THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 201 OF 2010

KISULE FRANCIS :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala before His Lordship Akiiki-Kiiza, J. delivered on 6th September, 2010 in Criminal Session Case No. 0203 of 2010)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court sitting at Kampala in Criminal Session Case No. 203 of 2010, delivered on 6th September, 2010 by Akiiki-Kiiza, J. in which the appellant was sentenced to a term of imprisonment for 20 years for the offence of murder contrary to section 188 and 189 of the Penal Code Act, Cap.120.

Brief Background

The appellant was indicted for the offence of murder contrary to section 188 and 189 of the Penal Code Act, Cap. 120 and tried before Akiiki-Kiiza, J. The particulars of the indictment were that Kisule Francis, Mwebe David and others still at large on the 29th day of December, 2007, at Mpererwe in Kampala District murdered Bbosa Rajab. The facts as accepted by the learned trial Judge were that the appellant was part of a mob which lynched the deceased and that he had formed a common intention, in conjunction with other members of that mob, to carry out the said unlawful purpose. He also found that the deceased had died from the injuries sustained during the said lynching. The learned trial Judge, then convicted the appellant for the

offence as charged and sentenced him to serve a term of imprisonment for 20 years.

Being dissatisfied with the decision of the learned trial Judge, the appellant lodged this appeal in this Court, on grounds, which were formulated as follows:

> **"1. The learned Judge erred in law and fact when she failed to appraise uncorroborated evidence pointing to identification of Appellant in unplanned perverted sense of mob justice thereby wrongly convicting the Appellant of murder.**
>
> **2. The learned judge erred in law and fact when she imposed upon the Appellant harsh excessive custodial imprisonment of 20 years without deducting remand period."**

Representation.

At the hearing of this appeal Mr. Rukundo Seth Henry, learned Counsel, appeared for the appellant while Ms. Asiku Nelly, learned Senior State Attorney, appeared for the respondent. Counsel for the appellant adopted his earlier filed written submissions, making a few oral highlights, while counsel for the respondent made oral submissions.

Appellant's case.

On ground 1, counsel faulted the learned trial Judge for reliance on the uncorroborated evidence of PW3, Banyana Frank, a single identifying witness to convict the appellant. He submitted that there was a possibility of error by PW3, given that there was a considerable time lag from 29/12/2007, when the offence in question was committed, to 22/01/2008, when PW3 identified the appellant shortly before the appellant was arrested. Further, counsel faulted the learned trial Judge for making a wrong finding that the appellant had been arrested from the crime scene, at 4pm, on 29/12/2007, basing on the appellant's sworn statement. He pointed out that the appellant had stated in his unsworn statement that he was arrested at 4pm on 22/01/2008. That since the arresting officer in this case was not brought as a witness to explain the circumstances of arrest, the appellant's testimony should have been believed. Furthermore, counsel submitted that the basis

of PW3's familiarity with the appellant was not sufficiently brought out by his evidence, which, had weakened his identification evidence, even further.

On ground 2, counsel submitted in the alternative that the sentence imposed on the appellant was harsh and excessive in the circumstances. To support this, he pointed out that the appellant had no malice aforethought when killing the deceased because there was no evidence showing that he moved with the iron bar with the intention of killing the deceased. He cited **R vs. Mohamadali Jamal (1948) 15 EACA 12**, for the proposition that those who participate in mob justice should not be put on the same plane while sentencing as those who plan their crimes and execute them in cold blood. He then prayed to this Court, to exercise its discretion and find the appellant guilty of the minor cognate offence of manslaughter.

Respondent's case.

Ms Asiku Nelly, learned Senior State Attorney, opposed the appeal and supported the finding of the learned trial Judge that the evidence of PW3, squarely placed the appellant at the scene of crime. She stressed that PW3 testified that on 29/12/2007, the appellant was among the mob which assaulted the deceased, and that the deceased had hit the appellant on the head with a metallic bar. She supported the reliance of the learned trial Judge on PW3's identification evidence because the witness knew the appellant; the conditions for identification were proper as it was during broad day light; and the distance between PW3 and the appellant at the scene of crime was just 10 metres. She then submitted that courts were entitled to convict basing on a single identifying witness as long as they caution themselves as was done in the present case.

On ground 2, counsel supported the sentence of 20 years imprisonment imposed in this case, arguing that it was commensurate with the gravity of the offence, given that the appellant was spared from the maximum death sentence. She asked Court to uphold both the conviction and the sentence.

Rejoinder.

Counsel reiterated his earlier submissions and added that there was a possibility of mistaken identity because the single identifying witness failed to describe how he knew the appellant.

Resolution of Court.

We have carefully considered the submissions of both counsel, the record and the law and authorities cited to us. We are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with its own inferences. **See Rule 30 (1) of the Rules of this Court and Kifamunte Henry vs. Uganda Supreme Court Criminal Appeal No. 10 of 1997.** As a first appellate Court, it is our duty to review and re-evaluate the evidence adduced at the trial and reach our own conclusion bearing in mind that this Court did not have the same opportunity as the trial Court had, to hear and see the witnesses testify and observe their demeanour.

Ground 1.

It was the case for the appellant that the learned trial Judge erred when he convicted the appellant upon reliance on the uncorroborated evidence of a single identifying witness, while it was the respondent's submission that the learned trial Judge rightly convicted the appellant basing on such evidence because he had warned himself before reaching his decision.

The conviction of the appellant in the trial Court, hinged on the evidence of a single identifying witness. The law on the subject is well settled, and was recently discussed in **Jamada Nzabaikukize vs. Uganda, Supreme Court Criminal Appeal No. 01 of 2015,** where it was observed as follows:

> **"The law on identification by a single witness has been laid out in several cases. The leading authority is that of Abdullah Bin Wendo and another vs. R (1953) 20 EACA 583. The law was further developed in the authorities of Abdulla Nabulere vs. Uganda Criminal Appeal No.9 of 1978 and Bogere Moses vs. Uganda (supra). The principles deduced from these authorities are that-**
>
> **i) Court must consider the evidence as a whole.**
> **ii) The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.**

iii) The court must caution itself before convicting the accused on the evidence of a single identifying witness.

iv) In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailants, the quality of light, and material discrepancies in the description of the accused by the witness."

PW3, Banyana Frank, the single identifying witness in this case testified, at Page 9 of the record as follows:

> **"I know the deceased. He was a taxi conductor. He is now dead. On 29/12/2007, at 4 p.m, I was at Mpererwe after having lunch. Then I saw father (sic) at Mpererwe, that they wanted to burn one Kibuka. The police then took Kibuuka away. Then the boda boda man said that they were going to burn Kibuka's house. Then they came back with the deceased, and threw him at Kobil Petrol Station at Mpererwe. He could not even talk. They got the deceased and put him on (sic) Buwambo Justin, they continued assaulting the deceased. I knew A1 before this case. I never knew A2 before. On the material day I saw both of them A1 got a metal and hit the deceased with it on the head. He hit him once. The iron bar he used was about 2 inches in diameter. It was about a meter long...I saw A1 hit the deceased at about 5 p.m. I saw him hit the deceased on the head."**

In cross examination at page 10, PW3 testified that:

> **"There were many boda bodas which went to the home of Kibuka. I was about 10 metres from the scene. When A1 beat the deceased, I could clearly see what was going on. Later on many people also assaulted the deceased as the deceased was living (sic) on the road side. I saw A1, as soon as they had brought the deceased and dropped at the Kobil Petrol Station."**

The learned trial Judge handled the evidence of PW3, at page 20 of the record as follows:

> **"I have carefully considered all the evidence on record and I have critically analysed the demeanour of both PW3 and A1. I am satisfied that, PW3 is a truthful and reliable witness. On the other hand, A1 stuck me as a mere liar. PW3 gave his evidence in a candid and straightforward manner. On the other hand the accused gave his unsworn statement in a matter of fact way and impressed me as person who was not revealing**

what he actually knew about the case. PW3 told Court, in a calm, candid and with (sic) composure that, when he clearly saw the accused, whom he knew particularly as a boda boda operator, hit the deceased on the head with an iron bar, which was a metre long and about 2 inches thick (sic). Given the size of this iron bar and the part of the body he chose to hit, he clearly in my view meant no good to the deceased. It was during day time, at 4pm..."

From the above excerpt, it is clear that the learned trial Judge did not adequately warn himself or the assessors before relying on the identification evidence of PW3, alone, to convict the appellant. That failure was fatal, in our view, because it was mandatory for the learned trial Judge to so warn himself. He instead took a very strong view of PW3's demeanour as a single identifying witness and failed to consider several other vital factors including; the familiarity of PW3 with the appellant; the time at which the offence was committed; and the length of time of observation of the offence by PW3.

In **Abdalla Nabulere & 2 others vs. Uganda, Court of Appeal Criminal Appeal No. 9 of 1978**, the court observed that:

> **"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, <u>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.</u> The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came be to made, particularly, the length of time the accused was under observation, 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 a mistaken identity is reduced but the poorer the quality, the greater the danger.**
>
> **In our judgment, when the quality of identification 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 well before, a court can safely convict even though there is no other evidence to support to (sic) identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if**

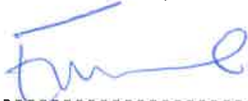
corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."

We, also, find that the learned trial Judge failed to examine the factors favouring the correct identification of the appellant in the circumstances. He instead, pre-occupied himself with discussing the demeanour of PW3 in comparison with that of the appellant. In our view, that was the wrong course to take in the circumstances, the learned trial Judge ought to have warned himself of the dangers of convicting the appellant in reliance on the uncorroborated evidence of PW3, alone, and thereafter proceeded to examine the factors favouring the correct identification of the appellant. He did neither. This rendered the conviction he reached very unsafe.

For the above reasons, we are inclined to quash the said conviction. By implication, the finding on ground 1 renders it unnecessary for us to consider ground 2. We, therefore, hereby allow this appeal, quash the appellant's conviction, and order the appellant's immediate release unless he is being held on other lawful charges.

We so order.

Dated at Kampala this ...25th... day of ...June... 2019.



....

Elizabeth Musoke
JUSTICE OF APPEAL

....

Hellen Obura
JUSTICE OF APPEAL

....

Ezekiel Muhanguzi
JUSTICE OF APPEAL