THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

CRIMINAL APPEAL NO. 211 OF 2009

KIZITO DAVID Alias MAGYE MAGYE:::APPELLANT

VERSUS

UGANDA:: RESPONDENT

(Arising from High Court Criminal Session Case No. 010 of 2008 before Hon. Mr. Justice Eldad Mwangusya (as he then was) dated 4th November 2009)

JUDGMENT OF THE COURT

Introduction

This is an appeal against the decision of Eldad Mwangusya, J (as he then was) in which he convicted the appellant on two counts of murder contrary to Sections 188 and 189 of the Penal Code Act and sentenced him to suffer death.

Background to the Appeal

The facts giving rise to this appeal as far as we could ascertain from the court record were that Byron Talemwa, a Post Bank Manager, Kakuru Richard a Lieutenant in the Uganda People's Defense Forces (hereafter known as the deceased persons) and Aseni Kirya (PW18) were guests at a party hosted by Namara Mbabazi Collins (PW5) at Universe Girls Secondary School, Kisaasi. They left the party at about 11:00 pm and according to PW18, they did not go home straight. Instead they passed through Kisaasi Trading Center where they had a drink in three different places. As they were retiring to their homes they met A7, Tom Mukungu carrying Namakula Lydia (PW16) on his motorcycle. Tom Mukungu was a

boda boda operator and he had been sent from the home of a one Charles to purchase soda. There was another party at the home of the said Charles. There was a scuffle between Tom Mukungu and the two deceased persons who were in the company of PW18. Following the scuffle, PW16 rushed to the party at the home of Charles and sought assistance from the revelers at the party who in turn rushed to the scene where the deceased were. While PW18 managed to escape from the assailants, the two deceased persons were assaulted and died at the hands of the mob, who burnt them to death. The police later visited the scene of crime and removed the bodies of the deceased. The police arrested a number of villagers including the appellant (Kizito David). They were tried and at the end of the trial, the appellant together with Tom Mukungu were found guilty, convicted on two counts of murder and were sentenced to suffer death on both counts but the sentence on the second count being suspended.

Being dissatisfied with the decision of the learned trial Judge, the appellants appealed to this Court against both conviction and sentence. However before the appeal was heard, Tom Mukungu (the 2nd appellant) died in Prison. The 1st appellant filed a memorandum of appeal with the grounds set out as follows:

1. *"The learned trial Judge erred in law and fact when he convicted the appellant on the basis of unreliable and inconclusive circumstantial evidence.*
2. *The learned trial Judge erred in law and fact when he rejected the appellant's alibi which was plausible.*
3. *The learned trial Judge erred in law and fact when he imposed a procedurally irregular, manifestly harsh and excessive sentence against the appellant."*

Representations

At the hearing of this appeal, Mr. Nsubuga Samuel holding brief for Mr. Henry Kunya represented the appellant while Mr. Nelly Asiku a State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellant

At the commencement of the hearing, Mr. Oluka Onanyang Principal Officer II, Upper prison Luzira informed court that a report was furnished from prison authority indicating that the 2nd appellant died from prison. Counsel for the appellant pointed out that the appeal of the 2nd appellant abated upon his death and prayed that this Court so finds and allows the appeal of the 1st appellant to proceed. His prayer was allowed and he adopted the written submissions and the list of authorities filed by Mr. Henry Kunya on 15/3/2019 subject to some minor amendment. Counsel for the respondent prayed to make oral reply and he was allowed by this Court.

On ground 1, counsel submitted that the learned trial Judge erred in relying on the evidence of the manner of the appellant's arrest. He argued that it is very incomprehensible for someone who is a fugitive to run into a single room with a door left wide open simply awaiting arrest by Police Officers. In his view, the arrest of the appellant would have been more credible if evidence of the defence secretary who led PW8 to the appellant's house had been availed. He further contended that the evidence of PW16 Namakula Lydia, fell short of confirming the version of PW8 regarding the appellant's involvement and arrest. Regarding the blood stains on the appellant's clothes and nails, counsel submitted that the appellant explicitly pointed out that he was beaten upon arrest and resultantly bled. He added that no efforts whatsoever were made by the prosecution to rule out whether the blood stains found on the appellant's nails were a result of the beating or linked to the deceased persons. Counsel therefore submitted that it was erroneous for the learned trial Judge to convict the appellant on such unreliable and inconclusive pieces of circumstantial evidence. He relied on the case of ***Mulindwa James vs Uganda, SCCA 23 of 2014*** to support his submissions and he prayed that this Court allows this ground of appeal.

On ground 2, counsel submitted that whereas the learned trial Judge took cognisance of the appellant's alibi in his judgment at page 219 of the record of appeal but he never discussed it in detail which was erroneous. Further, that having erroneously found that the circumstantial evidence against the appellant was strong to link the appellant to the alleged offence, the trial Judge disregarded the appellant's plausible defence to the detriment of the appellant. Counsel contended that the appellant's alibi was not disproved. He relied on the case of ***Oyee George vs Uganda, CACA 159 of 2003*** to support his submissions and he prayed that this ground be allowed.

Regarding the ground on severity of sentence, counsel submitted that it was procedurally irregular for the learned trial Judge to sentence the appellant to suffer death, the same having been outlawed by the Supreme Court in the decision ***Susan Kigula vs Uganda, SC Constitutional Appeal No. 03 of 2006.*** Secondly, counsel submitted that whereas there were several compelling mitigating factors raised in favor of the appellant for example; being a first offender, having family responsibilities, the learned trial Judge totally ignored them and imposed the outlawed mandatory death sentence against the appellant without recourse to the said consideration. Thirdly, counsel submitted that there was incontrovertible evidence that there was involvement of mob justice. In conclusion, counsel submitted that it was erroneous for the learned trial Judge to impose a death sentence without having fully appreciated the probable role of the appellant in the alleged commission of the said offences.

He invited this Court to re-appraise the evidence on record and accordingly allow this appeal, quash the conviction and set aside the death sentence. He added that in the event that the conviction is upheld, the death sentence be substituted with an appropriate custodial sentence.

The Respondent's reply

Counsel opposed the appeal and submitted on ground 1 that much as the blood samples on the appellant's finger nails was of limited genetic evidence, it corroborated the other evidence on record regarding the appellant's subsequent conduct. On ground 2, counsel submitted that the appellant was placed at the scene of crime by the evidence of PW15 and the DNA report. Regarding the sentence, counsel conceded that a sentence of death penalty was harsh and excessive in the circumstances of this case since the appellant was a first offender. He prayed that this Court substitutes it with a sentence of 30 years imprisonment. He relied on the case of ***Muhereza Bosco and anor vs Uganda, CACA No. 066 of 2011*** which gives the range of sentences in similar offences as 30 years imprisonment.

In rejoinder, counsel for the appellant submitted that the limited genetic evidence could not be relied upon to convict the appellant in the absence of corroboration. Regarding sentence, counsel proposes a sentence of 20 years imprisonment from the date of conviction.

Decision of Court

We are aware of our duty as the first appellate Court under ***Rule 30 of the Judicature (Court of Appeal Rules) Directions.*** We have the onus to re-appraise the evidence and draw our own inferences of fact. This duty of the first appellate court was elaborately stated by the Supreme Court in ***Baguma Fred vs Uganda, SCCA No. 7 of 2004*** as follows;

> *"The first appellate court should reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court."*

It is also trite law that an accused person is convicted on the strength of the prosecution case, and not on the weakness of the defence case as was held in ***Akol Patrick & Others vs Uganda, Court of Appeal Criminal Appeal No. 60 of 2002.*** We are also alive to the cardinal principle of law that prosecution has to prove the case beyond reasonable doubt.

Bearing in mind the above principles of law, we shall proceed to consider the 3 grounds of appeal. On ground 1 the appellant faults the learned trial Judge for convicting him on the basis of unreliable and inconclusive circumstantial evidence which includes; the manner of his arrest and the blood stains on his clothes and finger nails.

The principles which courts apply in deciding cases based on circumstantial evidence were well summarized by the Supreme Court in ***Akbar Hussein Godi vs Uganda, SCCA No. 03 of 2013***, as follows:

> *"There are many decided cases which set out the relevant principles which courts apply in deciding cases based on circumstantial evidence. In the case of Simon Musoke vs R. (1958) E.A. 715 at page 718H, the Court of Appeal for East Africa held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. See also Teper vs R. (1952) 2 ALLER 447. Also see Andrea Obonyo & Others vs R. (1962) E.A. 542 where the principles governing the application by courts of circumstantial evidence were considered."*

The Supreme Court in ***Janet Mureeba and 2 others vs Uganda, Supreme Court Criminal Appeal No. 13 of 2003*** stated that;

> *"Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused."*

The above authorities clearly set out how courts ought to deal with circumstantial evidence. Having stated that position of the law, we now proceed to re-appraise the

evidence on record and come up with our own conclusion as to whether the inculpatory facts in this case are incompatible with the innocence of the appellants, and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The learned trial Judge relied mainly on the evidence of PW8, Detective Constable Charles Kakaire who was one of the officers who effected arrest of the appellant. PW8 testified that on 2/12/2007, he together with Detective Constable Turihamwe Felix went to the crime scene in Kisaasi where they gathered information from Namakula Lydia (PW16) that the appellant was the first to arrive at the scene of crime. As a result of this information, the Defense Secretary led them to the appellant's house where they found the door open.

PW8 entered with Turihamwe and found the appellant hidden under the bed. They pulled him out and saw that the army green trouser he was putting on had blood stain on its lower part and the blue shirt he wore also had some blood stain on its sleeves. PW8 added that there were suspected blood stains on the appellant's nails as well. Furthermore, that they arrested the appellant and took him to the crime scene where they informed him of the reason of his arrest and thereafter took him to Kiira Road Police Station where he was handed over to Detective Sergeant Rutagira. In cross examination, PW8 confirmed that there were suspected blood stains which were scattered at the scene of crime. He added that the appellant was the first to be arrested and on reaching the scene they asked the appellant to sit down.

In his defence, the appellant put up an alibi and stated that on that fateful night he attended a party at Charles' home and he left the party between 12:00 midnight and 12:40 am to go back home. He remained at home until 7:30 am. Special Police Constable and Policemen came to his house and found him sleeping on his bed, they entered and started beating him all over the body using batons. He started bleeding from the head, right hand

and on the legs. He was put on a patrol vehicle and taken to the crime scene where he found around 20-25 people already seated. It was his evidence that he heard about the deceased's death from the police at about 8:00 am. The appellant admitted that he made and signed a police statement which he identified in court but said he could not remember having said some of the things that were recorded in the statement. He specifically denied the part where he was recorded to have narrated the incident that took place on the fateful night.

The learned trial Judge observed that there was no direct evidence to point to the appellant's participation in the killing of the deceased. However, he found that the appellant's participation mainly depended on circumstantial evidence relating to his arrest by PW8 and it is upon this evidence that he found the appellant guilty and convicted him. The learned trial Judge at page 232 of the court record stated as follows;

> *"The most damning evidence was that contrary to the accused's story that from the party he went home and slept in his bed where he was arrested from the evidence which was not contradicted in cross examination was that the door of his room was found wide open and was found hiding under his bed which to me is inconsistent with his innocence. The inference to be drawn from this testimony is that the accused hurried from the scene with blood stains on his clothes, had no time to close his door to remove the clothes and instead hid under the bed from where he was pulled."*

The learned trial Judge referred to the authorities of ***Janat Mureeba and anor vs Uganda (supra)*** and ***R vs Kipkening Arap Kosile and anor, (1949) 16 EACA 135*** on the test to be applied in cases wholly dependent on circumstantial evidence. He then concluded as follows;

> *"Applying the above tests I am of the view that the evidence of the circumstances under which A1 was arrested with the blood stains on him are not capable of explanation upon any other reasonable hypothesis than that of guilty. In other words, his conduct was inconsistent with his innocence."*

We have perused the record as a whole and looked at the evidence adduced by the prosecution against the appellant and the defence evidence as given by the appellant. The evidence the learned trial Judge relied on to find the appellant guilty is that of PW8 who said when they went to arrest the appellant they found him hiding under his bed with his door wide open and upon pulling him out, his trouser, shirt and finger nails had suspected blood stains. The learned trial Judge concluded that the appellant's conduct of hiding under his bed was inconsistent with his innocence.

From the testimony of PW8, the learned trial Judge drew an inference that the accused hurried from the scene with blood stains on his clothes, had no time to close his door to remove the clothes and instead hid under the bed from where he was pulled. With all due respect to the learned trial Judge, we find this inference erroneous for the following reasons:

First of all, from the different contradictory accounts of the time the offence was committed, one can only conclude that it was between 12.00 midnight to 2.30 am. The appellant was arrested between 7.00 am to 8.00 am. There was therefore a span of not less than 5 hours between the time the offence was committed and when the appellant was arrested. There is no evidence on record that the appellant was found at the scene of crime or outside his house and he ran inside to hide so as to justify the inference that he had no time to close his door to remove the clothes and he instead hid under the bed leaving his door wide open.

Secondly, the evidence of PW8 that the appellant was arrested from where he was hiding under his bed is not corroborated. Corroboration of the evidence of PW8 would have been provided by two potential witnesses who were not called to testify. These are Defence Secretary whose name PW8 did not know but he said led them to the appellant's home and a one Detective Corporal Turihamwe Felix with whom PW8 allegedly effected the

arrest. An explanation was given that Detective Corporal Turihamwe was serving outside the country and his evidence was dispensed with. The appellant whose evidence corroborated the aspect of the evidence of PW8 that he was arrested from his house said he was found sleeping on his bed and this evidence was never challenged in cross-examination.

Before we draw any conclusion on the learned trial Judge's reliance on the uncorroborated evidence of PW8 regarding where exactly the appellant was found in his house when he was arrested, we wish to analyse other aspects of his evidence. PW8 stated in cross-examination that it was a one Namakula who gave information that the appellant was the first at the scene and it was on the basis of that information that they were led to the appellant's home. We have looked at the evidence of Namakula Lydia (PW16) who testified that she was with the motor cycle rider (Musoga) who met the deceased persons that fateful night and when a scuffle ensued she ran away to the party venue while shouting. According to her a number of the party revelers ran to the scene to rescue Musoga. While it is possible that PW16 could have told PW8 that the appellant was the first person at the scene, we note that throughout her evidence on oath PW16 never mentioned the name of the people who she said went to the scene when she ran to the venue of the party, leave alone the appellant's name.

PW8 further testified that the appellant was the first suspect to be arrested. In our view, this aspect of the evidence of PW8 contradicts that of Kyambadde Josephine (PW2), the area Local Council (LC) 1 who said when police arrived at the scene they started arresting the people found there. She said she went to the scene of crime at dawn. She then testified as follows:

> *"As we were still standing at the scene the RDC came together with councilor Katono and the police who started arresting people who were at the scene. They arrested many people. Kizito David (A.1) was arrested in my presence. He was arrested and brought at the scene....."*

We have highlighted the above aspects of the evidence of PW8 to show that they were not consistent with the other evidence on record and, to our minds, this casts doubt on his truthfulness. In our view, it would be risky to rely on his uncorroborated evidence, as the learned trial Judge did, to find a conviction. In the premises we would fault the learned trial Judge for doing so.

Be that as it may, we have also reappraised the evidence relating to the blood stain that was alleged to have been found on the appellant's clothing and finger nails. We must observe generally that the evidence of blood stain that was alleged to have been found on the clothing of some of the other suspects who were acquitted was found by the learned trial Judge not to be credible. The learned trial Judge criticized the manner in which up to about 80 suspects were rounded up and made to sit at the scene of crime which was littered by the blood of the deceased persons. He concluded that he could not see how the possibility that the suspects were stained with the blood when they were made to sit at the scene could be ruled out.

We note that while the other accused persons had testified that their clothing got stained with the blood they sat on at the scene, the appellant on his part testified that it was his own blood that stained his clothing and fingernails because he was beaten upon being arrested and he bled.

Andrew Mubiru (PW15), a Government Analyst testified that the appellant's trouser and shirt among other suspects' clothing had insufficient DNA that was recovered and therefore there were no DNA profiles generated. In other words they could not be subjected to scientific analysis.

However, as regards the blood stain on the appellant's fingernails, the DNA profiles were generated and analysed. The probability of relatedness to the blood of Kakuru (one of the deceased persons) was said to be 99.83%. The conclusion drawn by PW15 was that

there was limited genetic evidence for the proposition that the donor of the blood stains was the late Kakuru. PW15 explained that "limited" genetic evidence means there is very little for court to rely on, "moderate" would imply that court would require evidence other than relying on the findings, "strong" would mean that the genetic evidence would stand on its own with or without other evidence and "very strong" would be regarded as overwhelming genetic evidence.

It therefore follows from that explanation that the genetic evidence of the blood stain that was found on the appellant's fingernails which was said to be limited genetic evidence was too weak to be relied on. The learned trial Judge himself acknowledged this at page 232 of the record of appeal when he said it was the evidence of PW15, a Government Analyst that limited genetic evidence could not be relied upon to convict an accused person. This is more so in view of the evidence of PW8 who testified that when the appellant was arrested, he was taken to the scene of crime. PW8 confirmed in cross examination that the whole crime scene had blood stains scattered all over and upon reaching it, the appellant was asked to sit down. The appellant himself testified that he was taken to a place where many other people were made to sit. He found about 20 to 25 people already seated.

To our minds, much as the appellant was said to have had blood stained fingernails at the time of his arrest, which he explained was his own blood, the possibility that the appellant could have also brushed his fingernails with blood from the scene where he was made to sit down could not be ruled out given that the crime scene was all littered with blood. This possibility, in our view, presents another hypothesis which explains why there was limited genetic evidence for the proposition that Kakuru (deceased) was the blood donor of the stains found on the appellant's fingernails.

The learned trial Judge found corroboration of the weak genetic evidence in what he called the most damning evidence of the appellant being found hiding under his bed from where he was arrested which conduct he said was inconsistent with his innocence. We have already critically analysed the evidence of the appellant's arrest from under his bed and found it unreliable. Having so found, the weak genetic evidence would be the only evidence linking the appellant to commission of the offence. However, since there is another hypothesis that explains how the late Kakuru's blood could have gotten to the appellant's fingernails, and PW15 having said that limited genetic evidence could not be relied upon to convict, we are left in doubt.

It is also noteworthy that none of the prosecution witnesses, especially those who were at the crime scene on that fateful night testified that they identified the appellant there. PW10 Irene Kisembo (the wife to late Kakuru) testified that she identified the people who were stoning her husband as Kanyike, Kisitu Godfrey, Tom Mukungu, Charles and others who were not in court. PW5 Mbabazi Nuwagaba Collins testified that she saw 5 people who were carrying tyres and wanted to burn the body which was half way burnt and they included; Walusimbi, Mukungu. Senyonga, Kanyike and a lady whose name she did not know. PW18 Afani Kirya testified that out of the 7 accused persons who were in court, 4 of them were at the scene of crime and these included Asea Monday, Kimbowa James, Lule Alex, Kisitu Godfrey and also Tom Mukungu who was riding the boda boda.

If indeed the appellant had been at the crime scene at least one of these witnesses would have seen him and mentioned his name. It is therefore our finding that the prosecution failed to adduce any evidence to put the appellant at the crime scene and to show that he participated in the killing of the deceased persons. Even the circumstantial evidence relied on is too weak which leaves doubt in our minds whether the appellant participated in the offence.

The Supreme Court in ***Bogere Charles vs Uganda, Supreme Court Criminal Appeal No. 10 of 1998*** stated that for a court to find a conviction based on circumstantial evidence, the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt.

In the instant case, there is reasonable doubt which can only be resolved in the appellant's favour. Had the learned trial Judge properly evaluated the evidence and addressed his mind to the gaps he would have found the circumstantial evidence unreliable and inconclusive to sustain a conviction.

In the premises, we find that the learned trial Judge erred in convicting the appellant based on weak circumstantial evidence which did not pass the test stated in the authorities we have cited herein above. We accordingly allow the 1st ground of appeal.

Regarding the 2nd ground of appeal, the appellant put up a defence of alibi that he attended a party at Charles' place on 1/12/2007 and he left the party between 12:00 am and 12:30 am to return home where he remained until 7:30 am when he was arrested by a special Police Constable in the company of other policemen and beaten all over his body and he started bleeding. He was put on a patrol vehicle and taken to a crime scene where he found about 20-25 people already seated. In cross examination, the appellant denied having knowledge of the incident that led to the killing of the deceased persons.

The law is well settled that when an accused person puts up a defence of alibi the duty is upon the prosecution to destroy that defence by adducing evidence which puts the accused at the scene of crime at the time the offence was being committed. ***See: Sekitoleko vs Uganda, (1967) EA 531.***

We note that in his evaluation of the evidence on record, the learned trial Judge considered the appellant's alibi against the prosecution circumstantial evidence and found that it had been disproved by the prosecution evidence which was not contradicted in

cross-examination to the effect that the door of the appellant's room was found wide open and he was hiding under his bed. The learned trial Judge found this evidence of the appellant's conduct inconsistent with his innocence and convicted him on that basis.

We earlier found, in our resolution of ground 1 that the circumstantial evidence of the prosecution witnesses that would put the appellant at the crime scene was too weak to found a conviction. This therefore means that the appellant's alibi was not disproved by the prosecution. Had the learned trial Judge properly evaluated both the prosecution and defence evidence judicially, he would have so found. In the premises, ground 2 of this appeal also succeeds.

Grounds 1 and 2 having succeeded, the appeal is disposed of and we find no reason to proceed to resolve the 3rd ground on sentence. In the result, we allow the appeal, quash the appellant's conviction and set aside his sentence. We order for his immediate release from custody unless he is being held on other lawful grounds.

We so order.

Dated at **Kampala** this...15-th...day of...Jan.....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