THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

[*Coram: Kakuru, Egonda-Ntende, Madrama, JJA*]

CRIMINAL APPEALS NO.0237 OF 2017 & 518 of 2016

(Arising from High Court Criminal Session Case No. 240 of 2016 at Mukono)

BETWEEN

Ndidde Khalid==========Appellant No.1
Kawere Abdul==========Appellant No. 2

AND

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

(*An appeal from the judgment of the High Court of Uganda [Mutonyi, J] delivered on 3rd July 2017*)

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted 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 10th day of October 2015 at Nakagere village in river Lwajjali in Mukono district with malice aforethought unlawful caused the death of Mbalangu Ibra. Appellant no.1 was convicted of the offence on his plea of guilty and sentenced to 20 years' imprisonment. Appellant no.2 was tried, convicted of the offence and sentenced to 30 years' imprisonment.

[2] Being dissatisfied with decision of the trial court, the appellants have appealed against both the conviction and sentence on the following grounds:

'1. The learned trial judge erred in law and fact when she conducted the trial with impropriety when she omitted summing up notes to the assessors as required by law and this occasioned a miscarriage of justice to the appellant.

2. The learned trial judge erred in law and fact when she proceeded with assessors who did not take oath.

3. The learned trial judge erred in law and fact by convicting the 2nd appellant basing on a confession of a co-accused.

4.That the learned trial judge erred in law and fact in failing to enquire into the 2nd appellant's age and treated him as of majority age yet he was a minor at the time the offence was committed.

5.That the learned trial judge erred in law and fact when she failed to follow the requisite procedure of plea taking and convicted the 1st appellant which occasioned a miscarriage of justice.

6. That the learned trial judge erred in law and fact when she sentenced the 1st appellant to 20 years imprisonment and 30 years imprisonment for the 2nd appellant which was harsh and excessive in the circumstances of the case.'

[3] The respondent opposed the appeal.

Submissions of Counsel

[4] At the hearing, the appellants were represented by Mr. Andrew Sebugwawo while the respondent was represented by Ms. Fatina Nakafeero, Senior State Attorney in the office of the Director of Public Prosecutions.

[5] Counsel for the appellants abandoned the third ground and proceeded to submit on the fifth ground. He argued that the learned trial judge failed to record the plea of appellant no.1 in accordance with the prescribed law. He referred to sections 60 to 65 of the Trial on Indictments Act and the case of Adan v Republic [1973] EA 445. He submitted that there is no evidence on record that the indictment was first read out to the appellant in the language that he understands. He stated that the indictment was never explained to the appellant and that he did not give a reply to the indictment. He argued that the procedure adopted by the trial court to enter the conviction against appellant no.1 was irregular.

He stated that there was no reflection in the court proceeding as to the plea bargain agreement.

[6] Further Counsel for the appellants submitted that given the irregularities on the record which were caused by the trial court, this court should consider the period the appellants have served under their terms of imprisonment and release them instead of ordering a retrial.

[7] In relation to ground 2, counsel for the appellants submitted that there is no evidence on record to show that the assessors were sworn which is contrary to section 67 of the Trial on Indictments Act that is mandatory. He also stated that there is no indication on the record of proceedings of the trial court that the trial judge summed up the evidence and the law to the assessors in accordance with section 82 (1) of the Trial on Indictments Act.

[8] It was Mr. Sebugwawo's submission on ground 4 that appellant no.2 informed the trial court during *allocutus* that he was 17 years at the time of commission of the offence but that was not taken into consideration while sentencing. He was of the view that the trial court should have put into inquiry and determined the exact age of the appellant when it came into question before sentencing the appellant.

[9] On ground 6, counsel for the appellants submitted that the sentence of 30 years' imprisonment that was given to appellant no.2 was harsh and excessive given the fact that he was a minor at the time the offence was committed and that appellant no.1 was given 20 years' imprisonment for the same offence.

[10] Ms Nakafeero, in reply to counsel for the appellants' submissions acknowledged that the record of proceedings in the trial court is silent as to what transpired during the plea taking of appellant no.1 and requested for an audio version of what transpired in the trial court in order to resolve the issue. She also conceded to the fact that there are no summing up notes on the record of proceedings and neither does it indicate that the assessors were sworn in. Counsel for the respondent also admitted that the age of appellant no.2 was not taken into consideration while sentencing. She prayed that a re-trial be ordered by this court.

Analysis

[11] It is our duty as a first appellate court to subject the evidence adduced at trial to a fresh re-appraisal and to reach our own conclusions and

inferences, bearing in mind, however, that we did not have the opportunity to see and hear the witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

[12] We shall procced to do so.

Ground 1

[13] Counsel for the appellants faults the learned trial Judge for not having summed up the law and evidence to the assessors as required by the law. Counsel for the respondent conceded to this contention. On the record of the trial court, there is no indication that the assessors were sworn after appointment. Neither did the learned trial judge sum up the law and evidence for the assessors during the trial of appellant no.2. At page 21 of the record of appeal, after the defence closed its case, the trial court immediately took the opinion of the assessors. Both these facts were conceded to by learned counsel for the respondent.

[14] The only conclusion we can reach is that the assessors were not sworn after appointment, contrary to section 67 of the Trial on Indictments Act which is mandatory. Neither did the learned trial Judge sum up the law and evidence in the case contrary to section 82 (1) of the Trial On Indictments Act.

[15] Section 82 (1) of the Trial on Indictments imposes a mandatory obligation on trial courts to sum up the law and evidence to the assessors give their opinion. It states as follows:

> '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 each such opinion. The judge shall take a note of his or her summing up to the assessors.'

[16] In Sam Ekolu Obote v Uganda [1995] UGSC 7, the Supreme court while considering section 81 (1) of the Trial on Indictment Decree now section 82 (1) of the Trial on Indictments Act stated:

> We think that these provisions impose a statutory obligation on a trial Judge to sum up the law and the

evidence in a case to the assessors. The provision are different from those of *section* 283(1) of the Tanzanian Criminal Procedure Code, in which the word "may" was used instead of the word "shall", used in Section 81(1) of our T.LD. The Tanzanian Statute was considered in Miligwa s/o ***Mwinje and Another V. R.*** (1953), 20, E.A.C.A., 255; ***Washington s/o Odinga V. R.*** (1954) 21. E.A.C.A. 392, and ***Andrea s/o Kuhinga and Another V R.***(1958)E.A.684.

In these cases it was decided that the Tanzanian Statute imposed no such obligation.

In the instant case there is no evidence on the record that the learned trial Judge summed up the case to the assessors after the close of the case of both sides. This in our view amounted to a failure to comply with the obligatory requirement of Section 81(1) by the learned trial Judge. It was a procedural error, which was fatal to the appellant's conviction.'

[17] Sam Ekolu v Uganda (supra) was followed by this court in Agaba Lillian and Anor v Uganda [2019] UGCA 226; Byamukama Francis v Uganda [2018] UGCA 134 and Mbaguta Ronald and Anor v Uganda [2018] UGCA 235.

[18] In light of the failure by the learned trial judge to sum up the law and evidence to the assessors, which is incurable under section 139 of the Trial on Indictments Act, the trial of appellant no.2 was a nullity.

[19] For the above reasons, we quash the conviction of appellant no.2 and set aside the sentence imposed against him. It is not necessary to handle ground two.

Ground 5

[20] The record of proceedings with regard to the taking of the plea for appellant no.1 states as follows:

'BEFORE: HON. LADY JUSTICE MUTONYI MARGARET

Proceedings:-

21/12/2016:-
Accused A1 present.
A1:-

Pleads guilty
Agreed facts:-
Convicted
State:-
We have agreed on 20 years imprisonment. Period of remand not inclusive.'

[21] The law governing the taking of a plea in the High Court by any person indicted of an offence triable by the High Court is set out in section 60 of the Trial on Indictments Act. It states:

> 'The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy.'

[22] Section 63 of the Act provides that upon the accused person pleading guilty, the Court shall record the plea of guilty; and may convict the accused person on it. In Adan vs Republic [1973] EA 445 at page 447, the East African Court of Appeal set out the procedure as follows:

> 'When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can peak and understand. The magistrates should then explain to the accused person all the essential ingredients of the offence charged. If the accused person then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formerly enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any

> material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to the sentence. The statements of facts and the accused's reply must, of course, be recorded. The statement of facts serves two purposes; it enables the magistrate to satisfy himself that the plea of guilty were really unequivocal and that the accused had no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for statements of facts to precede the conviction.'

[23] In Tomasi Mufumu v. R [1959] EA 625 at page 627 the same court had earlier stated that;

> '...it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder (R. v. Yonasani Egalu and Others (1) (1942), 9 E.A.C.A. 65) and understands that the penalty is death.'

[24] From the record it is evident that the learned trial Judge did not follow the procedure laid down in Adan v R (Supra) during the taking of the plea of appellant no.1. It was not indicated whether the charge was read and explained to appellant no.1. The agreed facts were not recorded. Neither was the appellant required to respond to them nor his response recorded. The record is insufficient as to what transpired during the proceedings of plea taking. Trial courts ought to record as much as possible all the relevant details so as to be able to ascertain what transpired in court. We find that the procedure adopted by the trial court was irregular and thus occasioned a miscarriage of justice.

[25] We are aware of course that this was one of the cases taken under the plea-bargaining procedure and in fact on the court record there was a plea bargain agreement. We wish to observe that this procedure did not replace the law with regard to the taking of plea from accused persons. It is a pre-trial procedure that may lead to the conclusion of a criminal case by way of plea of guilty. Nevertheless, it does not replace the obligation on the court to conduct plea taking in accordance with the law

as laid down in both statute and established case law. See Musinguzi Appollo v Uganda [2019] UGCA 157.

[26] For the above reasons, we quash the conviction of appellant no.1 and set aside the sentence imposed against him.

[27] Counsel for the respondent prayed that in the event that this court quashes the convictions and sets aside the sentences of the appellants, a retrial should be ordered. An order for a retrial is as a result of exercise of court's discretion which must be exercised in accordance with settled principles. In Wapokra Vs [2016] UGCA 33, this court stated:

> 'The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However, that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the re-trial. An order for a retrial is as a result of the judicious exercise of the Court's discretion. This discretion must be exercised with great care and not randomly, but upon principles that have been developed over time by the Courts: See: FATEHALI MANJI V. R [1966] EA 343.'

[28] Owing to the fact that the nature of the offence for which appellant no.1 was convicted of is a serious offence and that the deceased was murdered in a gruesome manner, it is only proper that the guilty parties are brought to justice. Although the appellant has not enjoyed liberty for almost 5 years but when this is weighed against the need for justice, this court finds that an order for a re-trial against appellant no.1 would be appropriate in the interest of justice.

[29] Appellant no.2 stated in his testimony that he was 19 years on 28th June 2017 during the hearing. In *allocutus* he stated that he was 17 years at the time the offence was committed and that he was born on 7th July 1999. When his father was questioned on the appellant's age, he stated that he did not know when the appellant was born. The medical doctor who examined him on 23rd October 2015 indicated on Police Form 24, that the appellant's approximate age was 18 years. The offence for which he was indicted is said to have taken place on 10th October 2015.

[30] Where there is doubt as to the exact age of the accused such doubt ought to be resolved in favour of the accused rather than the state. If the testimony of the appellant is to be believed, it would mean that he was 17 years at the time of the commission of the offence. He ought to have been tried within a period of 3 months from the date of the commission of the offence as required by section 95 (5) (a) of the Children's Act.

[31] Under Section 94 (7) of the Children Act, the maximum sentence that can be imposed in the case of a child above sixteen years who is convicted of an offence punishable by death is three years. See Odongo Tonny v Uganda Court of Appeal Criminal Appeal No. 452 of 2016 (unreported)

[32] In the appeal before us, it is on record that at the time of trial, the appellant no.2 had been on remand for at least 1 year and 8 months. At the time of the hearing of this appeal, he had served 2 years and 4 months of the sentence. This totals up to 4 years and 2 months, exceeding maximum sentence that could be lawfully imposed upon him.

[33] In light of the fact that the sentence imposed upon the appellant was illegal we set it aside. As he has spent in custody more time than the maximum sentence that could be lawfully imposed upon him we shall not exercise our powers, under section 11 of the Judicature Act, to impose a lawful sentence. We shall order his immediate release.

Decision

[34] We order the immediate release of appellant no.2 unless he is held on some other lawful charge.

[35] We order a retrial of the appellant no.1 before another judge.

[36] As the offence was committed 5 years ago it is in the interests of justice that the retrial proceeds as fast as possible. We direct the Registrar of the High Court to ensure that this matter is listed for trial at the earliest opportunity.

Signed, dated and delivered at Kampala this 11th day of June 2020.

Kenneth Kakuru
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

Christopher Madrama
Justice of Appeal

11.06.2020

Judgment delivered via zoom in presence of Mr. Nkalubo Robinson h/b for Mr. Ssebugwawo Andrew, counsel for the Appellants; and in the presence of Ms. Nabisenke Vicky Counsel for the Respondent and both Appellants.

Ayebare Tumwebaze
Ass Reg. CoA
11-06-2020