**Bagatagira v Uganda**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 24 August 2005

**Case Number:** 4/04

**Before:** Oder, Tsekooko, Karokora, Mulenga and Kanyeihamba JJSC

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*[1] Appellate procedure – Duty of a first Appellate Court – Re-evaluation of evidence on record –*

*Whether Court of Appeal had adequately discharged its duty.*

*[2] Criminal law – Murder – Deceased cut with a panga – Whether evidence proved that the appellant*

*inflicted fatal injuries.*

*[3] Criminal procedure – Constitutional law – Sentencing – Mandatory death sentences – Whether*

*mandatory death sentences were constitutional.*

*[4] Evidence – Alibi – Identification – Appellant claiming to have been in Tanzania – Whether*

*prosecution had disproved the alibi.*

**JUDGMENT**

**Oder, Tsekooko, Karokora, Mulenga and Kanyeihamba JJSC:** This second appeal is from the decision of the Court of Appeal upholding the conviction by the High Court of the appellant for the offence of murder.

The facts of the case are simple. The appellant, Bagatagira Mujuni, and the deceased, Byandagara Moses, lived in Kyempisi Village, Mbarara District. Apparently the appellant owed the deceased some money. On the same village, the father of the appellant engaged Bagorogonza Tumusiime (Tumusiime) to distil a local brew called Enguli for the former. On 1 July 1999, at 1 pm, the appellant and the deceased went to where Tumusiime was distilling Enguli. They appear to have arrived at the same time. The appellant was carrying a *panga*. After a while, the deceased demanded that the appellant pay the debt there and then. Apparently the latter did not have money, so he promised to pay it the next day. The deceased persisted in demanding the money. At that stage, Tumusiime left the two and proceeded to attend to the Enguli distillation by replenishing the fire. As he was proceeding, he heard the deceased groan with pain and when Tumusiime looked back at the two, he noticed that the deceased lay on the ground while the appellant had raised one of his arms up poised to cut the deceased with the *panga*. The appellant then cut the deceased. Tumusiime ran away from the scene and proceeded to inform members of the family of the deceased about what he had observed.

As the appellant was fleeing from the scene, while carrying his *panga*, he met Twinomujuni Richard (PW2). When Twinomujuni inquired of the appellant about what had happened, the appellant told Twinomujuni “to leave him alone” as he continued running away from the scene. At the Enguli Distillery, Twinomujuni found the deceased lying dead in a pool of blood, while more blood was oozing out from a cut wound at the back (*sic*).

According to Gideon Safari, (PW3), a teacher and village mate of deceased and the appellant, after the incident, the appellant disappeared from the village until he was arrested in Tanzania, ten months later.

At his trial, the appellant put up an alibi to the effect that he was not at the scene on the day the deceased was murdered, claiming that he had gone to Tanzania on 27 June 1999 in search of employment. The learned trial Judge rejected that alibi and convicted and sentenced him to death. Upon appeal to the Court of Appeal based on six grounds, the conviction and the sentence of death were confirmed by that court. From that confirmation the appellant has preferred this appeal which was originally founded upon three grounds formulated by his counsel, Mr Robert *Tumwiine*. With leave of the court, Messrs Katende Ssempebwa and Company Advocates, also counsel for the appellant, filed a supplementary ground of appeal in respect of mitigation of the sentence of death.

Mr Robert *Tumwiine* lodged a written statement of his arguments in support of the appeal. He abandoned the second ground of appeal but argued the remaining two grounds together. Mr Vincent *Okwanga*, Acting Senior Principal State Attorney, also lodged a written statement of arguments on behalf of the respondent. Consideration of mitigation on sentence would depend on our decision in regard to the conviction of the appellant.

Grounds one and three of appeal are worded this way:

1. The Honourable Justices of Appeal erred in law and fact when he (*sic*) failed to correctly re-evaluate the appellant’s evidence, especially his defence of alibi.

2. The Honourable Justices of Appeal erred in law in confirming the conviction of the appellant that was based on the prosecution evidence that was tainted with falsehoods, contradictions and inconsistencies.

Mr *Tumwiine*’s arguments in substance consist of two parts. First he criticised the Court of Appeal on its alleged failure to re-evaluate the appellant’s evidence. Secondly, he criticised the court for relying on evidence which he contended was tainted with falsehoods, contradictions and inconsistencies. We may point out that in presenting the arguments, learned Counsel oscillated from one set to the other.

It is convenient to start with the second leg of learned Counsel’s contentions. According to him,

Bagorogoza Tumusiime (PW1) and Twinomujuni Richard (PW2) were unreliable prosecution witnesses and, therefore, the two courts should not have relied on them to disprove the appellant’s alibi. According to counsel:

“(*a*) PW1 was being employed by the appellant’s father who refused to pay him and this biased him. (the witness)

(*b*) PW2 purportedly met the appellant running with a *panga* and did not mind making an alarm.

These are the same arguments which Ms Nafula had argued on behalf of appellant in the Court of

Appeal. In reply, Mr *Okwanga* argued that the evidence of the two witnesses disproved the appellant’s alibi. We agree with the submission of Mr *Okwanga*. The two witnesses and the appellant were village mates. Each had known the appellant since childhood. The incident happened during broad daytime, at 1:00 pm. These facts were not challenged. No question of mistaken identification was raised nor could be properly raised at all. The two reasons advanced by Mr *Tumwiine* are far-fetched and have no sound basis. In our opinion, the learned trial Judge considered the evidence of the two witnesses and the alibi before he rejected the latter.

The Court of Appeal properly re-evaluated the evidence before it concurred with the trial judge that the two witnesses were credible and that they put the appellant at the scene of crime.

In our opinion, the Court of Appeal, like the trial court, justifiably rejected the appellant’s alibi. We cannot fault any of the two courts. We think that the appellant ran to Tanzania after the murder to look for employment as he claimed. Next Mr *Tumwiine* contended that there were contradictions between the post mortem report on the one hand and the evidence of Tumusiime (PW1) and Mugisha Gideon Safari, (PW3) the teacher, on the other. Counsel appears to argue that although the post-mortem report (exhibit P1) shows that there was only one cut wound, Tumusiime stated that the appellant inflicted two cut wounds on the deceased. He further contended that Safari’s testimony suggests that either the head of the deceased or both the head and the trunk, had been severed off from the rest of the body. Counsel contended that the Court of Appeal should have treated the evidence of PW1 and PW3 as lies and therefore the court should have quashed the conviction. For the respondent, Mr *Okwanga* argued that any of the contradictions are minor and do not go to the root of the prosecution case. He supported the decisions of the two courts.

With respect to Mr *Tumwiine*, we think that the contradictions he pointed out are not material. We perused the record of appeal and we do not find anywhere in the evidence of Tumusiime, where he stated that any part of the body, let alone the head or the trunk, had been severed as claimed by Mr *Tumwiine*.

Further, neither Tumusiime evidence nor the post-mortem report shows that there were two cut wounds.

Mr *Tumwiine*’s arguments regarding contradictions in the evidence of PW1 as to the cuts inflicted on the deceased, are the same arguments which Ms Nafula raised in the Court of Appeal on behalf of the appellant, that court considered the post-mortem report, the evidence of Tumusiime and how the learned trial Judge had evaluated that evidence. The Court of Appeal considered two authorities including the famous case of *Tajar v Uganda* EACA criminal appeal number 167 of 1969, which sets down applicable tests on the reliability of the evidence of a witness who is perceived to have given contradictory evidence. The court found that there was no grave inconsistency between the evidence of Tumusiime and the post-mortem report. The court held that the injury revealed by the report was consistent with the evidence of Tumusiime, namely that the deceased sustained a cut wound. The Court of Appeal therefore agreed with the trial judge that Tumusiime’s evidence was reliable. We respectfully agree with that conclusion. In result, the two grounds have no merit and must fail.

There is no merit in the appeal against conviction and it is accordingly dismissed.

It is now convenient to advert to the supplementary ground of appeal that reads as follows:

That the learned Justices of Appeal erred in law and occasioned a miscarriage of justice in not giving the appellant an opportunity to be heard on the question of mitigation of sentence.

We did not hear counsels’ arguments on this ground. However, earlier in the same session, we considered arguments on a similar ground of appeal in the case of *Zahura v Uganda* (Supreme Court criminal appeal number 16 of 2004) and made a ruling that is applicable to all pending criminal appeals in capital offences convictions, namely that where we uphold a conviction in a capital offence in which the accused has been sentenced to death, we would make an appropriate order as to sentence. Accordingly, as we did in the *Zahura* appeal (*supra*) we exercise our discretion and postpone confirmation of the sentence in this case under Article 22(1) of the Constitution, until the determination of the pending constitutional appeal against the decision of the Constitutional Court in Constitutional Petition number 6 of 2003.

For the appellant:

*Mr Robert Tumwiine*

For the respondent:

*Mr Vincent Okwanga*, Acting Senior Principal State Attorney