THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.95 OF 2009

(Appeal from a decision of the High Court of Uganda holden at Mbarara before His Lordship Hon. Justice Lawrence Gidudu dated the 31st day of March 2009 in Criminal session Case No.148 of 2006).

MURINDWA JAMES.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

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

JUDGMENT OF THE COURT:

The background facts to this case are the following:-

The appellant and the deceased moved together from a bar in the evening of 26/04/2005. They met Fred Barigye (PW.2) who is a brother of the deceased on their way to their homes at about 8.00

p.m. He was taking a sick child to the clinic. On his return from the clinic at 9.00 p.m. he passed by the deceased's home to brief him on the child's treatment. The deceased's wife informed him that the deceased had not returned. He informed her, he had met the deceased with the appellant and perhaps they could have gone to the appellants home to finish the waragi the appellant was carrying in a "Fanta" bottle.

The deceased never returned home. A search was mounted the next day and the search party came across a scene of struggle with stains of blood, marks of tyre sandals and a match box.

A further search along the stream revealed the body of the deceased lying in water. A post mortem confirmed the deceased's death was by strangulation.

The appellant was arrested wearing a T-shirt that he wore a day before which had a blood stain. He was charged with murder for which he was convicted and sentenced to life imprisonment. He has appealed against both the conviction and sentenced on the following grounds:-

1. **That the learned trial judge erred in law and fact when he convicted the appellant on the basis of unsatisfactory circumstantial evidence.**

2. **That the learned trial judge erred in law and fact when he failed to adequately evaluate all the material evidence adduced at trial and hence reached an erroneous decision which resulted into a serious miscarriage of justice.**

3. **That the learned trial judge erred in law and fact when he sentenced the appellant to life imprisonment, which is deemed to be manifestly harsh and excessive given the obtaining circumstances.**

At the hearing of the appeal, learned counsel Henry Kunya, represented the appellant on state brief.

The State was represented by Simon Peter Semalemba, a Principal State Attorney.

Counsel for the appellant argued grounds 2 and 3 together. He submitted that the case is mainly hinged on circumstantial evidence.

According to counsel the learned trial judge properly stated the law and the principles on circumstantial evidence but fell short on the applicability of the principles on the facts of this case.

Counsel contended that the learned trial judge mainly relied on his finding that the appellant was the last person seen with the deceased on the night of his death. According to counsel the two were not the only people in the village so there was nothing exclusive about this as any other people could have had opportunity to commit the offence after the appellant had parted with the deceased.

Counsel further contended that the learned trial judge was at fault to have considered the purchases of a match box and waragi that the appellant had made that evening from Kansiime Rossete (PW.3) as circumstantial evidence implicating him in the commission of the offence.

According to counsel, the items the appellant purchased were, a match box which was found the next day at the scene of the crime and waragi in a fanta bottle that was recovered from the home of the deceased. These items according to counsel are ordinary items

of common use in the village. The fact that the match box was recovered from the scene of crime and the bottle from the deceased's home were not sufficient circumstantial evidence to implicate the appellant according to counsel.

Counsel also submitted that the blood stain that was found on the appellant shirt had not been tested to establish that the blood was that of the deceased and therefore this piece of evidence was insufficient for implication of the appellant.

Counsel further submitted that the appellant never run away from the village when the body of the deceased was discovered which conduct was of an innocent person. According to counsel the circumstantial evidence before the learned trial judge was not sufficient to warrant conviction of the appellant and this Court should quash the conviction.

On the third ground counsel for the appellant argued that the sentence of life imprisonment was harsh and manifestly excessive and should be reduced by this Court.

Mr. Semalemba for the State in his submissions supported the conviction and sentence of the appellant. According to the Principal State Attorney on behalf of the State, the exculpatory facts were inconsistent with the innocence of the appellant. The appellant was the last person seen in the company of the deceased which fact the appellant does not deny.

PWII, a brother of the deceased saw the appellant in company of the deceased at around 8.00 p.m. When he checked at the deceased's home an hour later, the deceased had not reached his home. He had met the two about 8 metres from the bar where the two had been together. This was about 10 metres away from the scene of crime where the struggle marks were found the next morning and it was a short distance of about 80 metres from the stream of water where the body of the deceased was found dumped. The State Attorney submitted that that short distances of 8 metres from the bar and 80 metres from the stream where the body was recovered and the short time rule out opportunity for any other person to have killed the deceased.

According to the State Attorney the learned trial judge had properly evaluated the evidence and had properly concluded that it was the

appellant who had killed the deceased and he had correctly convicted him for the murder.

On sentence the Principal State Attorney submitted that the sentence was justifiable for the offence committed and the appellant was lucky not to have been sentenced to death in the circumstances of the case. He submitted that the conduct of the appellant after the killing the deceased of throwing the body in the water and thus attempting to conceal the death and destroy the evidence was brutal. Counsel for the State contended that this was a premeditated murder and a life sentence was the appropriate sentence in the case and this Court should not interfere with it.

Courts resolution of the case.

This is a first appeal. We are aware of our duty as a first appellate court under Rule 30 of the Rules of this Court. We have a duty to re-appraise the evidence and draw inferences of fact. This duty of a first appellate court was elaborately stated by the Supreme Court in the case of **Father Nomensio Tiberaga SCCA 17/20 (22.6.04 at Mengo) from CACA 47/2000 [2004] KALR 236** in which the Court held:-

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

We shall therefore re-evaluate the evidence on record, consider the judgment of the learned trial judge, consider the submissions of both counsel and the authorities they have availed to court and all the issues raised in the appeal to come to our own conclusion of the appeal.

One very critical issue that was raised by both counsel in arguing ground one and two was the applicability of circumstantial evidence in the facts of this case. We shall first state the law on circumstantial evidence.

The East African Court of Appeal had occasion to state the law in **Simon Musoke VR [1958] EA 715,** the Court held:-

"..In a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. As is put in Tayloar on evidence (11th Edn.), P.74.

The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."

There is also the further principle, which was stated in the judgment of the Privy Council in **Teper v R (2), [1952] AC 480 at P.489** as follows:-

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

The exercise of caution in handling of circumstantial evidence was re-stated by the Supreme Court in **Tindigwihura Mbahe v Uganda Criminal Appeal No.9 of 1987** where it held:-

"Briefly the law is that circumstantial evidence must be treated with caution and narrowly examined because evidence of this kind can easily be fabricated. It is therefore necessary before drawing an inference of the accused's guilt from circumstantial evidence which would weaken or destroy the evidence."

That, however, is not to say that circumstantial evidence is not useful evidence. As held in **R v Taylor, Weaver and Danovanu (1928) Cr. App. R20** cited in **Tumuhairwe v Uganda [1967] EA 328**

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of Mathematics. It is no derogation of evidence to say that it is circumstantial."

We shall re-examine the evidence and analyse it applying the above principles to assess whether or not the trial judge was correct or not to have come to the conclusion that he did in the instant case.

The appellant was met in the company of the deceased at about 8.00 p.m by PW2 which the appellant does not deny. PW2 was taking a child to the clinic. On his return at about 9.00 p.m he checked at the deceased's home to brief him about the treatment of the child as had been agreed and the deceased had not reached home. He informed the wife how he had met the deceased and the appellant together.

The appellant and the deceased are neighbours. The deceased's home was before that of the appellant when travelling from the trading centre. This was confirmed by the appellant in his own testimony.

The deceased had not reached home next morning causing a search to be conducted and his body was found in a stream of water. Medical evidence was that he was strangled and the body had bruises in the neck and eyelid.

When PW2 met the appellant and the deceased and he saw the appellant with a bottle of waragi.

Near where the appellant and deceased were met by PW2, the search party the next morning found "a scene where it appeared people had struggled. There were blood stains, marks of tyre sandles and a match box." The search party discovered the deceased's dead body about 80 metres away in a stream of water which was shallow and full of grass. That is when the appellant was arrested.

PW3 confirmed she had sold a match box of the type found at the scene of this offence the evening of the deceased's death. She testified she had also sold waragi in a fanta bottle to the appellant. A fanta bottle she identified to be the one she had given to the appellant was recovered from the appellant's house the next morning after the deceased's body was found.

We note the distances from the bar to the place where PW2 found the appellant and the deceased is quite close. The scene of the struggle was only about 10 meters from where he met them and the body of the deceased was found in the stream only 80 meters away from that point. All witnesses agreed that the houses of the deceased and the appellant are close in the same direction though the distances are not stated in specific meters or other measurements.

It is significant that the appellant and the deceased were last seen together on their way home. The appellant's home is after that of the deceased. The appellant would therefore reach his home after he has by passed that of the deceased. The appellant explained in his defence that he never met anybody else on his way to his home. The body of the deceased was discovered near where the two had been seen walking together.

Upon arrest the appellant was wearing a T-shirt which was the one he wore a day before. A stain of blood was seen on the T-shirt. The trial judge found that the stain on the T-shirt was not scientifically proven to be blood of either a human being or that of the same group as that of the deceased for which he faulted the investigating officer and we agree.

Having so found the stain does not remain relevant evidence to consider. We observe that the investigating officer failed in his duty in this case to seek scientific proof of the suspected stain of blood.

The appellant had bought items from PW3. These were a match box found at the scene of the offence where there were signs of a

struggle and the fanta bottle found at the home of the appellant in the morning the body was discovered dead in a stream of water.

Counsel for the appellant argued that the match box and the fanta bottle are common items and there is nothing exclusive about them to lead to any suspicion or inference of guilt on the appellant. We agree these are common items and so did the trial judge. But the circumstances of the case are that when they are considered together with other evidence they cease being simply common items. PW2 testified she gave the appellant waragi in a fanta bottle. The appellant denies this and says he bought bear instead which PW3 disputes. PW2 testified that he met the deceased and the appellant when the appellant had waragi in a fanta bottle. He informed the wife of the deceased that evening that the two might have gone to the home of the appellant to finish the waragi. This bottle was recovered from the appellant's house in the morning. All this evidence collaborates PW3 that she sold waragi to the appellant in a fanta bottle. The trial judge considered the fact that the appellant told lies in his defence. The trial judge considered his denial to have bought waragi from PW3 and concluded that the denial by the appellant to have bought waragi in a fanta bottle from PW3 was for the purpose of hiding his (appellant) role in the crime.

There was evidence also by PWIII that she sold a match box to the appellant when he was with the deceased. We note that the witness had sold similar match boxes to other customers. The significance of the match box found at the scene is that, after its purchase the appellant left together with the deceased. A match box similar to the one PWIII sold to the appellant was found at the scene of crime where there were signs of a scuffle.

The learned trial judge considered the combination of these available pieces of circumstantial evidence together and not in isolation of each other to come to the irresistible inference that the appellant committed the murder of the deceased.

We find his analysis of the evidence to have been proper and without fault. We agree with the analysis of the evidence by the learned trial judge and do find that he was not at fault to reach the conclusion he did. We find upon re-appraisal of the evidence that the learned trial judge was correct. Grounds one and two of the appeal therefore fail.

Ground three

This ground was on sentence which counsel for the appellant submitted was harsh whilst the State submitted it was appropriate. The principles upon which this Court as an appellate court can interfere with the sentence imposed by a trial court were set out by Supreme Court in **Kiwalabye Bernard versus Uganda; Criminal Case No.143 of 2001** (unreported) . The Court held:-

> **"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that 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 the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence imposed is wrong in principle."**

Applying the above stated principles to the instant case, we have looked at the sentencing process the trial court went through. The prosecution and the defence spent time each pleading its case before the appellant was sentenced. The learned trial judge

elaborately considered their submissions. He gave his reasons for the sentence of life imprisonment on a murder charge whose maximum sentence is death. Considering the circumstances of the case as the learned trial judge did we do not find the sentence imposed to have been manifestly excessive or so low as to amount to a miscarriage of justice. We do not find either that the trial judge did not consider any facts or that the sentence was based on a wrong principle.

The third ground of appeal therefore fails.

On the whole we do not find merit in the appeal and we according dismiss it.

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

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Hon. Mr. Justice Remmy Kasule

JUSTICE OF APPEAL

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Hon. Mr. Justice Eldad Mwangusya

JUSTICE OF APPEAL

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Hon. Mr. Justice Richard Buteera

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