**Otule and another v Uganda**

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

**Date of judgment:** 2 March 2005

**Case Number:** 41/03

**Before:** Odoki CJ, Oder, Tsekooko, Karokora and Kanyeihamba JJSC

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

*Whether the court had adequately re-evaluated the evidence.*

*[2] Criminal law – Murder – Deceased attacked and cut with* pangas *in broad daylight – Whether the*

*appellants were responsible for the attack and injuries.*

*[3] Evidence – Identification – Alibi – Corroboration – Single eyewitness – Whether circumstances*

*suitable for identification – Whether the evidence of the deceased’s wife was corroborated.*

**JUDGMENT**

**Odoki CJ, Oder, Tsekooko, Karokora And Kanyeihamba JJSC**: This is a second appeal arising from the decision of the Court of Appeal which confirmed the appellants’ conviction by the High Court, at Mbale, for murder. On 30 November 2002, we heard and dismissed the appeal and promised to give our reasons later. We now give those reasons. The facts of the case are simple. The appellants, Otule Ateker Charles (A1) and Isabirye Peter (A2) are brothers. They both lived with the deceased, Kasakya Zubairi, in Bubulange Village, Buseta Subcounty, in Pallisa District. At some point A2 migrated to another village called Namukai. On the night of 17 to 18 March 1999 while the deceased and his wife, Jamila Kantono, (PW1) were sleeping, one Henry Kifumbo, an LCI Chairman of their village, called out the name of the deceased from outside. Upon realising that it was the Chairman calling, the deceased opened the door of his house. Kifumbo entered the house but declined to take the seat that was offered by the deceased. Instead, he told the deceased that a resident on the village had a problem and that fellow villagers had refused to answer his alarm and yet there was need for help. Kifumbo did not disclose what the problem was nor who the resident was. The deceased left his home in the company of Kifumbo and never returned home that night. In the morning PW1 decided to look for the deceased in the home of Kifumbo, there she learnt that the deceased had, in fact, been taken to Buseta Subcounty Headquarters. PW1 went there in search of the deceased. On the way, she learnt that the deceased was one of the people suspected to have assaulted one Gondoko, a brother of the two appellants. The deceased was by then detained in the cells at Buseta Subcounty Headquarters. Upon arrival she found many people outside, some of whom were armed with *panga*s or sticks. The deceased was taken out of the cell so that he could be escorted to Tirinyi Police Station by one Magino, a Defence Secretary of the LC1. Magino carried the deceased on a bicycle. Strangely the two appellants also followed while riding a bicycle peddled by A1. Soon after, Magino and the deceased returned again followed by the two appellants. At 10:00am, a brother of the two appellants called Otule appeared at the scene armed with a *panga* and a metallic rod, with which he hit the deceased. The deceased fell to the ground. When the deceased attempted to get up, the two appellants set upon him and cut him many times in the face, on the back and head using *panga*s, while asserting that he had assaulted Gondoko. PW1 was then standing about only 10 paces away from where the deceased was being assaulted. Because the appellants were armed with and were welding *panga*s, people who were around feared to intervene to save the deceased. During the process of the cutting of the deceased by the appellants, PW1 became frightened. So she retreated into a disused butchery and continued to watch the cutting of the deceased through a window on the wall of that butchery. The crowd left the scene. So did the appellants. Later a Mr Labani Kirya, the LC5 Chairman of Pallisa District, arrived at the scene in his car. The chairman took the deceased to Pallisa Hospital. PW1 went to the hospital where she found the deceased had already died and the body was in Pallisa Hospital mortuary. She identified the body to a doctor who carried out the postmortem examination. She reported the appellants to the police, as the people who cut and killed the deceased. At the trial both appellants gave sworn evidence, in which each denied the offence. According to A1, on the night of 17 March 1999 while he was at his home he learnt that his brother called Odidi Clement, who lived 2 km away, had been attacked. He went to Odidi’s home where he discovered that Odidi had fled from his home to a neighbour’s home where A1 traced him. Odidi, who had sustained a cut wound, was unconscious. A1 was assisted by three other people to take Odidi to Buseta Health Centre where Odidi was treated, before he regained consciousness. Odidi informed A1 that the deceased was among the people who broke into his house and assaulted him. Later A1 reported the assault of Odidi to LCS and DISO. In course of the day, A1 learnt that the deceased had been arrested and had been taken to Buseta Subcounty Headquarters. A1 visited Buseta Headquarters and discovered that the deceased had been detained there, inside a cell. A1 proceeded to report the assault of Odidi to Tirinyi Police Station, where he was authorised to take Odidi to Pallisa Hospital. While he was at Pallisa Hospital attending to Odidi, the deceased was taken there 3 hours later and died later the same day. A1 was arrested on 13 July 1999 from his home. On the other hand, A2 testified that he lived in Nanoko Village, Ririnyi Subcounty. He denied knowledge of PW1 and of the deceased. He denied the offence and raised an alibi to the effect that on 12 March 1999 he was admitted in Ngora Hospital where he stayed till 29 March 1999. In other words he was away from the scene of crime at the material time. He was arrested by the police on a certain night at 4:00 am. The trial judge believed the prosecution evidence and disbelieved the appellants whom she described as liars. She found PW1 a credible witness who could not be mistaken about the identification of both the appellants at the scene of crime. The judge convicted them and sentenced each of them to death. Their appeal to the Court of Appeal was dismissed. They have now appealed to this Court. A1’s memorandum of appeal contains two grounds while that of A2 contains only one ground. Mr *Kunya*, counsel for A1 argued the two grounds separately. Mr *Mubiru* argued A2’s ground of appeal. We will first consider A1’s appeal. The first ground for A1 is formulated as follows: The learned Justices of Appeal erred in law and fact in upholding the conviction of the appellants on the basis of the unreliable and uncorroborated evidence of the single identifying prosecution witness. Mr *Kunya*, for A1, submitted that the evidence of Kantono, PW1, the only identifying witness was unreliable and was not corroborated. He contended that the trial judge neither warned herself nor the assessors of the possibility of mistaken identification of A1 by Kantono. That evidence on record shows that there was a crowd of people and therefore PW1 must have had to crane her neck in order to see what was taking place (*sic*). He contended that the Court of Appeal did not properly consider the negative factors in this case. Mr *Wagona*, PSA, supported the decisions of the two courts below. He submitted that the trial judge was alive to the issue of identification and argued that there was no possibility of mistaken identification of the two appellants by PW1. In effect, he argued that except for the three brothers, the crowd was not violent and there is no evidence that any other person assaulted the deceased, therefore the two courts were correct in relying on the evidence of PW1. The first ground of appeal in this Court was in effect the first ground of appeal in the court below. In that court Mr Wandera Ogalo, who represented the appellants, in effect made submissions similar to those made before us. He there contended that circumstances were not ideal for correct identification; that the mob could have obstructed Kantono’s view of what took place. So there was a possibility of mistaken identification of the two appellants. In their judgment, the Justices of Appeal stated this in respect of identification: “We have in particular considered the evidence of PW1, who was the only identifying witness. We are satisfied that her evidence could not be anything but the truth. All requirements of proper conditions for correct identification were present. The offence was committed in broad daylight at 10:00am. The appellants were village mates of the witness (PW1) and had been known to her for a long time. The incident itself took a reasonable time to enable PW1 determine who had assaulted her husband, and who had not participated. The witness herself was only 10 paces from the scene of the assault. Even when she got frightened and hid herself, it was in an abandoned butchery where she could still see what was going on. We think that her evidence put the appellants at the scene of the crime. We also think that the alibi of the appellants was correctly rejected.” There are some features in the trial judge’s summing up and judgment that left a lot to be desired. In summing up to the assessors, in respect of A1, the judge was rather unfair. She suggested that A1 was a liar because he denied even the most obvious things. She did not, in her summing up, direct the assessors about the need for corroboration of PW1’s evidence since PW1 was a single identifying witness. Neither did she caution herself in her judgment on the need for such corroboration of the evidence of PW1. Be that as it may, we have reviewed the evidence and have considered the submissions of both counsel for the appellant and of the learned Principal State Attorney. We are unable to accept Mr *Kunya*’s speculation that PW1 had to crane her neck in order to observe what took place. There is no evidence to support this. We are satisfied that the learned Justices of Appeal properly evaluated the evidence and arrived at the correct conclusions on the facts. If any corroboration was required it was provided by A1, who, in his own sworn evidence, stated that he was at the place where the deceased was, on the day the deceased was assaulted. A1’s explanation as to why he visited the scene at 7:30am on the fateful day of 18 March 1999 and by coincidence found a crowd of people there is incredible and not plausible. Once PW1, who was at the scene of crime, was believed as a truthful witness, on the facts of this case, it was inevitable that the guilt of the two appellants had been established beyond reasonable doubt. Therefore, A1’s first ground must fail. These conclusions would, in fact, dispose of the appeal. The second ground of appeal for A1 states: The learned Justices of Appeal erred in law and fact when they failed to subject the evidence on record to a thorough evaluation and, hence, reached an erroneous decision. Mr Henry *Kunya*, for A1, again contended, in respect of this ground, that both the Court of Appeal and the trial judge failed to evaluate evidence especially on the arrest and the investigation of the case in as much as A1 was arrested long after PW1 had reported the murder to the police. Such unexplained delays should be held in favour of A1’s innocence. Mr *Wagona*, for the respondent, conceded that there appeared to be a mistake in the date of the arrest of A1 but that is not fatal. However, the learned Principal State Attorney submitted, on credibility of prosecution evidence, that the trial judge found PW1 a truthful witness as opposed to the two appellants whom he found to be liars. The trial judge saw PW1 and the appellants in the witness box and preferred to believe PW1. The Court of Appeal upheld the findings of the trial judge. We think that the two courts were correct. Ground 2 must fail. The only ground for A2 states that: The learned Justices of Appeal erred in law when they decided that the contradictions and inconsistencies in the prosecution evidence were minor. When arguing the ground, Mr *Mubiru*, counsel for A2, contended that the Court of Appeal did not evaluate the evidence properly and so it did not reach proper conclusions on inconsistencies and various defects. That the courts below only relied on the truthfulness of PW1 to found a case against A2 (*sic*). He pointed out differences in respect of the date of the death of the deceased as reflected in the evidence of the prosecution and on the indictment; he also pointed out lack of date of A2’s arrest. As indicated earlier when discussing A1’s grounds of appeal, Mr Vincent *Wagona*, for the respondent, supported the decisions of the two courts below, although he conceded lack of evidence concerning the arrest of A2. He argued that the evidence of Kantono placed A2 at the scene of crime. On the date of death, Kantono’s evidence is definitive. The deceased left home on the night of 17 March 1999. On the following day ie 18 March 1999, he was assaulted and cut with *panga*s by the appellants in her presence. He was taken to Pallisa Hospital where he died the same day. A1 confirmed the death in his evidence and therefore corroborates PW1. We note that the learned judge did not properly evaluate A2’s evidence of alibi especially as regards A2’s claim that between 12 March and 29 March 1999 he was hospitalised in Ngora Hospital. We do not accept the view of the learned trial judge that the fact that A2’s wife never visited him in hospital is evidence against A2. However, the Court of Appeal held that the trial judge acted properly in relying on the evidence of PW1 whom the judge found to be truthful. The court further agreed with the trial judge in rejecting the alibi. These are two concurrent findings by the two courts on reliability of PW1 and the rejection of the appellants alibi. In spite of the said lapses by the trial judge, we are satisfied that both courts were correct in relying on the evidence of PW1. We are also satisfied that the so called inconsistencies do not affect PW1’s testimony nor the fact of the murder of the deceased on 18 March 1999. We have already held when we discussed ground 1 of A1’s memorandum that the evidence of A1 to the effect that on the material day he was at or near the place where the deceased was assaulted corroborates the testimony of PW1 about A1’s presence at the scene. It is a pity that the prosecution chose to call the barest of evidence in this case without explaining why, but we are satisfied that there is ample evidence to support the conviction of both appellants. Accordingly, the only ground of A2 must fail. It was for the reasons we have given that we dismissed the appeal.

For the first appellant:

*Mr Henry Kunya*

For the second appellant:

*Mr Mubiru*

For the respondent:

*Mr Vincent Wagona*