and in fact in failing to correctly evaluate the evidence on record thus reaching a wrong conclusion**

2. **The learned trial judge erred in law and in fact in his interpretation and application of the well established law regarding a dying declaration and as a result he erroneously convicted and sentenced the appellants to suffer death.**
3. **The learned trial judge erred in law and in fact in disregarding the appellants' defence of *alibi* when it was not disproved by the prosecution.**
4. **The learned trial judge erred in law and in fact in his assessment, interpretation and application of the well established principle of the law on circumstantial evidence thereby arriving at a wrong conclusion that there was sufficient circumstantial evidence to corroborate the dying declaration.**
5. **The learned trial judge erred in law and in fact when he erroneously convicting the appellants for the offence of murder and aggravated robbery when they were not properly identified.**
6.

When the appeal came before us for final disposal, Mr Bwengye, learned counsel for the appellant argued grounds 2 and 5 together, ground 3 separately and ground 1 and 4 together.

The gist of his submissions on grounds 2 and 5 is that there was no cogent evidence to connect the appellants with the offences with which they were charged. On the dying declaration, counsel submitted that it was insufficient and needed to be corroborated by other evidence. He further stated that the trial judge believed mere assertions by PW 5 and PW6 who alleged that the appellants deserted their homes.

He referred to page 13 lines 1-17 of the record of appeal and claimed that from the extract it is clear the deceased did not know the people he was supposed to transport. He pointed out that it was Didas who mentioned Milton and it is also not mentioned how he identified the second appellant. He further pointed out that PW5 in her evidence in court did not mention second names of the attackers and yet PW6 mentioned second names.

On the law applicable to dying declarations counsel cited section 30 of the Evidence Act and the case of ***Uganda v Simbwa –Criminal Appeal No.37/95*** (SC) which was relied on by this court in the case of ***Oyee v Uganda Criminal Appeal No. 159/03*** (CA) both unreported.

On conditions that were prevailing at the time of the attack, learned counsel stated that conditions for correct identification were absent and yet the trial judge relied on the testimony of a single witness without warning himself. He cited the case of ***Abdallah Bin Wendo &another v R {1953} EACA 166*** where the court held that although a fact may be proved by the testimony of a single witness, this does not lessen the need to test with the greatest care

the evidence of such witness respecting identification, especially when it is known that the conditions favouring correct identification are difficult.

Learned counsel pointed out that the trial judge misdirected himself when he concluded that Nabaasa was arrested with a motor cycle when there no proof that the motor cycle belonged to the deceased.

Onenochan learned Principal State Attorney did not agree. He submitted that the trial judge correctly applied the law regarding a dying declaration and he relied on the case of ***Uganda v Ssimbwa***(supra) and found the circumstances as stated by PW5, PW2 and PW4 that the deceased was in a critical condition and therefore what he told PW5 about the identity of the attackers was true. He pointed out that the trial judge found corroboration of the dying declaration in the testimony of PW 6 who went to the homes of both appellants and failed to find them. In the dying declaration, Mr Onenochan pointed out, the deceased stated that his motor cycle was taken from him and it was later found with the person whom he mentioned in the dying declaration. He claimed that the dying declaration was corroborated.

On identification, the learned Principal State Attorney submitted that the deceased knew the attackers and he mentioned their names. He further pointed out that the deceased operated a boda boda at Kizinda stage and the appellants were residents of the same area.

The case for the prosecution depended largely on the visual identification of the appellants by the deceased. The Supreme Court in the case of Bogere Moses &another v Uganda Criminal Appeal No 1/97 gave guidelines on the approach to be taken in dealing with the evidence of identification. The court said:

"The starting point is that the court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been were or were not difficult, and to warn itself of the possibility of mistaken identity. The court should 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 of any factors favouring correct identification together with those rendering it difficult.

This being the first appeal, it is our duty to re-evaluate the evidence ourselves and determine whether the conclusions reached by the trial court should be allowed to stand.

We shall now examine the conditions which were prevailing at the time of the attack and determine whether the deceased was able to recognize his attackers. The case for the prosecution is that the deceased was told by one Hasani (who did not testify) that there was a customer who needed transport. The time was about 9 p.m at night. No one gave evidence at the conditions that were prevailing at the time of the attack. Before a conviction can be based on evidence of visual identification the court must make sure that there is no mistaken identity. The witness may be honest but mistaken. In order to ensure that the witness or in this case, the deceased was not mistaken, the court has to look for 'other' evidence direct or circumstantial to confirm in material particular that the accused committed the offence.

In the matter now before us, the evidence implicating both appellants and which the learned judge relied upon to convict, was the dying declaration and the conduct of the appellants. The conduct in question was that they ran away from their homes to elude arrest.

To begin with, the motor cycle which was allegedly stolen from the deceased and later recovered from Didas Nabaasa by one Mpora (who did not testify) was never proved at the trial to have belonged to the deceased. Although the defence did not contest the ingredients of the offence of robbery and murder except participation of the appellants the court had a duty to make findings as to whether the prosecution had proved the ingredients beyond reasonable doubt. The motor cycle which was stolen from the deceased had no registration number. At the trial, the said motor cycle was not exhibited and no witness testified that the said motor cycle belonged to the deceased. However the learned trial judge in dealing with the issue of the motor cycle said:

"According to the evidence of D/C Twinomugisha the motor cycle was black in colour, Quinqui make and numberless. It was recovered by Mpora from Ibanda where Nabaasa was arrested with it and on the way to Bushenyi, the other boda boda riders pounced on the vehicle carrying Nabaasa and the motor cycle and lynched Nabaasa while the motor cycle was exhibited at the police. This ingredient was not contested by the defence.

I find as a fact that the motor cycle was stolen from the deceased. This ingredient was proved beyond reasonable doubt."

We are of the opinion that the learned judge, with respect, erred in the conclusion he reached that the prosecution proved beyond reasonable doubt that the motor cycle found with Nabaasa belonged to the deceased. The evidence which was on record was that the deceased was a *boda boda* operator. The only witness who testified that she saw the deceased with a

motor cycle was his sister (PW5). She was not asked either in examination in chief or during cross-examination what type of motor cycle her brother had. Other *boda boda* operators were not called either to prove that the motor cycle which was recovered from Nabaasa belonged to the deceased. Therefore there was no proof beyond reasonable doubt that the motor cycle in question belonged to the deceased. Without that proof the appellants could not be convicted of the offence of robbery.

As for the evidence of identification, we have already stated that there was no evidence of the conditions that were prevailing at the time material to this appeal. The learned trial judge did not address his mind to this important aspect of the case before convicting the appellants. Instead he relied on the conduct of the appellants to convict. PW6 testified that he went to the homes of the two and found them at their respective homes. He also stated their relatives were uncooperative. The first appellant in his defence stated that he was around all the time and even when his brother Nabaasa was killed he attended his burial. He denied having been in hiding from the long arm of the law. Arresting suspects involves more people than the police. The local council leaders are people who are in a position to know whether a resident in the locality has disappeared or are just absent from home. PW6 was stationed at Bushenyi Police station which must be some distance away from the areas of residence of the two appellants. Whereas the first appellant stated that he remained at his home and continued running his shop normally, the second appellant stated that he had a shop in Mbarara which he was running. He stated that he never went to his home in 2004 but went in 2005 that is when he was arrested. The person who arrested him did not testify. The evidence of identification by the deceased did not rule out the possibility of mistaken identity and as such the conduct of the appellants could not corroborate the dying declaration. The prosecution did not adduce sufficient evidence to prove its case beyond reasonable doubt.

In the circumstances we are unable to uphold the conviction of the appellants.

In the result we quash the conviction, set aside the sentence of death and order for the immediate release of the appellants from custody unless they have other lawful charges against them.

Dated at Kampala this 4th day of February 2010.

C.K.BYAMUGISHA

JUSTICE OF APPEAL

S.B.K.KAVUMA

JUSTICE OF APPEAL

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A.S.NSHIMYE

JUSTICE OF APPEAL