THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 217 OF 2014

RUTABAZUKA PATRICK.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal against conviction and sentence of the High Court sitting at Nakawa before Hon. Justice Wilson Masalu Musene dated 7th day of May, 2014 in High Court Criminal Session Case No. 377 of 2012)

Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

JUDGMENT OF THE COURT

Introduction

This is an appeal against conviction and sentence of the High Court (Wilson Masalu Musene, J) wherein the appellant was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 and sentenced to life imprisonment.

Brief background

The facts of this case as accepted by the learned trial Judge are that on the 21st day of June, 2011, the deceased, Ekau Robert and his friends

Ebalu went to Kyoga Trading Centre to do some shopping and thereafter went for drinks at one Anne's bar. Ebalu left the deceased at the bar and he (the deceased) did not return home that night.

The following day, Ebalu learnt that his friend had been attacked. The deceased was rescued and taken to Mulago Hospital where he revealed that when he left Anne's bar, he was attacked by a group of people who beat him severely and left him for dead. He mentioned the appellant as one of the attackers, together with one Musisi. The deceased subsequently died at Mulago Hospital. Consequently the appellant was indicted, tried, convicted and sentenced to life imprisonment for the offence of murder.

Being dissatisfied with the whole decision of the trial court, the appellant now appeals to this court on the following grounds;

1. ***The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record involving the testimony of PW2 as to the deceased's warrant card that was recovered in the toilet, the hearsay evidence of PW2 concerning the recovered items, the circumstantial evidence of PW2 and PW3, the contradictions in the prosecution's case, uncorroborated evidence of PW2 of the dying declaration of the deceased which he made to him and arrived at a wrong conclusion that the appellant was guilty of the offence of murder contrary to sections 188 and 189 of the Penal Code Act without any evidence on record which caused a miscarriage of justice.***
2. ***The learned trial judge erred in law and in fact when he failed to afford the appellant a fair trial which proceeded on facts different from those which the prosecution presented before court in the indictment and the summary of the case upon which the appellant took plea which caused a serious miscarriage of justice.***
3. ***The learned trial judge erred in law and in fact when he failed to take note of the poor defense which the defense counsel accorded to the appellant***

which highly affected his right to a fair trial which caused a miscarriage of justice.

4. ***The learned trial judge erred in law and in fact when he imposed a harsh and ambiguous sentence of life imprisonment upon the appellant and thereby occasioned a miscarriage of justice.***

Representation

Mr. Bruno Sserunkuma, learned counsel represented the appellant on state brief while Ms. Nelly Asiku, learned Senior State Attorney represented the respondent. The appellant was present in court.

Submissions by the appellant

In relation to the purported admission of the appellant to PW2, counsel submitted for the appellant that, since PW2 was a police officer he ought to have recorded the alleged admission as a charge and caution statement and follow the procedures of recording the same, which procedure was not followed by the witness. Counsel argued that the prosecution did not prove that the identity card was recovered from the appellants pit latrine.

As regards hearsay evidence of PW2, counsel submitted that, it was hearsay evidence, in that, the witness testified to have been told by a one Nakyanzi that immediately the deceased left the bar, the appellant followed him. He argued that Nakyanzi ought to have been called as a witness by the prosecution to testify and prove these facts.

In relation to the issue of circumstantial evidence, counsel submitted that, the fact that the items belonging to the deceased were found in possession of the appellant did not imply that the appellant actually killed the deceased. He pointed out that appellant would have been

charged with theft instead. He further submitted that the deceased was staying with another person who was not called as a witness.

In respect of an uncorroborated dying declaration, counsel submitted that, the learned trial judge relied on an uncorroborated evidence of PW2. He relied on ***Kazarwa Henry v Uganda,*** *Supreme Court Criminal Appeal No. 17 of 2015,* where court held that evidence of a dying declaration must be corroborated.

Counsel retracted his submission on contradictions in the prosecution's evidence.

On ground two, counsel submitted that, the trial of the appellant proceeded on matters and facts which were completely set out in the summary of the case which were presented before court. He argued that the contents of the case summary were different from the evidence adduced before court against the appellant and this denied the appellant a fair trial.

On ground three, counsel relied on ***Kawooya Joseph & Ors v Uganda,*** *Supreme Court Criminal Appeal No. 50 of 1999* and submitted that the defense counsel and the trial court owed a duty to the accused person to conduct a defence diligently and in the best interest of the accused.

On ground four, counsel submitted that the sentence of life imprisonment is harsh and excessive in the circumstances. He relied on ***Livingstone Kakooza v Uganda,*** *Supreme Court Criminal Appeal No. 17 of 1993*, where court reduced a sentence of 18 years to a sentence of 10 years for the offence of murder and submitted that the sentence of life imprisonment be substituted with a sentence of 10 years imprisonment considering the fact that the appellant was a first offender.

Submissions by the respondent

The learned Senior State Attorney opposed the appeal and supported conviction and sentence of the High Court. In reply to the first ground, counsel conceded that the evidence of PW2 is hearsay evidence but it is admissible under section 30 of the Evidence Act Cap. 6. She argued that it amounted to a dying declaration that must be corroborated. According to counsel, this evidence was corroborated by the evidence of PW3, the Scene of Crimes Officer.

Further, counsel submitted that, the circumstantial evidence was enough to identify and show the participation of the appellant in the commission of the offence.

In reply to the second ground, counsel submitted that, court should rely on the evidence of the witnesses that testified in court but not the summary of the case as alluded to by counsel for the appellant. Counsel pointed out that the charge of murder was read to the appellant and evidence was led to prove the participation of the appellant in the commission of the offence.

In regard to the third ground, counsel submitted that, the appellant was diligently represented throughout the trial. She argued that when a case to answer was found against the appellant, court indicated all options that were open to the appellant.

In respect of the fourth ground, counsel submitted that, the sentence of life imprisonment is legal since the appellant was convicted of the offence of murder which attracts a maximum sentence of death. She argued that both mitigating and aggravating factors were considered by the learned trial judge before sentencing the appellant. Counsel asked

court to uphold conviction and sentence of the lower court and dismiss the appeal for lack of merit.

Consideration by court

We have carefully listened to the submissions of both counsel, read the court record and the authorities cited to us. As a first appellate court, and in accordance with the provisions of Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10, we have to subject the evidence adduced at the trial to fresh appraisal and scrutiny; and to reach our own conclusion thereon. However, in doing so we must not disregard the judgment of the trial court against which this appeal lies. This duty is well illustrated in numerous decided cases. In ***Kifamunte Henry v Uganda,*** *Supreme Court Criminal Appeal No. 10 of 1997*, the Supreme Court reaffirmed the duty when it stated as follows;

> ***"We agree that on first appeal from a conviction by a judge, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole, and its own decision thereon. The first appellate court has a duty to review the evidence of the case and reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering it."***

Other authorities on this position of the law include ***Pandya V Republic***, *(1957) EA 336 and* ***Bogere Moses V Uganda***, *Supreme Court Criminal Appeal No. 1 of 1997*. Important to note in the authorities cited above is that in the exercise of the duty to make fresh appraisal of evidence, as a first appellate court, we must bear in mind that we have not had the benefit of observing the witnesses testify in court and so, our competence to pronounce ourselves on the issue of the demeanor of the witnesses is limited.

At the trial, the appellant did not raise a defense, he chose to keep quiet. However, he was not required to prove the offence alleged against him as the burden of proof lies upon the prosecution to prove its case beyond reasonable doubt. In doing so, the prosecution led evidence of PW1, Kiwanuka Geofrey, who identified the deceased at the scene of crime, PW2, AIP Egesa Peter Ogai, the Investigating Officer and PW3, Olupot Emmanuel, the Scene of Crime Officer.

PW1 testified that he was at home with Ssalongo Masanzo who told him that a man had collapsed near his home. He found there a man who he identified as Robert, a police officer in civilian clothes. He testified that when he asked him what had happened, the deceased told him that he was attacked by thugs who took his money, telephone and identity card. The deceased requested him to take him to the hospital. PW1 called Ojambo, a police officer who sent a patrol vehicle which took the deceased to hospital.

PW2, testified that when he received a call from PW1, he rushed to the scene. He found that the deceased was beaten seriously, was half naked and had defecated on himself. He called a patrol vehicle which took him to Mulago Hospital. He stated that when he talked to the deceased, the deceased talked with difficulty that two men followed him from the bar and beat him. He identified them as Patrick and Musisi. He also stated that parts of the exhibits were recovered from the appellant's home; that is a warrant card belonging to the deceased which was recovered from the appellant's pit latrine, a piece of soap and a green T-shirt from the appellant's home.

He testified that the appellant admitted that he threw the warrant card in the pit latrine. He stated that he was told by one Nakyazi that immediately the deceased left the bar, the appellant followed him.

PW3, testified that in their investigations, they recovered a T-shirt, khaki like, pieces of soap, a torn trouser from the appellant's home. He stated that:-

> ***"We interrogated the accused who told us that he had dropped the documents of the deceased in the toilet. When the accused was arrested, he led us to recover all the mentioned exhibits including the bar and his residence. The accused is the one who revealed that the identity card and notebook were in the toilet. I interrogated the accused. He admitted having met the deceased in the bar and that it was the deceased who attacked him first."***

The 1st, 2nd, and 3rd ingredients are not in dispute. The prosecution proved beyond reasonable doubt that Ekau Robert is dead, his death was unlawful and that the death was caused with malice aforethought due to the body parts injured. However, what is in contention is the participation of the appellant in the commission of the offence. The prosecution relied on the evidence of PW2 and PW3 to connect the appellant to the crime.

PW2 gave evidence of a statement made by the deceased as to the cause of his death. He testified that when he talked to the deceased in the hospital, the deceased mentioned the names of the appellant and one Musisi as persons who attacked him. This evidence qualifies as a dying declaration as provided for under section 30 (a) of the Evidence Act Cap. 6. It provides as follows:-

30. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases—

(a) when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question;

The law regarding dying declarations is well settled. The law demands that such evidence be corroborated by independent evidence to secure a conviction. See: ***Tindigwihura Mbahe v Uganda,*** *Supreme Court Criminal Appeal No. 9 of 1987.* We have carefully read the court record and we find that the learned trial judge properly directed himself on the law of a dying declaration and the need for its corroboration. We find this corroboration in the evidence of PW2 and PW3 who testified in court that the appellant led them to his residence where they recovered the deceased's belongings including his (deceased) police identity/warrant card which was recovered from the appellant's pit latrine. PW3 further testified that he took photographs of the recovered items. These items were identified by him in court and admitted as exhibits. Among the many photographs exhibited was P12, a police identity/warrant card identified by PW3 as one of Ekau Robert, the deceased. We therefore find no reason to fault the learned trial judge. This ground therefore fails.

The case against the appellant was also dependant on circumstantial evidence. The question is whether the trial court subjected it to close scrutiny as is required. This requirement was emphasized in ***Katende Semakula v Uganda,*** *Supreme Court Criminal Appeal No. 11 of 1994,* where it was stated as follows:-

> ***"Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."***

The circumstantial evidence relied upon by the trial court to convict the appellant is that of PW2 who testified that he was told by one Nakyanzi that the appellant went following the deceased. This amounts to hearsay evidence which cannot be relied upon even if it was conclusive unless it falls under the exceptions listed under section 30 of the Evidence Act which is not the case in the instant case.

The other piece of circumstantial evidence relied on by the learned trial judge to convict the appellant is the admission by the appellant in relation to the recovered items from the appellant's residence. Both PW2 and PW3 testified that the appellant led them to where he had thrown the deceased's documents. Their evidence corroborates one another.

This evidence is supported by law under section 29 of the Evidence Act. It stipulates as follows:-

> **29. Information leading to discovery of facts.**

"Notwithstanding sections 23 and 24, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

This court in ***Odong Ronald v Uganda,*** *Criminal Appeal No. 048 of 2010,* held that:-

"The finding of the gun and ammunition at the place and location first described by the appellant to PW5 D/Sgt Kilama Ben speaks volumes for the credibility of that information, because only a person who participated in the commission of the crime could have given details leading to the discovery of the gun, live ammunition, and the rain coat that had been described by other witnesses. The appellant volunteered the information, and led the search party to the place where the gun was found without any apparent coercion, leading to the irresistible conclusion that his statements were true and the inference of his guilt."

The learned justices of appeal in the above case cited ***Kedi Martin v Uganda,*** *Supreme Court Criminal Appeal No. 11 of 2001* where the supreme court held as follows:-

"The basic law governing the admissibility of a confession made by a person accused of a criminal offence, as evidence in his or her trial, is contained in section 24 and 26 of the Evidence Act. Needless to say at the outset that the said law comes into play when the accused person retracts or repudiates a confession attributed to him or her. Section 24 renders inadmissible, any confession made by person in custody of a police officer, unless it is made in the immediate presence of a magistrate or a police officer of or above the rank of assistant inspector. It does not apply to a confession made by a person who is in custody, or who is in the custody of anyone other than a police officer. See Babyebuza Swaibu v Uganda, Supreme Court Criminal Appeal No. 47 of 2000(unreported) which we decided in the same session. Section 25 however, applies to all confessions by accused persons wherever

and whenever made, and renders inadmissible, notwithstanding of the provisions of section 24 and 25, so much of any information, (including a confession), received from an accused person, as distinctly leads to the discovery of a material fact which is disposed to at his trial as so discovered. The ultimate objective underlying these provisions is to avoid receiving in evidence, and receiving upon, false confessions. This is underscored by the provisions of section 29 A whose rationale must be that the discovery of the 'fact' confirms the truth of the 'information'; see Babyebuza Swaibu v Uganda (supra)."

In view of the above cited authorities, we find that there was sufficient circumstantial evidence on record to sustain a conviction of murder in this case against the appellant. Ground 1 therefore fails.

In respect to ground two, we note that the trial court is not bound by the evidence listed under the summary of the case. Its duty is to evaluate the evidence adduced in court and reach a decision which in this case the trial court did before he came to his decision.

As regards ground three, we agree with the submissions of counsel for the respondent that the appellant was diligently represented throughout the trial and we find that the appellant was accorded a fair trial because he was given an opportunity to raise his defence. We find no merit in grounds 2 and 3 of appeal which are hereby dismissed. The conviction against the appellant is upheld.

In respect of the appeal against sentence, this Court has limited discretion to interfere with the decision of the trial Court on sentence.

In ***Kiwalabye Bernard Vs Uganda***, *Supreme Court Criminal Appeal No.143 of 2001*. It was held that;-

"The appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

Taking into account the fact that the appellant is a first offender, was aged only 34 years at the time he ought to be given an opportunity to reform. However, murder is a heinous and serious offence that carries a maximum sentence of death.

In ***Kamya Abdullah & 4 others V Uganda***, *Supreme Court Criminal Appeal No. 24 of 2015,* the appellants were part of the group that killed the deceased. They were convicted and accordingly sentenced to 40 years imprisonment, this Court substituted the sentence of 40 years imprisonment with 30 years imprisonment. On further appeal the Supreme Court reduced the sentence to 18 years imprisonment.

In ***Kasaija David v Uganda***, *Court of Appeal Criminal Appeal No. 128 of 2008*, the appellant was a first offender and sentenced to life imprisonment for the offence of murder. On appeal, this court reduced it to 18 years imprisonment.

In ***Higenyi Andrew Paulo v Uganda***, *Court of Appeal Criminal Appeal No. 0085 of 2008*, the sentence of life imprisonment was reduced to 20 years for the offence of murder.

This court in ***Befeho Iddi v Uganda,*** *Court of Appeal Criminal Appeal No.264 of 2009*, reduced a sentence of life imprisonment to 30 years for the offence of murder.

In ***Bwarenga Adonia vs Uganda***, *Court of Appeal Criminal Appeal No. 276 of 2009,* the appellant murdered two people and was sentenced to suffer death. On appeal, this Court reduced the sentence to 30 years imprisonment.

In view of the above cited cases, we find the sentence of life imprisonment harsh and excessive because it is out of range of the sentences imposed by this court and the Supreme Court for the offence of murder. This ground of appeal also included an issue that the sentence was ambiguous, however, counsel did not submit on this issue. Nevertheless, we do not find this sentence ambiguous in any way.

Taking into account all the circumstances of this case and considering the sentencing range in the above cited authorities, we consider a sentence of 25 years imprisonment to be appropriate, since the appellant spent five years on remand, he shall now serve a term of 20 years imprisonment commencing from 7th May, 2014 when he was convicted.

Dated at Kampala this 1st day of May 2019.

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Elizabeth Musoke

Justice of Appeal

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Hellen Obura

Justice of Appeal

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Ezekiel Muhanguzi

Justice of Appeal