THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.127 OF 2012

1. **SSEKITOLEKO YUDA TADEO**
2. **MWESIGYE MAIKOLO ALIAS ENYEKA**
3. **NAMULI ROSE…… ……APPELLANTS**

V E R S U S

UGANDA……RESPONDENT

CORAM: **HON. MR. JUSTICE REMMY KASULE, JA**
HON. JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA

THE JUDGMENT OF COURT:

Each of the appellants was convicted of murder and sentenced to 28 years imprisonment. They all appealed on four grounds set out in the Memorandum of Appeal:-

1. **The learned trial judge erred in law and fact when he convicted the three appellants of the offence of murder without sufficient evidence to prove all the ingredients of the offence against each of the appellants.**

2. **The learned trial judge erred in law and fact when he convicted the three appellants on the principle of joint offenders and common intention when no evidence was adduced to prove that fact.**

3. **The learned trial judge erred in fact and law when he convicted the 3rd appellant on basis of retracted charge and caution statements of A1 and A2.**

4. **The sentence passed against the appellants was excessive and should be set aside and/or reduced.**

The appellants prayed Court for their appeal to be allowed, the conviction of each quashed and the sentence to be set aside.

The background facts to this appeal as found by the learned trial judge are the following:-

On 14.05.2010 the second appellant who was the first accused at the trial came to the home of the deceased, Luyinda John Bosco, at around 2 pm. He said he was looking for land to buy which the deceased had said he had. He went away with the deceased to a nearby trading centre at Makole at about 3 pm. They drank beers at the said trading centre. The second appellant had a black kavera in his hands. The second appellant and the deceased returned to deceased's home together at about 3 am and the second appellant still had the black kavera. Each had a bottle of beer. They slept in the same bedroom on one bed. The deceased lit a "tadooba" which he left burning while the two went to sleep. Nakasinde Joanita, PWI, a daughter of the deceased, and staying in the same house with the deceased testified that she saw deceased and second appellant return and their going to sleep together in the same room and on a single bed.

She woke up when there was a snoring sound emanating from the deceased's room. She informed her brother, one Katumba, whose home was in the same compound with that of the deceased and on checking in their father's bedroom they found their father injured with wounds on his head. The second appellant had left and was not in the house. The deceased then died. The second appellant was

arrested that morning by Abwara Peter, PW5, who saw a strange looking man that said he was waiting for a vehicle to Ibanda late in the night. The second appellant had a hammer in a black kavera.

PWI later identified the second appellant to be the person who had moved out to a trading centre with her father and returned to sleep with him on the same bed. The second appellant upon arrest, was found with shoes that were later identified to belong to the deceased.

The second appellant made a charge and caution statement which was found by the trial court to have been made voluntarily and to be true before the same was admitted in evidence. He stated in detail how he had been hired by the first appellant, (second accused (A2) at the trial). Second appellant had been promised by first appellant to be paid shs.600,000/= to kill the deceased. He explained how the deceased had been killed and how he picked the deceased's shoes as evidence to be shown to those that hired him that he had fulfilled his mission. That is how he came to be found with the shoes and the hammer that was used to kill.

The second appellant took the deceased's shoes to the third appellant (Namuli Rose) immediately after the killing in order to prove that the mission of killing the deceased had been fulfilled. The third appellant gave him 10,000/= and a bottle of waragi. She then assured him that the 600,000/= would be paid later by the first appellant.

The agreement to pay 600,000/= for killing the deceased had been discussed and concluded in her house with her participation.

Representation.

At the hearing of the appeal, the appellants were represented by learned counsel, Mr. Kafuko Ntuyo on State brief. The respondent was represented by Mr. Fred Kakooza, a Principal State Attorney.

Submissions of counsel.

Mr. Kafuko Ntuyo, for the appellants submitted that while the rest of the ingredients of the offence of murder for which the appellants were convicted were proved, the ingredient of participation of each of the appellants in the murder was never proved.

Counsel submitted that there was no eye witness to the murder. The only evidence that connected the three appellants as to a common intention was that of PW2 Nantongo Christine who testified to have seen them together in the third appellant's house but did not hear what they talked about.

Counsel contended that the charge and caution statements of the first and the second appellants were not properly admitted in evidence as it was never proved that the said confessions were true and voluntarily made.

On sentence counsel submitted that the sentence of 28 years imprisonment passed against each of the appellants was long and should be reduced by this Court.

He, further submitted, that the appellants had each reformed in prison and had greatly changed their lives detailing the new occupations they were now trained in whilst in prison. Counsel called on this Court to take them into consideration the new status of each appellant showing reform and reduce their sentences.

Mr. Fred Kakooza for the State opposed the appeal and called upon this Court to uphold both the conviction and the sentence in respect of each appellant.

He submitted that the learned trial judge properly evaluated the evidence adduced against the appellants. The trial judge had held a trial within a trial before finding and found the confessions of the first and second appellants admissible. He had warned himself and the assessors of the danger of relying on a retracted or repudiated confession. After the said warning he had found it safe to admit and rely on the said confessions.

According to counsel for the State, the trial judge considered the alibi raised by the second appellant but found it discredited. He found that the said appellant had been squarely put on the scene of crime by the prosecution evidence.

Counsel contended that the detailed confessions of the first and second appellants were properly admitted and evaluated together with other evidence.

On sentence Mr. Kakooza submitted that sentencing is the duty of the trial Court. The sentence should not be interfered with by the appellate court unless the sentence was found to be illegal or the judge proceeds on a wrong principle which was not the case here.

According to counsel for the State, the learned trial judge considered all the mitigating factors raised for the appellants in mitigation at the hearing on sentencing. He considered that the appellants had been on remand for about three and half years. He also considered that the maximum sentence for murder was death.

He submitted that in determining the sentence the trial judge considered the circumstances available at that time and not the new circumstances. The appellants are in now at the time of hearing the appeal. The said new status of the appellant was not available for the trial judge to consider at the time of conviction and sentencing. Therefore this Court should not interfere with the sentence of 28 years which, in fact, according to respondent's counsel, was lenient.

Courts Resolution of the Appeal.

This being a first appeal from the High Court we shall proceed in to exercise our duty under Rule 30(1)(a) of the Rules of this Court to re-appraise the evidence adduced at trial, draw inferences of fact and come to our own conclusion.

Counsel for the appellant did concede that the prosecution proved before reasonable doubt the other ingredients of murder but contested only one ingredient of participation of the appellants.

We shall accordingly re-evaluate the whole evidence on the participation of the appellants in commission of the murder offence.

We have studied the record of proceedings and the judgment of the lower court. We have had the benefit of considering the submissions of counsel for both parties and the authorities that were availed to Court.

The learned trial judge in his judgment considered the role of each of the appellants in the murder of the deceased in detail. He also dealt with each of the appellants' defences.

The prosecution called only six witnesses and their evidence is interconnected and related to all the appellants. The defence called only the appellants who testified and called no other witnesses.

The first appellant is a brother of the deceased and third appellant is their sister while PWI was a daughter of the deceased. PWII was a nephew of the deceased and the third appellant was her Aunt. The first appellant was an uncle to PWI and PW2. PWI and PW2 therefore knew the first and third appellants very well. They both did not know the second appellant before.

According to the evidence on record, PWI first saw the second appellant when he came to their home at about 3 p.m on 14.05.2010 inquiring whether the deceased had land to sell. The deceased accepted he had land for sale. The two, that is second appellant and deceased, went together drinking at Makole Trading Centre, to return late at night. The deceased lit a "Tadoba" and the two slept in the same bedroom on the same bed.

PWI woke up and heard snoring noise from the deceased's bedroom. PWI and her brother Katumba entered the deceased's room and found that the deceased was injured and the second appellant was

nowhere to be seen. This witness saw the first appellant for the first time during the day and then later that night when he returned with her father (the deceased) from drinking. She was later to identify second appellant at the police as the person who had come to their home and went out with the deceased. She had seen him with a black kavera at all those occasions.

When arrested by PW5 the second appellant had the black kavera with a hammer and shoes that were identified to belong to the deceased. There was blood on the head of the hammer he was arrested with. The arrest was the same night the deceased had been killed.

PWII had seen the three appellants in the house of the third appellant that night. The witness does not know what they discussed but she witnessed them hold a discussion. After the said discussion the said they went out together.

The first and second appellants made charge and caution statements which they each retracted and repudiated at trial. The trial court held a trial within a trial for each of the said two appellants. The trial court found that each of the charge and caution statements was true

and had been voluntarily made and the court admitted the said charge and caution statements in evidence.

In the confession the two appellants implicated each other and the third appellant. The second appellant explained how he had been approached by the first appellant while in Mubende for him to eliminate the deceased over land grudges and the death of relatives. The first appellant had land disputes with the deceased whom he also suspected to have bewitched and killed their relatives.

The second appellant explained how they had bought a metallic hammer in Kasambya in Mubende on 12/05/2010 which was later used to kill the deceased.

He also explained in the statement that they had negotiated for a fee of 600,000/= for killing the deceased. The three appellants participated in the negotiations. The deceased's residence was the shown to the second appellant. The confessions tally with and corroborate the testimony of PWI on how the second appellant came to the home of the deceased at 3 pm how and they went out to the bar together after holding discussions on the purchase of land

and how they returned together late at night and slept in the same bed room.

After killing the deceased the second appellant took the deceased's Nigina shoes from the deceased's home. The shoes were to act as evidence to the first and third appellants that the mission of killing the deceased was accomplished. On being told that the deceased had been killed and after being shown his shoes the third appellant gave the second appellant shs.10,000/= and a bottle of "Enguli" and assured him that the first appellant would pay the agreed upon fee of shs. 600,000/=. The second appellant was arrested that night with the deceased's shoes and the hammer in a kavera.

At the hearing of the appeal counsel for the appellants argued the first, second and third grounds of appeal together. We too are to handle them together in resolution of this appeal.

Counsel for the appellants on ground two of the appeal contended that the learned trial judge erred to have convicted the three appellants on the principle of joint offenders and common intention when no evidence was adduced to prove that fact.

He further, contended in ground three of the appeal that the learned trial judge erred in fact and law when he convicted the third appellant on the basis of a retracted charge and caution statements of the first and second appellants.

We shall first deal with the trial judge's admission into evidence the charge and caution statements of the first and second appellants.

The Supreme Court has had opportunity to state the law on admissibility of confession statements in **Criminal Appeal No.39 of 2003 Walugembe Henry & others vs. Uganda,** (unreported) and it held:-

> **"Section 24 of the Evidence Act, (Cap.6) provides:-**
>
> ***'A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made.'***

Where an accused person objects to the admissibility of a confession on the ground that it was not made voluntarily, the court must hold a trial within a trial to determine if the confession was or was not caused by any violence, force, threat, inducement or promise calculated to cause an untrue confession to be made. In such trial within trial, as in any criminal trial, the onus of proof is on the prosecution throughout. It is for the prosecution to prove that the confession was made voluntarily, not for the accused to prove that it was caused by any of the factors set out in s.24 of the Evidence Act, See *Rashidi vs Republic (1969) EA 138.*

We have studied the proceedings of the trial within a trial and the judgment of the trial judge and the considerations he had on the repudiated and retracted confessions of the first and the second appellants.

We reiterate the law governing retracted or repudiated or confessions as was succinctly in **Tuwamoi v Uganda (1967) E.A. 84;**

"A trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all

circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

We are satisfied that the learned trial judge followed the law and procedure on admission of the charge and caution statements which were retracted and repudiated. He properly handled a trial within a trial for each of the confession statements. He properly cautioned himself and the assessors on the admissibility of the statements.

We find that he admitted the said charge and caution statements into evidence in compliance with the law after due consideration and caution.

We also find that the admitted confession statements were corroborated by the evidence on record. The second appellant was seen by PWI when he came to the home of the deceased at 3 pm. He

went out with him to return at night and slept with him on the same bed in the same room.

After the killing of the deceased to which he confessed, he reported to the third appellant and was given 10,000/= and 'enguli'. He was assured by the third appellant of the payment of the agreed fee of 600,000/= by the first appellant. He had kept the shoes of the deceased and the hammer that was bought in Kasambya in Mubende. He was arrested with the hammer in a black kavera that he had when he came to the deceased's home that afternoon. He was also found with the deceased's shoes which he had kept as proof of fulfilment of the agreed mission of killing the deceased. He was arrested by PW5 that night immediately after the deceased had been killed. The killing was in fulfilment of an agreement between the three appellants. The evidence on record clearly illustrated the role of each of the three appellants in effecting the killing of the deceased according to their arrangement.

The learned trial judge considered this evidence and made a finding that the three appellants had formed a common intention to kill the deceased and they all played a role in effecting the said planned killing.

We find that the learned trial judge properly directed himself and the assessors on the law of common intention as stated by the Supreme Court in the case of **Charles Komwiswa vs. Uganda [1979] HCB 86** where the Supreme Court stated the law as follows:-

> **"Where several persons are proved to have combined together for the same illegal purposes, any act done by one of them in pursuance of the original concrete plan and with reference to common object in the contemplation of law, is an act of the whole, each party is the agent of the others in carrying out the object of the conspiracy and he renders himself a principal offender."**

We agree with the learned trial judge that the three appellants had formed the common intention to kill the deceased. They each played a role in execution of their common intention. We therefore find that the learned trial judge was correct when he convicted each of the appellants for murder.

The appeal therefore fails on the first, second and third grounds of appeal.

The fourth ground of appeal was on sentence. Counsel for the appellants submitted that the sentence of 28 years for the appellants was not illegal but it was too long and this Court should reduce it. This was opposed by the Principal State Attorney for the State who stated that 28 years were an appropriate sentence.

The principles upon which an appellate Court should interfere with a sentence imposed by the trial Court were considered by the Supreme Court in the case of **Kyalimpa Edward versus Uganda, Criminal Appeal No.10 of 1995** to which counsel for the respondent referred us. The Supreme Court referred to R vs De Haviland (1983) 5 Cr. App. R(s) 109 and held as follows at page 114:-

> **"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R.(1954) 21 EA.C.A.270** and **R V Mohamedali Jamal (1948) 15 E.A.C.A 126."**

The maximum sentence for murder for which the appellants were convicted is death.

We find that the learned trial judge exercised his discretion with all due consideration when he sentenced each of the appellants to 28 years imprisonment. The sentence is legal. We do not find it harsh or manifestly excessive or in any way based on a wrong principle. Therefore we do not find a convincing reason to interfere with the sentence.

We find no merit in the appeal and accordingly dismiss it.

We confirm the conviction and the sentence imposed by the trial Court upon each one of the appellants.

Dated this day .....of .....2014.

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Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

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Hon. Justice Eldad Mwangusya

JUSTICE OF APPEAL

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Hon. Justice Richard Buteera

JUSTICE OF APPEAL