THE REPUBIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

[CORAM: Egonda-Ntende, Obura &Musota JJA]

CRIMINAL APPEAL NO.38 &47 OF 2012

(Arising from High Court Criminal Session Case No.070 of 2009 at Masaka)

Between

Kazooba Godfrey ==========Appellant No.1

Namuga Annet ========== Appellant No. 2

And

Uganda ==========Respondent

(An appeal from the judgement of the High Court of Uganda [S.A. Choudry, J.,] delivered on 22nd February 2012)

REASONS FOR JUDGEMENT OF THE COURT

Introduction

1. The appellants were indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that on the 7th day of February 2009, the appellants at Mikomaga village in Rakai District murdered Kaweesi Emmanuel. On 22nd February 2012, the learned trial judge sentenced appellant no. 1 to serve a period of imprisonment for 45 years and appellant no. 2 to serve a period of imprisonment for 35 years.

2. The appellants being dissatisfied with the decision of the trial court appealed against both the conviction and sentence on the following ground;

> 'The learned trial judge erred in law and fact when he held that the appellants participated in the murder of Kaweesi Emmanuel'

3. The respondent opposed the appeal.

4. After hearing the appeal we decided to allow the appeal, quash the conviction of the appellants, set aside the sentences imposed upon them and ordered their immediate release from custody. We promised to give our reasons on notice and we now do so.

Submissions of Counsel

5. At the hearing, the appellants were represented by Tusingwire Andrew and the respondent by David Ndamurani, Senior Assistant Director of Public Prosecutions. Mr Tusingwire submitted that there is no evidence on record placing the appellant no.1 at the scene of the crime and participation of appellant no.2 in the crime. The evidence of PW2, a doctor related to the cause of death of the deceased. That PW3, gave evidence of the fight that ensued between the appellant no.1 and the deceased on the night of 16th February 2009 but testified to court that he did not know who participated in the death of the deceased the following day. PW4 witnessed the fight at the bar. He testified that he did not know who murdered the deceased.

6. Mr Tusingwire further submitted that the PW5, the police officer who visited the scene of crime, gave evidence of his findings at the crime scene. That appellant no. 2 (wife to the deceased) in her defence rebutted the evidence of PW5 with regard to the clothes that were found at the scene of the crime. That the appellant no.2 was also a victim of the attack on that fateful night. The evidence of the blood stained clothes at the scene of the crime, not closing the door and failure by appellant no. 2 to raise an alarm was insufficient to sustain a conviction of the offence without other independent evidence. For his submissions, he relied on the case of Akbar Hussein Godie v Uganda HCB 1 2013.

7. He prayed that this appeal be allowed, conviction be quashed and the sentence be set aside.

8. Mr. Ndamurani in reply submitted that the trial judge properly directed himself in convicting the appellants. He submitted that PW3 testified that there was a grudge between the appellant no.1 and the deceased. That the conduct of the appellant after the incident also pointed to his guilt. He contended that appellant no.1 had motive to commit the offence because she had a sour relationship with the deceased husband on account of an alleged extra marital affair with another man and the fact that she did not raise an alarm on the night of the attack. He further submitted that her hiding the blood sustained clothes of her deceased husband pointed to her guilt.

Analysis

9. 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. See Rule 30(1) (a) of the Rules of this Court, Pandya v R [1975] E.A 336, Kifumante Henry Vs Uganda, (SC Criminal Appeal No. 10 of 1997 (unreported), and Bogere Moses & Anor, v Uganda, SC Criminal Appeal No.1 of 1997 (unreported).

10. The prosecution case was that on the 16th day of February 2009, the deceased (Kaweesi Emmanuel) went to the bar of a one Namugetwa Maxensia (PW 3) at Namikikongo to drink alcohol at around 8:00 pm. A fight ensued between the deceased and the appellant no.1. It was alleged that there were conflicts between the accused and appellant no.1. John Kizito (PW4) was also present at the bar. The following day, at around 1:00 am, both the appellants attacked the deceased at his home. They hit him on his head leaving him unconscious. He died on his way to hospital.

11. The appellants denied having participated in the offence.

12. In arriving to the conclusion that the appellant no.1 participated in the commission of the crime, the trial court relied on only circumstantial

evidence. This consisted of the conduct of the appellant no.1 before and after the murder of the deceased which was contained in the evidence of PW3 and PW4. PW3, Namugetwa Maxensia, testified that appellant no.1, the deceased and PW4 were at the bar, drinking alcohol on the night of 16th February 2009 when an argument erupted between them. Appellant no. 1 pushed the deceased against a table. That the argument was about PW4's money. The deceased saw appellant no.1 try to steal PW4's money yet he had been buying them drinks and confronted him. After the fight, the three left the bar for their homes. PW3 testified that he did not know who murdered the deceased.

13. PW4's testimony was similar to that of PW3. He also left the bar after the incident of the argument and the resulting fight and went on his way. He heard about the deceased's death the next day and the subsequent arrest of appellant no.1. He stated that he had never heard of any grudge between the deceased and appellant no.1.

14. Appellant no.1 in his defence testified that PW4's wallet fell from his pocket and he picked it while at the bar. When the deceased saw him and raised an alarm, he told him to stop spoiling his deal (from the money he was trying to steal). Thereafter, an argument ensued but there was no fight. They eventually left the bar and he went back to his home. He stated that he did not have any grudge with the deceased. Appellant no.1 was arrested the following day on his way to Kyotera with Muto, a young man he worked with.

15. The law on circumstantial evidence has been re-stated in a number of cases. In Simoni Musoke v R. (1958) EA 715 at page 718, the Court of Appeal for East Africa stated as follows;

> "... in a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt..."

16. The court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt. We are of the view that the evidence on record is not sufficient to sustain the conviction of either of appellants. The learned judge in implicating the appellant no.1 was of the view that the argument and fight at the bar culminated into a personal grudge between the appellant and the deceased which gave the appellant no.1 motive to murder the deceased. With all due respect, this is farfetched. The circumstances surrounding the arrest of the appellant no.1 do not indicate that he was trying to run away from the area. He stated that he was requested by Muto, one of the boys he used to work with to take him to Kyotera on his motor cycle to run some errands with regard to their work.

17. There is also no evidence on record implicating appellant no.2 in the murder of the deceased. The circumstances under which appellant no.2 handled the blood stained clothes of the deceased are explainable. She testified that upon returning from hospital, with the help of an elder person, she removed the blood soaked clothes from her deceased husband's body, dressed the body in a 'kanzu', placed the clothes in the bathroom. It would be suspicious if the clothes were hidden or thrown away which was not the case.

18. She also testified that she was a victim of the attack. That she raised an alarm upon the attack. However, these facts were not taken into consideration by court. PW5 in his testimony stated that appellant no.2 said she did not make an alarm when they were attacked and when asked why, she kept quiet. The judge in his decision relied on this evidence which is hearsay and should not have been admitted into evidence in the first place. The fact that there was no forced entry into the house has no bearing on the participation of appellant no.2 in the crime.

19. It is well established that in all criminal cases, the burden of proof is upon the prosecution to prove the guilt of the accused person beyond all reasonable doubt. The burden never shift save in exceptional cases provided by the law. See Woolmington v D.P.P, (1935) AC 462, Miller v Minister of Pensions, [1947] 2 ALL E.R372. By the accused's plea of not guilty, the accused puts in issue each and every ingredient of the offence

with which he is charged and the prosecution has the onus to prove each and every ingredient of the offence before a conviction is secured. See Ssekitoleko v Uganda, [1974] EA 531

20. We are satisfied that the prosecution failed to discharge its burden of proof. The evidence adduced to implicate appellant no.1 in the crime rests entirely on the conduct of the appellant before and after the murder of the deceased. It is weak and leaves doubt as to the guilt of the appellant. Similarly, there is no evidence pointing to the participation of appellant no.2 in the crime save for mere suspicion.

21. We also take note that this case was wholly heard by Lady Justice Elizabeth Ibanda Nahamya while Mr Justice S.A. Choudry only purported to sum up to the assessors, write and deliver the judgment in this case. This is improper and contrary to section 20 of the Judicature Act, which states in part,

> 'Subject to any written law, every proceeding in the High Court shall, so far as is practicable and convenient, **be heard and disposed of by a single judge**; and proceedings in any action subsequent to the final judgment or order shall, so far as is practicable and convenient, be taken before the judge before whom the trial or hearing took place.'

22. In the case of Kyakurugaha v Uganda C.A Criminal Appeal No. 51 of 2014, (unreported) this court in interpretation of the above section stated;

> 'Section 20 of the Judicature Act requires in our view one single judge to try and determine a proceeding so far as it is practicable and or convenient. That single judge must be one and the same rather than the possibility of multiple judges hearing bits and pieces of the case and finally the judgment being pronounced by the last judge who handles the file. This must be the antithesis of a fair trial.
>
> Except where it has been established that it is no longer practicable or convenient, only a judge who has tried the case, that is heard all the evidence in the case should be the one to dispose of that case on the basis of the evidence adduced before

him. A judge who has not heard and seen the witnesses testify at first instance to make the decision at that instance that finally disposes of the matter leaves much to be desired. The law in our view assumes that the trial will take place before a single judge who will dispose of that proceeding. It is not expected that the matter will be heard by a multiplicity of judges in a cumulative manner with the last one giving judgment in the matter.'

23. In that case, the prosecution case was heard by one judge and the defense by another judge who delivered the judgment. The judge who wrote the judgment in this instant case relied on the record of proceedings. He did not get the opportunity to see and hear the witnesses testify. Despite the fact that notes on the demeanor of the witnesses were taken, he did not get the opportunity to assess the witnesses himself to determine the truthfulness of their testimonies. It is not proper for a judge who has not heard the witnesses testify to write a judgment when the judge who heard the case is available. There is no reason available on record as to why the judge who tried the case did not deliver the judgment. This was a fatal irregularity.

24. We reiterate what this court stated in the case of Kyakurugaha v Uganda (supra) in the following words;

'The position that obtains in respect of proceedings before the High Court is different from the proceedings in the Magistrates courts where the Magistrates Courts Act, vide Section 144 specifically authorises multiple magistrates to try a criminal matter. It states,

"144. Conviction or commitment on evidence partly recorded by one magistrate and partly by another.

(1) Whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the trial and is succeeded, whether by virtue of an order of transfer under this Act or otherwise, by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the

> evidence so recorded by his or her predecessor, or partly recorded by his or her predecessor and partly by himself or herself, or he or she may re summon the witnesses and recommence the trial; except that—
> (a) in any trial the accused may, when the second magistrate commences his or her proceedings, demand that the witnesses or any of them be re-summoned and reheard;
> (b) the High Court may, whether there is an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was held, if it is of opinion that the accused has been materially prejudiced by that evidence, and may order a new inquiry or trial.
> (2) Whenever any magistrate, after judgment has been delivered in any case, but before sentence has been passed, ceases to exercise jurisdiction in the case and is succeeded, whether by virtue of an order of transfer under this Act or otherwise, by another magistrate who has and who exercises that jurisdiction, the magistrate so succeeding may sentence or may make any order in the case which he or she could have made if he himself or she herself had delivered judgment in the case."

There is no similar or equivalent provision in the Trial on Indictments Act or the Criminal Procedure Code or the Judicature Act. With regard to proceedings in the High Court the operating provisions are section 20 of the Judicature Act. It may be possible, under that section, where it is shown that it is not practicable or convenient for the judge who started the trial to complete it, for another judge to take over the part heard case and continue with the trial on the record of proceedings before him. This is the exception rather than the rule.

In this particular case the judge who wrote the judgment relied on the record of proceedings with regard to the case for the prosecution as he did not see or hear the witnesses testify. He was at a disadvantage in assessing the veracity

of these witnesses' testimony not having had the opportunity to watch their demeanour and comport in court. No reason is available on record as to why the judge who tried the case initially; heard all the prosecution case and ruled that there was a case to answer for all defendants did not complete the trial of this case.

As a matter of practice we would encourage that the traditional practice that had traditionally obtained at the High Court where one single judge conducts wholly the proceedings in each criminal case and disposes of the matter be maintained. Where for some reason that is not practicable or convenient the new trial judge should initially determine, after hearing from the parties, whether or not the trial should proceed *de novo* or on the old record.'

25. There were other irregularities at this trial. Though the learned trial judge stated that he summed up to assessors there are no summing up notes on the record of this case. This was contrary to section 82 (1) of the Trial on Indictment Act which requires the judge to make a note of the summing up. The learned trial judge differed from the advice tendered by assessors to acquit appellant no.1 without giving reason as to why he differed with the joint assessors' opinion. This was contrary to section 82 (3) of the Trial on Indictment Act.

26. We shall set out below the said relevant provisions.

'82 Verdict and sentence

(1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record such opinion. **The judge shall take a note of his or her summing up to the assessors.**

(2) The judge shall then give his or her judgment but in doing so shall not be bound to conform with the opinion of the assessors.

(3) Where the judge does not conform with the opinion of the majority of the assessors, he or she state his or her reasons for departing from their opinions in his or her judgment.'

27. Though the learned trial judge was free to depart from the assessors' opinion he was obliged in his judgment to give reasons why he differed from the joint opinion of the assessors to acquit the appellant no.1. He failed to do so. This was a fatal omission.

28. For those reasons we allowed the appeal; quashed the conviction and set aside the sentences imposed against both appellants.

Signed, dated and delivered at Masaka this 31st day of July 2018.

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Stephen Musota
Justice of Appeal